Guantanamo Bay Fair Trial Manual for U.S. Military Commissions

An Independent & Objective Guide for Assessing Human Rights Protections and Interests of the Prosecution, the Defense, Victims & Victims’ Families, Witnesses, the Press, the Court, JTF-GTMO Detention Personnel, Other Detainees, NGO Observers and Other Military Commission Stakeholders

Volume I: The Manual
(pages 1 – 344)

by

The Gitmo Observer*
(George E. Edwards, Principal Author)

26 February 2017 (4:20 a.m.)
Preliminary Draft!!
(All comments & suggestions welcome!!
Please e-mail to GitmoObserver@yahoo.com)

* “The Gitmo Observer” is the name given to the U.S. Military Commission Observation Project (MCOP) of the Program in International Human Rights Law (PIHRL) of Indiana University McKinney School of Law, operating with our Guantanamo Bay Periodic Review Board (PRB) Project.

The Gitmo Observer / MCOP was founded by Professor George Edwards, who is Special Assistant to the Dean for Inter-Governmental and Non-Governmental Organizations and is The C.M. Gray Professor of Law at the Indiana University McKinney School of Law.

Professor Edwards is also Faculty Director (Founding) of the Indiana University McKinney Law School’s Program in International Human Rights Law.
“Before I discuss the particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and of the defendant that might discredit our work if we should falter, in even minor matters, in being fair and temperate . . . . We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.”

Mr. Justice Robert H. Jackson
Chief Prosecutor, International Military Tribunal, Nuremberg
21 November 1945

Guantanamo Bay Fair Trial Manual for U.S. Military Commissions

An Independent & Objective Guide for Assessing Human Rights Protections and Interests of the Prosecution, the Defense, Victims & Victims’ Families, Witnesses, the Press, the Court, JTF-GTMO Detention Personnel, Other Detainees, NGO Observers and Other Military Commission Stakeholders

By: The Gitmo Observer
(Principal Author)

Table of Contents (Draft) (Volumes I and II)

Volume I – Main Manual (pages 1 – 344)

I. Preface.................................................................7
II. How to Use this Guantanamo Bay Fair Trial Manual........11
III. Acknowledgements........................................17
IV. Abbreviations..................................................19
V. What is the Right to a Fair Trial?..........................23
   A. “Rights” v. “Interests”........................................23
   B. Briefing on this chapter of the Guantanamo Bay Fair Trial Manual...23
   C. Who are the Military Commission stakeholders? Who is entitled to a fair trial?..24
   D. International law as binding source in US Courts (including the Military
       Commissions).................................................24
   E. Substantive areas of law binding on the U.S..............................................25
   F. International Humanitarian Law as a source of law for fair trials........26
       i. Treaty Law – International Humanitarian Law..............................27
       ii. Customary International Law – International Humanitarian Law......28
   G. International Human Rights Law as a source of law for fair trials..........30
       i. Treaty Law – International Human Rights Law.............................30
       ii. Customary International Law – International Human Rights Law......27
   H. Domestic U.S. law & the right to a fair trial.......................................31
   I. Rights not covered in this Guantanamo Bay Fair Trial Manual..............32
VI. Roles & Responsibilities of NGO Observers..................33
   A. The why and how of NGO Observers........................................35
   B. Responsibilities of NGO Observers............................................36
   C. NGOs should be true to yourselves!...........................................39
   D. NGO Observers serve an extremely important role for all stakeholders....40
VII. Background & Brief History of U.S. Military Commissions at Guantanamo Bay, Cuba......41
   a. The 9-11 attacks and the immediate aftermath..................................41
   b. Law governing U.S. Military Commissions.......................................43
   c. Who can be tried at by a Guantanamo Bay Military Commission?........43
d. Active Guantanamo Bay Military Cases .........................................................................44
e. U.S. Military Commissions are “War Crimes Tribunals” not “Terrorism Tribunals” ........45
f. Torture ..........................................................................................................................46
g. Periodic Review Boards (PRBs) ..................................................................................46
h. Closing Guantanamo Bay .............................................................................................48

VIII. General Information About the Case to Be Observed ..................................................51

IX. General Categories of Rights of Guantanamo Bay, Cuba, Military Commission Stakeholders ..........................................................................................................................57

A. Right to be Presumed Innocent; Right to Have the Burden of Proof on the Prosecution ....59
B. Freedom from Retroactive Application of Criminal Laws (No Ex Post Facto Laws)……59
C. Freedom from Double Jeopardy (Ne Bis in Idem) ..........................................................67
D. Right to Trial by Competent, Independent and Impartial Tribunal ................................71
E. Right to Effective Assistance of Counsel .....................................................................73
F. Right to Information & Access to Information ...............................................................89
G. Rights Related to Classified Information ...................................................................101
H. Rights to Adequate Time & Facilities to Prepare a Defense .........................................97
I. Right to Prompt Judicial Proceedings .........................................................................107
J. Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release; Right to Speedy Trial .........................................................................................................................133
K. Right to Liberty and Security of Person, including Freedom from Arbitrary Detention and Right to Review of Lawfulness of Detention .................................................................137
L. Freedom from Torture, and Cruel and Inhuman Treatment or Punishment ...............145
M. Right to Humane Treatment & Humane Conditions of Detention ...............................165
N. Freedom from Incommunicado & Solitary Confinement; Right to Access to the Outside World .................................................................................................................................167
O. Rights to Interpreter/ Translator ..................................................................................177
P. Right to Public Proceedings ...........................................................................................189
Q. Freedom from Self-Incrimination; Right Not to be Compelled to Testify Against Oneself or to Confess Guilt .............................................................................................................199
R. Right to Equality of Arms; Equality Before the Courts; Equal Protection of the Law ....207
S. Right to Be Present at or Absent From Pre-Trial Hearings ..........................................213
T. Right to be Defend Oneself in Person or Through Counsel of His Own Choosing .......221
U. Right to Examine and Cross-Examine Witnesses ........................................................227
V. Right to Exclusion of Illegally Obtained Evidence ......................................................233
W. Right to Exclusion of Hearsay ......................................................................................235
X. Rights of Detainees Who Were Juveniles When Taken to Guantanamo Bay .................239
Y. Right to Appeal (Interlocutory, Conviction, Sentence) ..............................................241
Z. Rights to a Remedy (Victims, Detainees, Defendants) ................................................245

X. Rights of Victims & Victims’ Families .........................................................................247
XI. Rights / Interests of the Prosecution ............................................................................257
XII. Rights of the Press .......................................................................................................265
XIII. Rights Related to Witnesses (Expert and Fact Witnesses) .......................................277
XIV. Rights / Interests of Joint Task Force-GTMO .............................................................281
XV. Rights / Interests of the U.S. public.................................................................289
XVI. Rights / Interests of the international community........................................291
XVII. Rights / Interests of NGO Observers............................................................293
XVIII. Conclusion (forthcoming)...........................................................................302

Glossary..................................................................................................................303
Bibliography ...........................................................................................................329
Index.......................................................................................................................341
Observation / Monitoring Note Pages..................................................................343

**Volume II – Appendices (pages 345 – 612)**

Preliminary pages for Vol II (Cover, Table of Contents, etc.).................................345

XIX. Appendices.....................................................................................................351

**Appendix A:** Sources of International Law......................................................353

1. International Humanitarian Law Treaties.........................................................355
   a. Geneva Conventions of 1949, Common Article 3........................................357
   b. Protocol Additional I to the Geneva Conventions of 1949, article 75..............559
   c. Protocol Additional II to the Geneva Conventions of 1949, article 6..............361
   d. Third Geneva Convention (Prisoners of War) (Excerpt)...............................363

2. International Human Rights Law Instruments..................................................365
   a. Universal Declaration of Human Rights.......................................................367
   b. International Covenant on Civil & Political Rights, Article 14.......................369
   c. United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (excerpts).........................................................371
   d. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.................................................................373
   e. List of Additional Non-Treaty International Instruments that Incorporate Rules of Customary International Law.................................................................377

3. International Criminal Law Instruments (forthcoming).................................379

**Appendix B:** Sources of Domestic U.S. Law.....................................................381

1. U.S. Non-Military Instruments...........................................................................383
   a. United States Constitution (excerpts)..........................................................385

2. U.S. Military & Military Commission Law.......................................................387
   a. Uniform Code of Military Justice (UCMJ) (Excerpts)...................................389
b. Military Commissions Act of 2009 (excerpts).............................................391

c. Rules of the Military Commission (United States) (14 August 1012) (excerpts)...395


e. Military Commissions Trial Judiciary Rules of Court (24 April 2012, as amended 4 June 2013)(excerpts).................................................................405

f. Military Commission Rules of Evidence (MCRE)........................................407

g. Department of Defense Media Ground Rules for Guantanamo Bay, Cuba (GTMO) (10 September 2010) (excerpt).................................................409

Appendix C: Charts of Fair Trial Provisions from International & Domestic Law Instruments.........................................................................................413

a. International Human Rights Law Treaties......................................................415


c. Historical and Other International Humanitarian Law, International Criminal Law Instruments.................................................................418

d. U.S. Federal Law (U.S. Constitution)..............................................................420

e. U.S. Military Commission Law; International Humanitarian Law Instruments..421

Appendix D: What You Need To Know Before You Travel to Guantanamo Bay or Ft. Meade on an NGO Observer Mission (forthcoming).........................423

Schematic of Guantanamo Bay Courtroom # 2........................................................................425

Appendix E: Al Nashiri case (U.S.S. Cole case) (Referred Charges of 28 September 2011)......427

Appendix F: Khalid Shaik Mohammad, et al (9/11 case) (Referred Charges of 2011 / 2012)....471

Appendix G: Hadi al Iraqi Case (Referred Charges of 4 February 2014)..............................489

Appendix H: Executive Order -- Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities (22 January 2009) (President Barack Obama).................................................495

Appendix I: Statement of Hon. Brian P. McKeon, Principal Deputy Under Secretary of Defense for Policy (Testimony of Before the Senate Committee on Armed Services February 2015).................................501

Appendix J: Excerpt from Military Commission Website.............................................505

Appendix K: White House Fact Sheet: New Actions on Guantánamo and Detainee Policy.....509

Appendix L: Guantanamo: Why the U.S. Has a Naval Base in Cuba (By Professor Christopher Jenks).........................................................................513


Appendix N: Ruling on Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary (9/11 Case) (Judge Pohl) (25 February 2015).............................................543

Appendix O: Bench Ruling on Executive Branch's Unlawful Influence on the Trial Judiciary - (al Nashiri USS Cole Case) (2 March 2015)...................................................545

Appendix P: Periodic Review Board Executive Order (7 March 2011) and Materials........575

Appendix Q: President Obama’s Plan to Close Guantanamo Bay (23 February 2016)........585

Observation / Monitoring Note Pages.................................................................................609

Not to be Quoted or Reproduced Without Permission --- This is a Preliminary Draft.© 2017

E-mail – GitmoObserver@yahoo.com  @ GitmoObserver The Gitmo Observer (Indiana U McKinney School of Law)
I. Preface

A. Birth of the Guantanamo Bay Fair Trial Manual


The roots of the Guantanamo Bay Fair Trial Manual can be traced back at least as far as the 2003 summer, when the newly appointed Guantanamo Bay Chief Defense Counsel asked if I would assist him and the newly created defense office. I was to seek to identify trial-related rights that should be afforded to the then many hundreds of “detainees” imprisoned at Guantanamo Bay. The detainees had begun arriving at Guantanamo Bay in January 2002, and well over a year later none of them had had any contact with any lawyer to assist with the defense of any possible criminal charges.

My Indiana University McKinney School of Law students and I undertook to research fair trial rights afforded to the defendants at the post-WW II Nuremberg trials, believing that rights afforded to Nuremberg defendants should, at the very least, be afforded to Guantanamo detainees. We scoured many thousands of Nuremberg and Tokyo Trial transcripts pages, extracting references to fair trial rules and procedures, motions, and rulings, and produced a 14-Volume set of research and source materials for the Office of the Chief Defense Counsel (under Colonel Will Gunn, USAF, now retired), though at that time no GTMO prisoner had been assigned a lawyer or charged. We completed our GTMO Right to a Fair Trial Nuremberg / Tokyo Project in late 2003.

b. The Case of David Hicks – The Australian “Detainee”

In early 2004, after our Nuremberg project ended, I received a call from the U.S. military lawyer for Australian detainee David Hicks (Michael Dan Mori, USMC, then Major, now Lieutenant Colonel, retired). He asked whether I and my students would work on fair trial issues on the Hicks’ case. We did so from 2004 until March 2007, when Mr. Hicks pleaded guilty in a Guantanamo Bay courtroom to “material support for terrorism”, and became the first person convicted by a U.S. Military Commission since post-WW II Nuremberg. (Hicks’ conviction was overturned on 18 February 2015 by the U.S. Court of Military Commissions Review.) My Indiana students produced countless memoranda of law on Hicks’ case, and were joined for a period by students from Stetson University School of Law when I was Visiting Professor of Law there. We engaged in numerous live and video-conferences with Hicks’ counsel.

In 2004 and again in 2005, I was tendered as an expert witness in the Hicks’ case, but the Military Judge ruled that I was “not necessary”, and neither were any of the other experts who had been tendered.2

---

1 Footnote to Nuremberg & Tokyo Transcripts.
2 Cite to Military Commission archives. Other expert witnesses called, and were also denied the opportunity to testify, included Professor Cherif Bassiouni, Judge Antoni Casese, and Professor Tim McCormick.
In lieu of live testimony in those years, I produced affidavits on the right to a fair trial under international humanitarian law (the law of war), international criminal law, and international human rights law.  

In 2007, two years after my affidavits in the David Hicks’ Guantanamo Bay case, I became one of the first two law experts permitted to travel to Guantanamo Bay for a Military Commission, and the first expert witness from the U.S (with the other law expert on the same trip being Professor Tim McCormick from the University of Melbourne Faculty of Law, Australia). I was present in the Guantanamo Bay courtroom for Hicks’ guilty plea and sentencing, which occurred in Courtroom #1, the yellow building on the hill (AV 34).

After our work on the case of David Hicks ended in 2007, we worked briefly on the case of Canadian Omar Khadr, who was 15 when he allegedly engaged in behavior for which he was subsequently captured and taken to Guantanamo Bay as a teenager. After our work on Khadr’s case, our Guantanamo Bay worked was put on hold for about a decade.


In addition to the Guantanamo Bay cases, our Indiana law school’s Program in International Human Rights Law worked on other high profile cases, such as the case of Slobodan Milosevic, the former President of the former Yugoslavia, who was on trial at the UN International Criminal Tribunal for the former Yugoslavia in The Hague. He was charged with war crimes, crimes against humanity and genocide for alleged behavior in the Balkans. We worked on his case until he died in 2006, before a verdict was reached. We also worked on a posthumous appeal and pardon case involving Breaker Morant, who was convicted by court martial in 1902 for alleged behavior during the Boer War in South Africa. We also worked on the extradition case of Dragan Vasilkovic (“Captain Dragan”), a Serbian born naturalized Australian sought by Croatia for alleged war crimes perpetrated in the 1990s.

In 2014, the Pentagon granted “Non-Governmental (NGO) Observer Status” to our Program in International Human Rights Law, permitting us to send representatives to Guantanamo Bay to observe and monitor proceedings. We began sending Indiana University McKinney law students, graduates, staff and faculty to Guantanamo Bay to observer and monitor hearings, and to the military base at Ft. Meade, Maryland, where Guantanamo Bay proceedings were videocast live by secure link.

In June 2014 I traveled to Guantanamo Bay, with an NGO Observer delegation, for hearings in the 9-11 case, against Khalid Shaik Mohammad and four other alleged masterminds of the September 2001 World Trade Center and Pentagon attacks. During this mission, which was my first trip back at GTMO since Mr. Hicks pleaded guilty in 2007, I realized that NGO Observers had no framework for analyzing whether a fair trial was being had or could be had at the Military Commissions. How can one assess whether a fair trial is being had if one has no clear vision of what a fair trial should look like?

I undertook to create a *Guantanamo Bay Fair Trial Manual* to outline fair trial rights that should be

---

3 Cite to Military Commission archives.


5 Mori, Michael “Dan”, In the Company of Cowards (2014 Penguin Press). (Lt. Col. Mori discusses roles of expert witnesses in the Hicks’ case.) Hicks’ proceedings were held in Courtroom 1, in the yellow building called AV 34 that sits above Camp Justice.
afforded to all Military Commission stakeholders, not just the defendants. Other individuals and groups have rights and interests too! The prosecution has rights, as do victims and victims’ families, the press, court and detention facility personnel, and many others.

In June and July 2014, Indiana McKinney Law School affiliates and I conducted research and began writing. On 12 August 2014, when I was back at Guantanamo Bay again for further 9-11 case hearings, I launched the Guantanamo Bay Fair Trial Manual live online using an internet connect in the NGO Resource Center at GTMO, distributing hard copies to NGO Observers on site and to a few others, and disseminating it online via The Gitmo Observer (www.GitmoObserver.com), which is hosted by the Indiana McKinney Military Commission Observation Project which I founded after the Pentagon granted us NGO Observer status.

d. What is www.GitmoObserver.com?

B. The Guantanamo Bay Fair Trial Manual

a. What is the Guantanamo Bay Fair Trial Manual? What does it contain?

This Guantanamo Bay Fair Trial Manual identifies general categories of internationally-recognized rights that apply to fair trials in the U.S. Military Commission context, and explains how these rights have been interpreted and applied by U.S. and international tribunals. It also lists interests, that may fall short of being called “rights”, that stakeholders have in the proceedings. It also lists questions that may guide NGO Observers as they fulfill their mission of ascertaining whether in the NGO Observers’ estimation fair trials rights and interests are being afforded to and met for all Guantanamo Bay Military Commission stakeholders.

b. Who are the Guantanamo Bay Military Commission “stakeholders”?

The Guantanamo Bay Fair Trial Manual identifies Military Commission stakeholders, including defendants and defense counsel, the prosecution, victims and victims’ families, judges and judicial staff, fact and expert witnesses, the press, governments with detained citizens, governments whose citizens were injured by the alleged crimes, Guantanamo Bay detention facility staff (Joint Task Force – Guantanamo), and the general international and U.S. publics. Stakeholders also include Guantanamo Bay prisoners who have not been charged with any offenses, and are thus not considered “defendants”. As Military Commission stakeholders, all of these individuals, groups and entities have rights or other compelling interests related to fair trials at Guantanamo Bay.

c. Where do fair trial rights and interests come from?

The listed rights are provided for under international human rights law, international humanitarian law (“the law of war” or the “law of armed conflict”), and international criminal law, and arise under various binding treaties that the U.S. has signed and ratified, including the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949. The rights also arise under customary international law. Interests mentioned have similar domestic U.S. and international law sources.

These rights and interests are also provided for under U.S. domestic law, including the U.S. Constitution, the Military Commission Act of 2009 and associated Military Commission instruments, and other federal statutes.

6 Until summer 2016, an NGO representative was charged $150 to connect to the internet in GTMO NGO Internet Resource Center using an ethernet cord at the beginning of any week of GTMO hearings. For the $150, the NGO representative could use the internet connection for up to a week. There were no refunds and the $150 was not pro-rated fees if the hearings lasted less than a week. Thus, an NGO could have ended up paying $150 for one or two days of internet usage in the NGO Resource Center. That situation changed when a fiber optic cable came to Guantanamo Bay, and the internet connection fee was approximately $8 per day, $14 per week, or $24 per month. Also, in September 2016, T-mobile reached GTMO and those with a T-mobile phone could use it as though they were in the continental U.S.
C. The future

a. Hopes for the U.S. Government, the rule of law, and human rights protections for all

It is hoped that the *Guantanamo Bay Fair Trial Manual* will be helpful as the U.S. government seeks to follow its longstanding mandate to respect the rule of law and human rights for all persons, particularly for the wide-range of stakeholders in the U.S. Military Commissions at Guantanamo Bay, Cuba. It is beyond the scope of the *Guantanamo Bay Fair Trial Manual* to seek to assess or predict whether the Guantanamo Bay U.S. Military Commissions will continue to move forward or whether they should move forward or whether the Guantanamo Bay detention facility will remain open or close. Though these issues may bear on fair trial rights, the *Guantanamo Bay Fair Trial Manual* has a more limited, direct focus.

b. Closure of Guantanamo Bay?

- See *Executive Order -- Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities* (22 January 2009) (President Barack Obama) (Appendix H)
- See also President Barack Obama’s *State of the Union Address*, Tuesday, 20 January 2015, in which he said “As Americans, we have a profound commitment to justice – so it makes no sense to spend three million dollars per prisoner to keep open a prison that the world condemns and terrorists use to recruit. Since I’ve been President, we’ve worked responsibly to cut the population of GTMO in half. Now it’s time to finish the job. And I will not relent in my determination to shut it down. It’s not who we are.”
- See President Obama’s Plan to Close Guantanamo Bay (23 February 2016) (Appendix xyz)

c. Torture of Guantanamo Bay prisoners, before and after their transfer to Guantanamo Bay.


D. Role of NGO Observers

International law and domestic law require procedural and substantive fairness in criminal prosecutions, and independent trial observers assist in assuring accountability under that law. NGO Observers are the eyes and ears of the outside world into the Guantanamo Bay courtroom. NGO Observers have a special burden of independently, impartially, accurately, and with integrity informing those outside the courtroom what is happening within. You, as an NGO Observer, play an incredibly important role in helping to ensure transparency, the rule of law, and /helping to ensure that the promises of international human rights law protections are fulfilled. More on the roles of NGO Observers can be found in Section XYZ, infra.

E. Conclusion

The *Guantanamo Bay Fair Trial Manual* is a work in progress. We have greatly appreciated comments and constructive criticisms from stakeholders in different camps, and remain open and willing to receive any suggestions on improving our document to help it better serve its purposes.

Please feel free to contact *The Gitmo Observer* through our e-mail (GitmoObserver@yahoo.com), Twitter (@GitmoObserver) or through our website (www.GitmoObserver.com)

Professor George E. Edwards (Principal Author)

Faculty Director (Founding), Military Commission Observation Project (MCOP) / The Gitmo Observer

Special Assistant to the Dean for Inter-Governmental & Non-Governmental Organizations

The C.M. Gray Professor of Law

Indiana University McKinney School of Law

U.S.A.
II. How to Use the Guantanamo Bay Fair Trial Manual

I. Introduction

a. Who are the intended users or the Guantanamo Bay Fair Trial Manual?

It is hoped that NGO Observers who travel to Guantanamo Bay for hearings, or travel to an alternative hearing viewing site like Ft. Meade, will use the Guantanamo Bay Fair Trial Manual. It is also hoped that other stakeholders will use it if they are interested in ascertaining whether a fair trial is being had, has been had, or can be had under Military Commission rules and practice. However, the Guantanamo Bay Fair Trial Manual has been drafted as a tool to be used by observers and monitors, such as official NGO Observers on the ground, and we hope it serves as a practical guide for them and others.

II. Traveling to Guantanamo Bay or Ft. Meade? Tips before you go to monitor hearings

a. Do your homework!


NGO Observers should become familiar with the facts of the case(s) they plan to observe. They should review the charge sheets and motion papers (found at www.mc.mil), newspaper articles, the websites of NGOs, and other open source outlets.

b. Develop an observation / monitoring strategy that permits you to be objective and independent

With the Guantanamo Bay Fair Trial Manual in hand, an NGO Observer can map out an observation strategy, consistent with the Terms of Reference provided by the NGO Observer’s sending NGO. Presumably, the Terms of Reference will require the NGO Observer to: (1) attend; (2) observe; (3) analyze; (4) critique; and (5) report on the proceedings, perhaps focusing more on the fair trial process than on inquiries into the nature or elements of specific substantive crimes or other non-procedural questions.

Your strategy may involve interviewing prosecution or defense lawyers, talking with the press, sorting out how you will take notes during hearings and access the internet to dispatch blog posts or articles immediately following proceedings, or collaborating with NGO Observers from other NGOs before you arrive and during your Observation mission. Your strategy will include establishing protocols to ensure that NGO Observers do not intervene in the process or be seen to intervene, overstepping the bounds of NGO Observers who are charged with monitoring the process objectively and independently. Yes, be certain that you are able to maintain objectivity and independence. Among other things, objectivity and independence will lead to your being deemed more credible as you report your findings.

Be aware that Military Commission hearings are subject to schedule changes or cancellations, triggering forced changes in travel to and from Ft. Meade or to Guantanamo Bay. Things take time within the GTMO system, including waiting 14 or 15 days for unclassified documents to clear review and be posted on the mc.mil website for view by the general public. Rules and regulations regarding travel to Guantanamo Bay and conditions on GTMO for NGOs change frequently. It has been said that rules for NGOs on the ground at GTMO change virtually every trip, including which government forms have to be completed prior to departure and how those forms are to be completed, how many copies of these completed government forms must carried with travelers, how many hours in advance of the flight to
Guantanamo the NGOs must arrive at Andrews Air Force Base, rules for how many NGO Observers sleep in each tent at Camp Justice at GTMO, what is an appropriate subject for photographs at GTMO, whether NGOs will have access to wifi, when NGOs are permitted to check in for their return flights from GTMO to Andrews Air Force Base, the amount of briefing information provided to NGOs, among other changes. Some say that travel to Guantanamo Bay involves a great deal of “hurry up and wait”, with hours spent waiting in the Andrews or GTMO air terminals waiting to board, or hours spent in holding waiting to know whether court will be in session.

III. On the Ground at Guantanamo Bay or Ft. Meade – Using the Guantanamo Bay Fair Trial Manual

c. Working through the Guantanamo Bay Fair Trial Manual

Part II of the Guantanamo Bay Fair Trial Manual calls upon NGO Observers to complete a background information table about the defendant(s) and the case of the proceedings you will be monitoring. This background may provide insights into law and fact questions that may arise during the proceedings, offering you familiarity needed to help you better understand the proceedings and help you better perform your role of ascertaining for yourself whether Guantanamo Bay stakeholders have, are, or may receive the fair trial to which they are entitled. Different facts trigger applicability of different law which may be interpreted and applied differently given the facts of each specific case.

d. Study of over 2 dozen rights to which Military Commission Stakeholders are entitled

The NGO Observer might then turn to Part III of the Guantanamo Bay Fair Trial Manual, which identifies over two dozen rights associated with the various stages of the criminal justice process in the context of the Military Commissions. Though Volume I of the Guantanamo Bay Fair Trial Manual focuses on rights generally associated with the pre-trial hearing stage, many of these same rights apply at one or more of the other stages.

Each rights section in Part III begins with a textbox that broadly sketches the parameters of the right under discussion, followed by a more detailed description of the rights’ reach. This discussion outlines binding international and domestic law under which the law arises, illuminates the scope of the right more fully, and provides examples of how the right has been interpreted and applied in different international and domestic fora, including in the Military Commissions.

Following each section’s discussion of each right are one or more “rights charts” that list out a series of questions that an NGO Observer might ask himself or herself (or might ask another Military Commission stakeholder!), as the NGO Observer seeks to ascertain whether a right to a fair trial has been had, is being had, or can be had under Military Commission rules and practice.

Not all rights charts will apply to all Military Commission Observations. For example, a rights chart that focuses on questions related to juvenile offenders would not apply if the defendant (the accused) was not a juvenile at the time of the alleged offense.

Likewise, not all questions in any given rights chart will apply to all Military Commission proceedings. The Guantanamo Bay Fair Trial Manual is deliberately repetitive, given that the rights and categories of rights overlap, and because the Guantanamo Bay Fair Trial Manual seeks to trigger in NGO Observers’ minds law they will apply to a wide range of facts that may arise at one or more stages of the Guantanamo Bay criminal justice process in cases in which stakeholders may or may not be similarly situated.

7 For purposes of the Guantanamo Bay Fair Trial Manual, Guantanamo Bay Military Commission proceedings might be divided into four stages:

a. Pre-Hearing Stage (Capture, Arrest, Early Detention, Pre-Charge);
b. Pre-Trial Hearing Stage (Post-Charge, Pre-Military Commission, Pre-Trial);
c. Trial & Judgment Stage (the proceedings during which a verdict is reached as to the guilt of the accused); and

d. Post-Trial & Post-Judgment Stage (including appeal of conviction and sentencing).

Stakeholder rights in all four stages overlap of GTMO proceedings, making significant portions of the pre-trial hearing analysis applicable during other stages. At the launch date of the Guantanamo Bay Fair Trial Manual, the three active GTMO cases were at the pre-trial stage.
The rights charts recognize that the defendant has the right to a fair trial, and accordingly, rights of the defendant are identified, described and interpreted. Similarly, rights and interests of other Military Commission stakeholders are also identified, described and interpreted. In addition to assessing the right to a fair trial for defendants, NGO Observers may turn to latter parts of the *Guantanamo Bay Fair Trial Manual* that focus on the rights and interests of other stakeholders, in sections that deal with: rights of victims and victims’ families (Part V); rights of the prosecution (Part VI); rights of the press (Part VII); rights of expert and fact witnesses (Part VIII); rights and interests of Joint Task Force-GTMO (Part IX); rights of the U.S. public (Part X); rights of the international community (Part XI); and NGO Observers “rights” and interests (Part XII).

The Part XIII Conclusion summarizes the purposes of the *Guantanamo Bay Fair Trial Manual*, and offers final tips on how it may be used.

The Appendices (Part XIV) contain reference materials that NGO Observers may consult as they prepare for and during their Observations. The Appendices include excerpts of binding treaties (e.g., the Geneva Conventions and the International Covenant on Civil and Political Rights), excerpts from non-treaty international law instruments that incorporate binding principles of customary international law (e.g., the Universal Declaration on Human Rights), provisions of Military Commission law (e.g., the Military Commission Act of 2009, and accompanying Rules and Regulations).

The Appendices also contain charts of rights provisions incorporated into a wide range of international and domestic law sources.

The Glossary of the *Guantanamo Bay Fair Trial Manual* may be useful to those who have minimal exposure to the military or to the Military Commissions, and may be useful to those who are not familiar with law terminology generally or with terminology related to international humanitarian law, international criminal law, or international human rights law.

IV. An objective, independent, simple yet comprehensive guide

*The Gitmo Observer* has as members Indiana University McKinney School of Law Affiliates (Indiana McKinney Affiliates), who are all faculty, staff, students and graduates of the Indiana McKinney Law School. Each of us holds his or her own political and social opinions generally, and each of us holds his or her own specific opinions about Guantanamo Bay, Cuba and its Military Commissions. Each of us is committed to ensuring that we distinguish between on the one hand, certain efforts in which we operate independently and objectively, and on the other hand our participation in a way in which we may choose to express personal opinions and beliefs we may hold.

Our efforts in researching and drafting the *Guantanamo Bay Fair Trial Manual* are objective, independent and impartial.8 We hold ourselves to standards not unlike those that apply to Military Commission personnel, such as judges, courtroom reporters, or security staff, who are obligated to do their jobs without favor or disfavor to any side.

*Gitmo Observer* participants are free to

---

8 I am the principal author of the *Guantanamo Bay Fair Trial Manual*, but significant credit goes to many who have conducted research for, drafted sections of, and otherwise participated in the preparation of this Manual. No political, ideological or similar litmus test has been used, or will be used, to determine who participates in the project, who contributes to the Manual, or who travels to Guantanamo Bay or Ft. Meade on behalf of the Military Commission Observation project. We encourage objective, independence and impartiality, which permits participants to examine, analyze, critique and arrive at their own conclusions which they are welcome and encouraged freely to share.
exercise their judgment and express their personal opinions when they travel to Guantanamo Bay or Ft. Meade, apply the law as they know it to facts they encounter on the ground, and report their conclusions on the www.GitmoObserver.com blogs and elsewhere.

In short, as an organization, Gitmo Observer is publishing an objective, independent and impartial guide that does not seek to apply the law to the facts and draw legal conclusions as to whether the rights of any stakeholders are or are not being afforded to them. However, the individuals who participate in Gitmo Observer activities are free and welcome to form opinions about these matters, draw conclusions, and report upon them, acting in and speaking in their personal capacities. Sometimes Gitmo Observer participants operate as independent and impartial stewards of the project, and sometimes Gitmo Observer participants operate without such constraints, speaking their minds.

The Gitmo Observer does not incorporate into our work pre-determined views about whether or not fair trials are being conducted at Guantanamo Bay, or whether fair trial have been conducted or will be conducted there. We bring to the table independent research on what the right to a fair trial entails, and we identify questions that may assist those who use the Guantanamo Bay Fair Trial Manual as they try to form their own informed judgments about the Military Commissions.

The Guantanamo Bay Fair Trial Manual is a guide only. We hope that each person who uses the Guantanamo Bay Fair Trial Manual will be equipped with a solid tool they might use as they reach their own informed conclusions about whether the Military Commission system is operating in accordance with, or contrary to, international and domestic law.

It is hoped that NGO Observers and others users will determine which charts and questions in the Guantanamo Bay Fair Trial Manual are most relevant and helpful to them as they seek to carry out their own personal missions, the missions of their sending NGO, or the mission of whatever organization dispatched them to monitor the Guantanamo Bay Military Commissions.

The Guantanamo Bay Fair Trial Manual questions, which are comprehensive yet not exhaustive, are drafted objectively, without favor for or slant against any stakeholder or stakeholder interests. The Guantanamo Bay Fair Trial Manual categories and questions do not presuppose U.S. government compliance, or noncompliance, with international or domestic law. Independent, objective NGO Observers and others may draw their own conclusions. The Guantanamo Bay Fair Trial Manual is intended to be a simple tool to assist those interested in fair trials at Guantanamo Bay. It is not intended provide pre-determined conclusions.

Another upcoming publication is The Guantanamo Bay Reader, which consists of 2 parts: (i) Part I, which consists of 25 essays by people who have lived and shaped, are living and shaping, or will live

---

9 These NGO Observer missions, and missions of others who may use the Guantanamo Bay Fair Trial Manual, could include analyzing, critiquing or investigating the Military Commissions, or researching to help develop and implement policy, or advocating in the Military Commission fair trial arena, inside and outside the U.S. These missions will presumably include seeking to ascertain whether all Guantanamo Bay stakeholders are being afforded their right to a fair trial.

10 The Guantanamo Bay Fair Trial Manual could be of interest to and use to members of the press who cover and report on the Military Commissions, representatives of foreign governments whose citizens are detained at Guantanamo Bay or whose citizens are victims of crimes charged at Guantanamo Bay, academics who teach about the right to a fair trial at Guantanamo Bay, JTF-GTMO personnel who may wish to learn about their rights and interests in working within the Guantanamo Bay detention environment, and many others, such as individuals who may seek to use material contained in the Guantanamo Bay Fair Trial Manual to assess rights in the context of criminal trials in military or civil tribunals outside of the U.S., conducted by other countries.

11 No inference regarding compliance or noncompliance should be made based on the existence of any particular question(s). That is, the existence any particular question(s) is not indication that there is compliance or that there is noncompliance.

and shape the Guantanamo Bay U.S. Military Commission experience, including defense counsel, victims and their families, government officials (including from the rank of military judges), media representatives, detainees, Observers, and others; and (Part II), which consists of primary documents related to the Guantanamo Bay and the U.S. Military Commissions, including the instruments issued by the White House and the Pentagon beginning in 2001 that led to the creation of the first Military Commissions established at Guantanamo Bay, U.S. Supreme Court and other cases that spelled out U.S. Constitutional and other rights to be afforded to detainees held without trial by military commission and detainees charged, Presidential Executive Orders, and other documents, including the original lease entered into between the U.S. and Cuba over a hundred years ago under which the U.S. exercises sovereignty over Guantanamo Ba.

V. Conclusion

Finally, the Guantanamo Bay Fair Trial Manual is meant to be used by those interested in fair trial questions in other hearings, for example, in those involving persons allegedly affiliated with ISIS / ISIL / Islamic State. If they are captured and brought to trial, should the rules used in those trials be identical to those used in the Military Commissions at Guantanamo Bay, Cuba? Would ISIS fighters be entitled to the same sort of fair trial protections afforded to the detainees at Guantanamo Bay? What about the rights of those who are ISIS victims or ISIS victims’ families? Are they entitled to the same rights as victims and victims’ families of the Guantanamo Bay crimes? And the same questions would apply to all other ISIS trial stakeholders, just as Guantanamo Bay fair trial rights apply to all Guantanamo Bay stakeholders.

Dean Andy Klein & Professor George Edwards, of Indiana University McKinney School of Law, travel to Ft. Meade, MD to monitor hearing in Guantanamo’s 9/11 case. Hearings are telecast live from the Guantanamo Bay, Cuba courtroom into a secure facility at Ft. Meade.
III. Acknowledgements

Guantanamo Bay Fair Trial Manual contributors include Mr. Mark Shope, Esq. who is supported through the pro bono program of the Faegre Baker Law Firm, Indianapolis, Indiana, and Ms. Qifan Wang (Research Assistant). Thanks to Ms. Michelle Werner who built the Gitmo Observer website (www.GitmoObserver.com) and the website of the Military Commission Observation Project (mckinneylaw.iu.edu/human-rights/military-commission-observation-project.html), and to Ms. Catherine Lemmer (International Law Librarian) who converted www.GitmoObserver.com into comprehensive Guantanamo Bay Military Commission resource and who has provided invaluable assistance to this project, and to John W. Davis III, Ben Keele, and Allan Berrien Celik, also from the Indiana McKinney Law Library. Thanks to Mr. Luke Purdy, Hon. Jeff Papa, Mr. Charles (Chuck) Duncan, Ms. Hattie Harman, Ms. Margaret Baumgartner, Mr. Greg Loyd, Mr. Paul Schilling, Mr. Tyler Smith, Ms. Kristin Brockett & Ms. Kyle Galster (MCOP Faculty Assistants), and Faculty Assistants Ms. Sylvia Regalado and Ms. Janice White. Thanks to the MCOP Advisory Council members, Mr. Luke Purdy, Mrs. Avril Rua Pitt, Mr. Bob Masbaum, Ms. Qifan Wang, Mr. Kevin Munoz, Mr. Mark Shope, Ms. Guang Yang, Hon. Harold House, Mr. Leontiy Korolev, Mr. Matt Kubal and Mr. Sukrat Baber.

Thanks to the following students enrolled in the Autumn 2014 International Criminal Law course at Indiana University McKinney School of Law -- Germaine Hassan Abououf, Michael Deveraux, Alyyssha Duncan, Amanda Fiorini, Collin Gruver, CharlesNiblick, Kunle Ogunmoyela, Luke Purdy, and Ellen Marie Queen, the following students enrolled in the Autumn 2015 International Criminal Law course at Indiana University McKinney School of Law -- Islam Attia, Zahra Ayoubi, Nia Bogar, Tex Boonjue, Hee Jong Choi, Eric Doyle, Jacob Jones, Robert Klobusnik, Andrew Kohlmeyer, Alicia Libla, Christine Picci, Christi Rever, Sharon Roberts, Katie Sheeian, Aaron Short, Shelby Thornburg, Nora Unverzagt, Michelle Yockelson Islam, and the following students enrolled in the Autumn 2016 international Criminal Law course at Indiana University McKinney School of Law -- Monyuak Arop, Ryan Eldridge, Moner Elharish, Katherine Forbes, David Frangos, Maria Ringwald, Seth Smoker, and Zhu Lin. Thanks to Hannah Marie Alcasid for designing the Gitmo Observer logo. Thanks also to Dean Andy Klein of the Indiana University McKinney School of Law for his support.

Thanks to NGO Observers present at Guantanamo Bay, Cuba and Ft. Meade, Maryland to observe and monitor hearings during the August 2014 pre-trial hearings in three Military Commission cases against: (a) al Nashiri (U.S.S. Cole case); (b) Khalid Shaik Mohammad et. al (the 9-11 case); and (c) Hadi al Iraqi (a/k/a Nashwan al Tamir) (the most recently arraigned defendant). These NGO Observers offered feedback based on their own experience, knowledge, and expertise on many of the important fair trial issues and commission observation issues covered in this Guantanamo Bay Fair Trial Manual. Much of the constructive, helpful feedback from these observers was immediately incorporated into the draft Guantanamo Bay Fair Trial Manual. NGO Observers present at Guantanamo Bay for 9 – 16 August hearings in the 9/11 case included Rita Cant (Center for Democracy; ACLU), George E. Edwards (The Gitmo Observer; Indiana University McKinney School of Law), Chris Jenks (SMU Dedman School of Law), Perlette Jura (Gibson Dunn), John Malcom (Heritage Foundation), Jason Patton (University of New Mexico School of Law), Cristina Rotaru (Judicial Watch), JD Walborn (University of Toledo School of Law), and Erik Wilson (Bingham McCutchen, New York City Bar Association). Thanks also to Dr. Andrew Clapham (Geneva, Switzerland) and Dr. Mark Shulman (New York, New York), Katherine Cosgrove (Washington, D.C.) Dru Brenner-Beck, who were also NGO Observers at Guantanamo Bay.

Colonel Will Gunn, USAF (ret), was the first Chief Defense Counsel for the Guantanamo Bay Military Commissions, who worked tirelessly in unchartered waters on a difficult mission, and provided an opportunity for us at Indiana McKinney School of Law to assist. Lt. Col. Michael “Dan” Mori, USMC (ret) worked tirelessly, also in unchartered waters, as the military lawyer assigned to Australian detainee David Hicks, the first person convicted in a U.S. Military Commission since World War II, and who also provided opportunities for us at Indiana to contribute.

Thanks to the Center on American and Global Security, at Indiana University – Bloomington, for hosting a Guantanamo Bay panel in October 2014. Thanks to co-panelists former Congressman Lee
Hamilton; Carol Rosenberg (Senior Correspondent for The Miami Herald); Professor Leila Sadat (Washington University School of Law and Special Advisor to the Prosecutor of the International Criminal Court), and the staff and affiliates of the Center on American and Global Security, including Rebecca “Becca” Dash, Jacob Seibel, Professor David Fidler, and Professor Ganguly. Thanks also to former U.S. Ambassador to Poland Lee Feinstein, who in 2014 became Dean of the Indiana University School of Global and International Studies, who chaired and moderated the panel. Thanks to Rick Kammen, who is Learned Counsel for defendant al Nashiri, who has participated in pre-departure briefings for Indiana University McKinney School of Law Affiliates who have participated in our Military Commission Observation Project. Thanks to General Mark Martins who has, along with his team, briefed Indiana University McKinney Affiliates at Guantanamo Bay, and who has committed to traveling to our Law School for a speaking engagement, and thanks to members of multiple other defense teams at Guantanamo Bay who have also provided briefings for us on site and otherwise. Personnel of the Office of Military Commissions and of JTF-GTMO also are to be thanked. Thanks to members of the press corps, including those who offered comments or suggestions about this project.

Thanks to Andrew Li (Tokyo), Laurence Bates (Tokyo), Ma Lun (Tokyo), Michael Lennon (Washington, D.C.), Joe McIntosh (Indianapolis), Paul Logan (Indianapolis), Mike Bergin (Indianapolis), Russell Langley (Dallas, Texas), Hon. Scott Bates (Washington, DC & Stonington, Connecticut), and Jeffrey Adams (Indianapolis).

Thanks to the Indiana International & Comparative Law Review (II&CLR) and its Editor-in-Chief Paul T. Babcock for hosting a 12 February 2015 Symposium Panel titled “International Criminal Law and its Influence, If Any, on the U.S. Military Commissions at Guantanamo Bay and other Domestic Tribunals”, with participants Chris Jenks (Southern Methodist University), Professor Bart Brown (Chicago Kent School of Law), Mr. Rick Kammen (Kammen and Moudy), and Professor Shahram Dana (The John Marshall School of Law), and George Edwards (Indiana University McKinney School of Law).

Thank you to contributors to The Guantanamo Bay Reader, (ed. George Edwards), which is scheduled to be published by Indiana University Press in 2016.

There are many other stakeholders who should be thanked, and this Acknowledgements section will likely grow as we move towards completion of the Guantanamo Bay Fair Trial Manual.

The Preliminary Draft Guantanamo Bay Fair Trial Manual was launched on Tuesday, 12 August 2014, at the U.S. Military Commissions Expeditionary Legal Complex at Joint Task Force Guantanamo Bay, Cuba (JTF - GTMO), during the pre-trial hearings in the 9-11 case (against Khalid Shaik Mohammad, et. al). Thanks to the Office of Military Commission Non-Governmental Organization (NGO) Internet Resource Center that provided facilities for printing the Guantanamo Bay Fair Trial Manual for dissemination at GTMO and for it at www.GitmoObserver.com. Also, thanks to the Office of Military Commission Escorts and other staff who work very hard help facilitate the missions of NGO Observers at Guantanamo Bay and Ft. Meade. Thanks to 2d Lt. Rory Swafford, US Air Force, Officer in Charge of Andrews Air Force Base Passenger Air Terminal, and his staff, for facilitating travel to / from Guantanamo Bay, Cuba and Andrews Air Force Base.

Professor George E. Edwards (Principal Author)
gedwards@indiana.edu
IV. Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAR</td>
<td>After Action Report</td>
</tr>
<tr>
<td>AE</td>
<td>Appellate Exhibit numbers</td>
</tr>
<tr>
<td>AO</td>
<td>Area of Operation</td>
</tr>
<tr>
<td>APACS</td>
<td>Aircraft and Personnel Automated Clearance System</td>
</tr>
<tr>
<td>ASD(HA)</td>
<td>Assistant Secretary of Defense for Health Affairs</td>
</tr>
<tr>
<td>ASD/PA</td>
<td>The Assistant Secretary of Defense for Public Affairs</td>
</tr>
<tr>
<td>ASD(RA)</td>
<td>Assistant Secretary of Defense for Reserve Affairs</td>
</tr>
<tr>
<td>AUMF</td>
<td>Authorization for the use of Military Force</td>
</tr>
<tr>
<td>BEEF</td>
<td>Base Emergency Engineering Force</td>
</tr>
<tr>
<td>BII</td>
<td>Biometric Identification Information</td>
</tr>
<tr>
<td>CA</td>
<td>Convening Authority</td>
</tr>
<tr>
<td>CCTV</td>
<td>Closed-Circuit Television Feed of Military Commission Proceedings</td>
</tr>
<tr>
<td>CDC</td>
<td>Chief Defense Counsel</td>
</tr>
<tr>
<td>CIA</td>
<td>Central Intelligence Agency</td>
</tr>
<tr>
<td>CIPA</td>
<td>Classified Information Procedures Act</td>
</tr>
<tr>
<td>CMCR</td>
<td>Court of Military Commissions Review</td>
</tr>
<tr>
<td>CO</td>
<td>Commanding Officer</td>
</tr>
<tr>
<td>CSO</td>
<td>Court Security Officer</td>
</tr>
<tr>
<td>CSRT</td>
<td>Combat Status Review Tribunal</td>
</tr>
<tr>
<td>DC CA</td>
<td>Court of Appeals for the DC Circuit</td>
</tr>
<tr>
<td>DCTHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>DDC</td>
<td>U.S. District Court for the District of Columbia</td>
</tr>
<tr>
<td>DIA</td>
<td>US Defense Intelligence Agency</td>
</tr>
<tr>
<td>DIMS</td>
<td>Detainee Information Management System</td>
</tr>
<tr>
<td>DIMS-F</td>
<td>Detainee Information Management System-Fusion</td>
</tr>
<tr>
<td>DoD</td>
<td>U.S. Department of Defense</td>
</tr>
<tr>
<td>DoDD</td>
<td>DoD Directive</td>
</tr>
<tr>
<td>DoD EA</td>
<td>DoD Executive Agent</td>
</tr>
<tr>
<td>DoS</td>
<td>U.S. Department of State</td>
</tr>
<tr>
<td>DSO</td>
<td>Defense Security Officer</td>
</tr>
<tr>
<td>DTA</td>
<td>Detainee Treatment Act</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights and Fundamental Freedoms</td>
</tr>
<tr>
<td>EITSD</td>
<td>Enterprise Information Technology Services Directorate</td>
</tr>
<tr>
<td>ELC</td>
<td>Expeditionary Legal Complex</td>
</tr>
<tr>
<td>FBI</td>
<td>Federal Bureau of Investigation</td>
</tr>
<tr>
<td>FOUO</td>
<td>For Official Use Only</td>
</tr>
<tr>
<td>GC DoD</td>
<td>General Counsel of the Department of Defense</td>
</tr>
<tr>
<td>GITMO</td>
<td>U.S. Naval Station at Guantanamo Bay, Cuba</td>
</tr>
<tr>
<td>GTMO</td>
<td>U.S. Naval Station at Guantanamo Bay, Cuba</td>
</tr>
<tr>
<td>HVD</td>
<td>High Value Detainee</td>
</tr>
<tr>
<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
</tr>
<tr>
<td>IACHR</td>
<td>Inter-American Commission of Human Rights</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
</tr>
<tr>
<td>ICTR</td>
<td>UN International Criminal Tribunal for the former Yugoslavia</td>
</tr>
<tr>
<td>ICTY</td>
<td>UN International Criminal Tribunal for the former Yugoslavia</td>
</tr>
<tr>
<td>IGO</td>
<td>Inter-Governmental Organization</td>
</tr>
<tr>
<td>IRF</td>
<td>Immediate Reaction Force; Initial Reaction Force</td>
</tr>
<tr>
<td>ISN</td>
<td>Internment Serial Number</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>JA</td>
<td>Judge Advocate</td>
</tr>
<tr>
<td>JAG</td>
<td>Judge Advocate General</td>
</tr>
<tr>
<td>JSP</td>
<td>Joint Task Force</td>
</tr>
<tr>
<td>JTF</td>
<td>Joint Task Force-Guantanamo Bay</td>
</tr>
<tr>
<td>JWICS</td>
<td>Joint Worldwide Intelligence Communications System</td>
</tr>
<tr>
<td>LPR</td>
<td>Lawful Permanent Resident of U.S.</td>
</tr>
<tr>
<td>M.C.A.</td>
<td>Military Commission Act of 2009</td>
</tr>
<tr>
<td>MCDO</td>
<td>Military Commissions Defense Office (replaced OCDC)</td>
</tr>
<tr>
<td>M.C.M.</td>
<td>Manual for Courts-Martial</td>
</tr>
<tr>
<td>M.C.</td>
<td>Manual for Military Commissions</td>
</tr>
<tr>
<td>MCA 2006</td>
<td>Military Commission Act of 2006</td>
</tr>
<tr>
<td>MCA 2009</td>
<td>Military Commission act of 2009</td>
</tr>
<tr>
<td>MCRE</td>
<td>Military Commissions Rules of Evidence</td>
</tr>
<tr>
<td>MCTJ</td>
<td>Rules Military Commissions Trial Judiciary Rules of Court</td>
</tr>
<tr>
<td>MOC</td>
<td>Media Operations Center</td>
</tr>
<tr>
<td>MS</td>
<td>Mitigation Specialist</td>
</tr>
<tr>
<td>MWD</td>
<td>Military Working Dogs</td>
</tr>
<tr>
<td>NCIS</td>
<td>Naval Criminal Investigative Service</td>
</tr>
<tr>
<td>NCO</td>
<td>Non-Commissioned Officer</td>
</tr>
<tr>
<td>NDA</td>
<td>Nondisclosure Agreement</td>
</tr>
<tr>
<td>NEX</td>
<td>Naval Exchange</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
</tr>
<tr>
<td>NIPRNet</td>
<td>Non-classified Internet Protocol (IP) Router Network</td>
</tr>
<tr>
<td>NMR</td>
<td>News Media Representatives</td>
</tr>
<tr>
<td>NSA</td>
<td>National Security Agency</td>
</tr>
<tr>
<td>NSC</td>
<td>National Security Council</td>
</tr>
<tr>
<td>OCA</td>
<td>Original Classification Authority</td>
</tr>
<tr>
<td>OCDC</td>
<td>Office of the Chief Defense Counsel of the Military Commissions (obsolete)</td>
</tr>
<tr>
<td>OCP</td>
<td>Office of the Chief Prosecutor of the Military Commissions</td>
</tr>
<tr>
<td>OGC</td>
<td>Office of General Counsel (of DoD)</td>
</tr>
<tr>
<td>OLC</td>
<td>Office of Legal Counsel (of the Department of Justice)</td>
</tr>
<tr>
<td>OASD (PA)</td>
<td>Office of the Assistant Secretary of Defense for Public Affairs.</td>
</tr>
<tr>
<td>OMC</td>
<td>Office of Military Commissions</td>
</tr>
<tr>
<td>OMCCCA</td>
<td>Office of the Convening Authority</td>
</tr>
<tr>
<td>OMCD</td>
<td>Office of Military Commissions Defense</td>
</tr>
<tr>
<td>OMCP</td>
<td>Office of Military Commissions Prosecution</td>
</tr>
<tr>
<td>OSS</td>
<td>Office of Special Security</td>
</tr>
<tr>
<td>PAO</td>
<td>Public Affairs Officer</td>
</tr>
<tr>
<td>POW</td>
<td>prisoner of War</td>
</tr>
<tr>
<td>PRB</td>
<td>Period Review Board</td>
</tr>
<tr>
<td>PSR</td>
<td></td>
</tr>
<tr>
<td>R.M.C.</td>
<td>Rules for Military Commissions</td>
</tr>
<tr>
<td>RDI</td>
<td>Rendition, Detention, and Interrogation CIA Program</td>
</tr>
<tr>
<td>RTMC</td>
<td>Regulations for Trial by Military Commissions (2011 Edition)</td>
</tr>
<tr>
<td>SCIF</td>
<td>Sensitive Compartmented Information Facility</td>
</tr>
<tr>
<td>SJA</td>
<td>Staff Judge Advocate</td>
</tr>
<tr>
<td>SMO</td>
<td>Senior Medical Officer</td>
</tr>
<tr>
<td>SPSRNet</td>
<td>Secret Internet Protocol Router Network</td>
</tr>
<tr>
<td>S/J/SCI</td>
<td>Top Secret / Sensitive Compartmented Information.</td>
</tr>
<tr>
<td>SJA</td>
<td>Staff Judge Advocate</td>
</tr>
<tr>
<td>SCt</td>
<td>United States Supreme Court</td>
</tr>
<tr>
<td>SOP</td>
<td>Standing Operating Procedure</td>
</tr>
<tr>
<td>SOUTHCOM</td>
<td>Southern Command</td>
</tr>
<tr>
<td>TS</td>
<td>Top Secret</td>
</tr>
<tr>
<td>UCMJ</td>
<td>Uniform Code of Military Justice</td>
</tr>
<tr>
<td>US or USA</td>
<td>United States of America</td>
</tr>
<tr>
<td>USCA</td>
<td>United States Court of Appeals</td>
</tr>
</tbody>
</table>
V. What is the Right to a Fair Trial?

Society has a compelling interest in investigating alleged illegal behavior, prosecuting those suspected of engaging in that behavior, and conducting criminal trials to determine whether the alleged perpetrators are guilty of that behavior. International law and domestic law demand that this process be conducted in a transparent, unbiased, non-discriminatory, just and equitable manner—that the process be fair.

International and U.S. domestic law require not only that the entire criminal justice system be fair, but also that each component of the criminal justice system be fair. Accordingly, criminal trials, as a component of the criminal justice system, must be fair. [Enhancement of rights in death penalty cases?]

A. “Rights” v. “Interests”

The concept of a “fair trial” may on its face seem to some to be amorphous. But, precise and definable international and domestic law rules exist that comprehensively provide internationally accepted guidelines for fair criminal trials. Typically, one thinks of criminal defendants as the primary stakeholders who have the right to a fair trial. And indeed, many international and domestic law instruments speak very directly to defendants’ rights, for example, the right to be tried by an independent tribunal, the right to counsel, the right to remain silent, and the right to be free from arbitrary deprivation of liberty, among many other rights. But, the prosecution, as a party to all criminal proceedings, also have very clear rights to a fair trial. Indeed, the prosecution and defense both have the right to equality of arms, which as applied means that the prosecution and defense must be allotted an equal opportunity to prepare their arguments, and have equal access to the courts and all other resources needed for their case.

Criminal trials have stakeholders other than the prosecution and the defense. It has been debated whether these other stakeholders have the “right to a fair trial”, whether they have other “rights” aside from the “right to a fair trial”, or whether they have no “rights”, and if they have no “rights” whether they have “interests” or some other stake. The Guantanamo Bay Fair Trial Manual recognizes this debate, and addresses it as the Manual uses “rights” and “interests” language in identifying, interpreting, or applying existing international and domestic law in the context of stakes of the identified stakeholders. For example, the press has clear rights related to the Guantanamo Bay Military Commissions, such as the right to access to the proceedings to facilitate disseminating information about the proceedings, and consumers of news have a corollary right to receive information from the press about Guantanamo proceedings. The Guantanamo Bay Fair Trial Manual discusses rights and interests of a wide range of stakeholders in the Guantanamo Bay, Cuba Military Commissions, and seeks to point to relevant, binding sources of international and domestic law that governs these stakeholders rights and interests.

B. Briefing on this chapter of the Guantanamo Bay Fair Trial Manual

The following paragraphs of this chapter of the Guantanamo Bay Fair Trial Manual identify the range of stakeholders in the criminal trial process and outlines international and domestic law sources of rights possessed by these stakeholder (Section c). This is followed by a discussion of international law

---

13 Research is being conducted on a distinct category of rights of defendants who are facing the death penalty.

14 See infra, pages abc – xyz (Section on Equality of Arms)

15

16 See section I(c) for a more comprehensive list of stakeholders.

17 See infra, pages abc – xyz (Section on Rights of the Press; Section on Right of the U.S. public). Free expression rights have many domestic U.S. law and international law sources, including the U.S. Constitution (the First Amendment), the ICCPR, and under customary international law as incorporated into the UDHR.
that binds the US and binds the Military Commission (Section d), including an introduction of treaties and customary international as general sources. Next is an introduction of specific bodies of international law that bind the U.S.— international humanitarian law and international human rights law (section e). Then fair trial rights arising under treaties and customary international law in the area of international humanitarian law are discussed (section f) followed by fair trial rights arising under treaties and customary international law in the area of international human rights law (section g). This chapter concludes with a discussion of domestic law that governs the Military Commissions (section h) and a brief mention of some fair trial rights that are not covered in the Guantanamo Bay Fair Trial Manual (section h).

C. Who are the Military Commission stakeholders? Who is entitled to a fair trial?

Stakeholders in the U.S. Military Commissions at Guantanamo Bay include a range of individuals and groups. These stakeholders include (a) the prosecution; (b) the defendant and defense counsel; (c) judges and judicial staff; (d) victims; (e) victims’ families; (f) witnesses; (g) the press; (h) NGO Observers; (i) the court itself; (j) JTF-GTMO personnel; (k) the U.S. public”; (l) the international community (including government treaty partners, governments bound by customary international law that also binds the U.S., governments of detained citizens, and governments whose citizens are victims); and (m) other entities and individuals, including GTMO detainees who are not and who may not be charged but are subject to Periodic Review Boards (PRBs) to ascertain whether their continued detention is “necessary to protect against a continuing significant threat to the security of the United States;.

Pursuant to international law and domestic U.S. law, all of these stakeholders have rights to and interests in a fair trial. For a fair trial to be had, the rights and interests of all stakeholders must be respected in full.

D. International law as binding source in US Courts (including the Military Commissions)

The U.S. Constitution confirms the role of the Constitution itself and of the role of international law as being “the supreme law of the land”. The Executive Branch of the U.S., Congress, and the U.S. Supreme Court have all acknowledged that the U.S. is bound to follow its international law obligations that arise by treaty law and by customary international law. International law binds the U.S. and should be consulted and followed when determining the scope of the right to a fair trial to be afforded to Military Commission stakeholders.

i. The Executive Branch of the U.S. recognizes that international law is the law of the land and must be followed by the U.S. government. For example, President Obama has stated that not only does the U.S. recognize treaties and customary international law as binding on the U.S., but also the U.S. complies with its treaty and customary international law obligations. Former U.S. Presidents have also recognized the U.S. recognition of and compliance with international law.

ii. Congress, in promulgating the U.S. Manual for Courts-Martial, recognized the binding nature of international law vis-à-vis U.S. domestic law, specifically as regards the law of war (international humanitarian law). The U.S. Manual for Courts-Martial, which directs U.S. military tribunals to look to the U.S. Constitution as well as to international law as sources of law to consider when deciding Courts-Martial, provides that “The sources of military jurisdiction include the Constitution and international law. International law includes the law of war.”

iii. The U.S. Supreme Court has also reaffirmed that international law is the law of the land in

---

18 U.S. Constitution, article VI, cl. 2. provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

19

20
the U.S. and should be followed by the U.S. government.\(^{21}\)

In particular, the U.S. Supreme Court has ruled that if the U.S. conducts Military Commissions, such as the Military Commissions at Guantanamo Bay, then the U.S. is obligated to ensure that those Military Commissions are created and operated in compliance with the international law, such as Common Article 3 of the Geneva Conventions, that governs the right to a fair trial.\(^{22}\)

For purposes of U.S. Military Commissions, the primary applicable and binding sources of international law are:

- **Treaties** that bind the U.S. when the U.S. ratifies or accedes to the treaties\(^{23}\) (in the areas of international humanitarian law and international human rights law treaties);\(^{24}\) and

- **Customary international law** that binds the U.S. upon creation by operation of state practice and opinion juris\(^{25}\) (in the areas of international humanitarian law and international human rights law)

### E. Substantive areas of law binding on the U.S.

The two principal substantive international law areas that bind the U.S. and that are relevant to the Guantanamo Bay Military Commissions are: (a) international humanitarian law (IHL); and (b) international human rights law (IHRL). This was made clear in the U.S. Supreme Court opinion in *Hamdan v. Rumsfeld*,\(^{26}\) a landmark case that affirmed that these bodies of law, and rights provided for in these bodies of law, apply in the context of U.S. Military Commissions. Thus, it is necessary: to explore the treaty and customary international law sources for rights in IHL and IHRL; to explore when either IHL or IHRL is applicable; and to explore whether the rights afforded under IHL are identical to or different from those afforded under IHRL, whether IHL and IHRL rights are to be fully afforded to all Military Commission stakeholders, or whether only a subset of all stakeholders are to be afforded those rights.\(^{27}\)

IHL, which is also known as the “Law of War” or the “Law of Armed Conflict”, for purposes of the Military Commissions applies only once an armed conflict exists, and provides, *inter alia*, rules for protecting certain individuals and property affected by the conflict.\(^{28}\) IHRL is a system of laws, policies and practices in place that protect human dignity and other indicia of humanity irrespective of the persons involved, and whether or not an armed conflict exists. Some argue that during armed conflicts, IHL trumps IHRL because IHL is “lex specialis”, or is a subset of international law tailored to the specific set of circumstances surrounding an armed conflict. However, there is no convincing argument that IHRL should be fully suspended during times of armed conflict, and indeed, the greater weight of global authority is that IHRL operates contemporaneously with IHL during armed conflicts, and that states are not permitted to avoid IHRL rules simply because an armed conflicts exists and IHL applies. Both IHL and IHRL can operate at the same time.

The U.S. Supreme Court has concluded that an armed conflict exists at least as between the U.S. and

\(^{21}\) *Paqueta Habana*, US (1901); see also …….

\(^{22}\) *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), rev’g 415 F.3rd 33 (D.C. Cir. 2005); see also


\(^{24}\) See infra, note xyz.

\(^{25}\) Restatement (Third) on the Foreign Relations Law of the United States. *See The Paqueta Habana, 175 U.S. 677, 700 (1900)* (find that “international law is part of our law.”)

\(^{26}\) 548 U.S. 557 (2006), rev’g 415 F.3rd 33 (D.C. Cir. 2005)

\(^{27}\) For general discussions about prisoner rights at Guantanamo Bay, *see* Garcia, John Michael, Elsea, Jennifer K., Mason, R. Chuck, Liu, Edward C., *Closing the Guantanamo Detention Center: Legal Issues* (Congressional Research Service Report, 28 March 2011), pp. 23 - 54 (discussing “Detainees’ Rights in a Criminal Prosecution”, including right to assistance of counsel, right against use of coerced confessions, right against prosecution under *ex post facto* laws, rules against hearsay evidence, right to a speedy trial, and right to confront secret evidence)

\(^{28}\) For example, IHL protects civilians, combatants who have set aside their arms, medics, and others not participating in hostilities.
al Qaeda, which triggers the applicability of IHL, and the Executive Branch has also recognized this.\(^{29}\) IHRL are closely related to each other, in that they both call for the protection of a wide range rights of a range of stakeholders in criminal proceedings such as those in the U.S. Military Commissions, with these rights including many of the stakeholder rights discussed in this *Guantanamo Bay Fair Trial Manual*. The treaties and customary international law sources that provide for IHL and IHRL rights overlap substantively, though.

**F. International Humanitarian Law as a source of law for fair trials**

The U.S. Military Commissions are obligated to comply with international humanitarian law (which is also commonly referred to as the “law of armed conflict” or LOAC). Sources of international humanitarian law include binding treaties and binding customary international law norms. This section of the *Guantanamo Bay Fair Trial Manual* discusses treaty provisions and customary international law norms that bind the U.S. as it conducts Guantanamo Bay proceedings under the Military Commissions Act of 2009.

The U.S. view on the definition of “international humanitarian law” or the “law of armed conflict” is in accord with a universally recognized definition. The U.S. has stated:

3. Definitions

3.1. Law of War. That part of international law that regulates the conduct of armed hostilities. It is often called the “law of armed conflict.” The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

**What law governs the Guantanamo Bay, Cuba U.S. Military Commissions?**

1. **International Law**
   a) **International Humanitarian Law** — a/k/a “Law of War” or “Law of Armed Conflict”
   1. Geneva Conventions of 1949 (including Common Article 3)
   2. Rules contained in Article 75 of Protocol I of the Geneva Conventions of 1949 (as Customary International Law)
   4. United Nations Charter

   b) **International Human Rights Law**
   5. U.N. International Covenant on Civil and Political Rights
   6. U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
   7. Norms contained in the Universal Declaration of Human Rights (as Customary International Law)
   8. United Nations Charter


   9. U.S. Constitution (including Amendments
   12. Military Commission Rules of Evidence (MCRE)
   15. Uniform Code of Military Justice (UCMJ)
   16. Other Federal Statutes
   17. Executive Orders of the U.S. President E.g., The Presidential Military Order of 13 November 2014 issued by George W. Bush that called for creation of the first post-9-11 Guantanamo Bay Military Commissions that the Supreme Court ultimately ruled violated the law.
   18. U.S. Supreme Court & other U.S. Federal Court Decisions (that interpret & apply international law & U.S. domestic law)

---

\(^{29}\) Department of Defense Directive 2311.01E (9 May 2006) (certified as current as of 22 February 2011). Further, this DoD Directive identifies the policy of the U.S. in complying with international humanitarian law:

4. POLICY It is DoD policy that:

   4.1. Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.
   4.2. The law of war obligations of the United States are observed and enforced by the DoD Components and DoD contractors assigned to or accompanying deployed Armed Forces.
3.2. Reportable Incident. A possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.


Under international and domestic U.S. law, all U.S. Military Commissions statutory rules (substantive and procedural), proceedings (pre-trial, trial, and post-trial) must be consistent with and comply with Common Article 3 of the Geneva Conventions,32 which provides for fair trial standards during non-international armed conflicts.33 The text of Common Article 3 follows:

In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions [prohibiting]: . . . (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.34

The U.S. Executive Branch, per President Obama, has recognized the binding nature of Common Article 3,35 and this position is thus followed by the U.S. Military Commission Chief Prosecutor, Brigadier General Mark Martins, who acknowledges the applicability to the Military Commissions of Common Article 3.36

The U.S. Supreme Court in Hamdan v. Rumsfeld ruled that Common Article 3 applies to the Military

---

4.3. An effective program to prevent violations of the law of war is implemented by the DoD Components.
4.4. All reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.
4.5. All reportable incidents are reported through command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities. Once it has been determined that U.S. persons are not involved in a reportable incident, an additional U.S. investigation shall be continued only at the direction of the appropriate Combatant Commander. The on-scene commanders shall ensure that measures are taken to preserve evidence of reportable incidents pending transfer to U.S., allied, or other appropriate authorities.

32 The U.S. Court of Military Commission Review (CMCR) has noted that “[t]he United States is a signatory nation to all four Geneva Conventions. The Geneva Conventions are generally viewed as self-executing treaties (i.e., ones which become effective without the necessity of implementing congressional action), form a part of American law, and are binding in federal courts under the Supremacy Clause.” United States v. Khadr, CMCR 07-001, n.4 (U.S.C.M.C.R. Sep. 24, 2007) (citations omitted)).

33 Many of the rights provided for in Common Article 3 are also provided for under international human rights law treaties that bind the U.S. See infra notes xyz & text accompanying notes (e.g., the ICCPR).

34 The drafters of the Geneva Conventions noted that Common Article 3 was “the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built.” Int’l Comm. of the Red Cross, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 14 (Jean S. Pictet, ed., 1958).

35 General Martins stated:

[A]ll three branches of government in the United States now regard military commissions as being bound to comply with the requirement of Common Article 3 of the Geneva Conventions of 1949. The pertinent provision requires that an accused detainee be tried by a “regularly constituted court affording all of the judicial guarantees . . . recognized as indispensable by civilized peoples.” The protections incorporated into the Military Commissions Act of 2009 clearly far exceed this international standard . . . .

Commissions, and Congress has also recognized this. Thus, pursuant to Common Article 3, the Military Commissions must provide judicial guarantees that are “recognized as indispensable by civilized peoples.” The Military Commissions must afford all stakeholders at least the rights provided for under Common Article 3.


In addition to being bound by international humanitarian law treaty provisions, such as Common Article 3 of the Geneva Conventions, the U.S. is also bound by customary international law norms in the international humanitarian law area. Among the customary international law norms that bind the U.S. is that the U.S. Military Commissions, like any other criminal trial systems, must provide for the right to a “fair trial affording all essential judicial guarantees.”

Customary international law norms are formed when sufficient state practice and opinio juris exist, giving rise to norms that bind all states, irrespective of whether those states have ratified or otherwise become bound by any treaty. Numerous fair trial rights that have risen to the level of customary international law require the U.S. to implement those rights in the Military Commissions, again, without regard to the existence of any treaty obligations. Many of these customary international law fair trial norms are also incorporated into various international instruments, and those incorporated customary international law norms bind irrespective of whether the U.S. is bound by the instrument itself. For example, the U.S. is bound by customary international law norms incorporated into Additional Protocol I and Additional Protocol II of the Geneva Conventions of 1949, even though the U.S. has not ratified these two Protocols.

As stated, the fair trial rules incorporated into Article 75 of Protocol Additional I have risen to the level of customary international law, and thus bind the U.S. Article 75 of Additional Protocol I provides in part that:

---

**References:**

37 Per the U.S., article 75 of Additional Protocol I to Geneva Conventions has risen to the status of customary international law, and the norms contained in article 75 thus bind the U.S. A 1986 Pentagon memorandum reflects that several high-ranking military officers concluded that “[w]e view the following provisions as already part of customary international law”, and then listed numerous Protocol I provisions, including “Fundamental guarantees: Article 75”. Military officials who signed the memorandum are (i) W. Hays Parks, Chief, International Law Branch, DAJA-IA; (ii) LCDR Michael F. Lohr, JAGC, USN; NJAG, Code 10; (iii) Dennis Yoder, Lt. Colonel, USAF, AF/JACI; and (iv) William Anderson, HQ, USMA/JAR. Others who participated in the preparation of the memo included (i) Lt. Col. Burrus M. Carnahan, USAF; and (ii) CDR John C. W. Bennet, JAGC, USN. (Memorandum to Mr. John H. McNeill, Assistant General Counsel (International), OSD, responding to 26 March 1986 memorandum from Mr. McNeill asking “our views on which articles of the Protocol are currently recognized as customary international law”).

38 Though Common Article 3 does not define “recognized as indispensable by civilized peoples”, the Military Commissions, in seeking to ascertain the scope of these judicial guarantees, may look to Hamdan, which in turn looked to Article 75 of Additional Protocol I to the Geneva Conventions, the ICCPR, and customary international law. (See Hamdan, 548 U.S. 557, xyz at n. 66 (2006), rev’g 415 F.3d 33 (D.C. Cir. 2005) (Stevens, J., concurring) (discussing appropriateness of considering ICCPR rights.))


41 © 2017 The Gitmo Observer (Indiana U McKinney School of Law)
“[n]o sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.”

Article 75 of Additional Protocol I then lists fair trial rights that must be afforded to defendants, including many of the rights discussed in this Guantanamo Bay Fair Trial Manual.43

The fair trial provisions incorporated in Article 6 of Protocol Additional II of the Geneva Conventions have also risen to the level of customary international law, and thus bind the U.S.44

Regarding Additional Protocol II, a 2011 White House Fact Sheet stated:

Additional Protocol II, which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts, was originally submitted to the Senate for approval by President Reagan in 1987. The Administration urges the Senate to act as soon as practicable on this Protocol, to which 165 States are a party. An extensive interagency review concluded that United States military practice is already consistent with the Protocol’s provisions. Joining the treaty would not only assist us in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also allow us to reaffirm our commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.

President Barack Obama stated that Additional Protocol I and Additional Protocol II are “two important components of the international legal framework that covers armed conflicts” and further, that the U.S. recognizes its customary international law obligation to follow these two Protocols “out of a sense of legal obligation”.45

Chief Prosecutor Martins follows the lead of President Obama in recognizing that the U.S. is bound to follow the customary international law fair trial rules incorporated into Article 75 of Additional Protocol I and Article 6 of Additional Protocol II.46

Other international instruments that incorporate the customary international law norms on the right

---


43 The Article 75 list of fair trial rights for defendants includes: the right to be informed without delay of the particulars of the offence alleged against the defendant; the right before and during trial to all necessary rights and means of defence; the right to be free from ex post facto crimes (ne bis in idem) or punishments; the right to be presumed innocent until proved guilty according to law; the right to trial in his presence; the right to be free from being compelled to testify against himself or to confess guilt; the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; the right to be free from double jeopardy; the right to a publicly pronounced judgment. Furthermore, it provides for the right of a detained person to be informed promptly in a language he understands why he was detained. Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.


46 General Martins stated:

While not party to the Additional Protocols to the Geneva Conventions, the United States now observes the requirements of Article 75 of Additional Protocol I and all of Additional Protocol II out of a sense of legal obligation. Article 75 of Additional Protocol I sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict. Additional Protocol II contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts. An extensive interagency review has concluded that United States practice is consistent with these provisions . . .


---
to a fair trial include the Nuremberg Principles of 1950.\textsuperscript{47}

G. International Human Rights Law as a source of law for fair trials


- The International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{48} is the principal international human rights law treaty ratified by and binding upon the U.S. that provides for the right to a fair trial treaty.\textsuperscript{49} The ICCPR, like other treaties that bind the U.S.,\textsuperscript{50} enumerates a large number of rights to be afforded to criminal trial stakeholders, and that are to be afforded to stakeholders in any criminal proceedings in the U.S. or run by the U.S. anywhere,\textsuperscript{51} and to be afforded to stakeholders in the Guantanamo Bay Military Commission setting.\textsuperscript{52} Many of these ICCPR rights are discussed in this Guantanamo Bay Fair Trial Manual.\textsuperscript{53}

The ICCPR provides that all States Parties to the ICCPR (including the U.S.) are obligated to afford every person suspected of or accused of a crime, in proceedings in that State’s territory or under the jurisdictional control of that State, fundamental, basic human rights, some of which rights are known in every person.

The ICCPR extensively details the what constitutes the right to a fair trial, covering protections from the pre-arrest stage, to arrest and detention pre-trial, to trial, to conviction or acquittal, to sentencing if there is a conviction, then on to appeal and beyond. Though many ICCPR fair trial rights are found in article 14, other ICCPR articles provide for rights that are also relevant to a fair trial. Among these other articles are article 9 (rights related to arrest, detention, and liberty and security of the person in general), article 10 (treating detained persons with humanity and with respect for the inherent dignity of the human person), article 15 (prohibiting, inter alia, ex post facto criminal laws).\textsuperscript{54} The ICCPR provides for the

\textsuperscript{47} Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal http://www.un.org/law/ilc/texts/nurnberg.htm (last visited 10 November 2005). The text of this international instrument was adopted by the Commission at its second session, in 1950, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The Nuremberg Principles provides that “any person charged with a crime under international law has the right to a fair trial on the facts and law”. (adopted by the International Law Commission in 1950) (Article V).

\textsuperscript{48} 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967)


The U.S. ratified the ICCPR in 1992, and re-affirmed its commitment to its ICCPR obligations in Executive Order No xyz of 1998 that provided “[i]t shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR”. The Executive Order continues: “[a]ll executive departments and agencies [including military commissions] shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully”.

\textsuperscript{50} Other treaties that the U.S. has become bound to have obligated the U.S. to honor the right to a fair trial include the Nuremberg Charter (Charter of the International Military Tribunal [http://avalon.law.yale.edu/imt/imtconst.asp] and the Tokyo Charter (Charter of the International Military Tribunal for the Far East, <http://www.yale.edu/lawweb/avalon/imttech.htm> (last visited 10 September 2014) The IMT Tokyo Charter provides for fair trial rights for the accused and lists procedures to be followed “in order to insure a fair trial for the accused”. (article 9))

\textsuperscript{51} States that are party to the ICCPR agree to protect ICCPR rights in the state’s territory and to other places where the state may exercise control. ICCPR Article 2(1) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.

\textsuperscript{52} See 548 U.S. 557 (2006), rev’g 415 F.3d 33 (D.C. Cir. 2005), supra note xyz. (is this ICCPR reference in the concurrence?)

\textsuperscript{53} The ICCPR list of fair trial rights includes:

\textsuperscript{54} Guantanamo Bay Military Commission stakeholders have other trial-related rights that may not generally be considered to be “fair trial rights”. For example, stakeholders have the ICCPR Article 19 right to freedom of expression, which includes right to impart and receive communications. If a defendant is stifled from speaking during proceedings or is prohibited from communicating with the outside world, article 19 rights may be implicated since the defendant’s right to express himself may be curtailed. If a defendant’s
rights of the accused at all stages of proceedings against him.

ICCPR rights are minimum guarantees to be afforded to all persons. The right to a fair trial is a substantive right that requires more than lip service. It requires that the government take positive action to ensure that each accused is accorded a fair trial.

The obligations under the ICCPR are “obligations of result”, meaning that the U.S. only fulfills its obligations when the right to a fair trial is fully realized by all stakeholders. ICCPR obligations are not “obligations of conduct”, which, for example, would obligate the U.S. only “to take steps” to comply with the treaty, rather than be obligated “to ensure” that ICCPR rights are fully realized.

Pursuant to the ICCPR, the U.S. is not permitted to derogate from its obligation to provide all detainees with a fair trial.55 Furthermore, the right to a fair trial is not only a customary international law norm, but also it is a jus cogens norm, meaning that states are not permitted to derogate from it under any circumstances.56

- The UN Convention Against Torture (CAT)

Another treaty that binds the U.S. (by signature and ratification) is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”), which the U.S. has signed and ratified, and is thus bound to comply with terms of that treaty. The U.S. is obligated to comply with the Torture Convention generally, and specifically as it relates to the right to a fair trial in the U.S. Military Commission context, and this obligation to comply applies wherever the U.S. exercises jurisdiction, including at Guantanamo Bay, whether or not Guantanamo Bay is considered to be “territory” of the U.S.

- The UN Convention on the Elimination of Race Discrimination (CERD)


  The principal customary international human rights law norms related to the right to a fair trial are incorporated into many international human rights law instruments. Those these instruments are not themselves binding, the customary international law principles incorporated into the instruments do bind the U.S.

  These instruments that have incorporated into them binding customary international law norms that call for a fair trial include: the Universal Declaration of Human Rights,57 the American Declaration on the Rights and Duties of Man,58 the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 59 The Principles and Guidelines on the Right to a Fair Trial and Legal

---

55 The Human Rights Committee, the expert body set up by the ICCPR to monitor that treaty’s implementation, notes that the right to a fair trial is non-derogable, even during states of emergency. The Human Rights Committee stated “the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.” (Human Rights Committee General Comment No. 29: “States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance . . . through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.”). (date of General Comment No. 29)

56 See Human Rights Committee General Comment no 29, para xyz.

57 ABC <http://www.unhchr.ch/udhr/lang/eng.htm> (last visited 10 September 2014) The Universal Declaration of Human Rights provides that “everyone is entitled in full equality to a fair and public hearing”. (article 10) Additional customary international law fair trial rights contained in the UDHR are identified in the rights charts of Appendix ABC.

58 < http://www.cidh.org/Basicos/basic2.htm> (last visited 10 September 2014) The American Declaration on the Rights and Duties of Man, in a section entitled “right to a fair trial”, provides that “every person may resort to the courts to ensure respect for his legal rights”. (Article 18))

59 This document is reproduced in Appendix ABC.
Assistance in Africa (2003), the United Nations Basic Principles on the Independence of the Judiciary, the United Nations Guidelines on the Role of Prosecutors, and the United Nations Basic Principles on the Role of Lawyers, and the Standard Minimum Rules for the Treatment of Prisoners. Additional non-binding international instruments that incorporate binding customary international law norms related to the right to a fair trial can be found in Appendix XYZ.

H. Domestic U.S. law & the right to a fair trial.

The multiple U.S. Constitution and other domestic U.S. sources that provide for the right to a fair trial, consistent and parallel to and in accordance with international law include the U.S. Constitution, the Military Commission Act of 2009 and accompanying Military Commission documents, and the Uniform Code of Military Justice.

a. U.S. Constitution. The 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution provide for fair trial rights, as do other portions of the U.S. Constitution, such as Article 1, § 9, clause 3 (prohibiting ex post facto laws). These U.S. Constitution fair trial rights must be afforded to all stakeholders in the Military Commission.

b. Military Commission Act of 2009. The Military Commission Act of 2009, which is the principal domestic U.S. instrument under which the U.S. Military Commissions at Guantanamo Bay were created and currently operate, contains provisions to protect fair trial rights. Other Military Commission Contains documents that contain fair trial provisions include the Manual for Military Commissions (United States) (14 August 1012), the Military Commissions Trial Judiciary Rules of Court (24 April 2012, as amended 4 June 2014); and the Regulations for Trial by Military Commissions (2011 Edition). The Court of Military Commissions Review also is relevant.

c. Uniform Code of Military Justice. The Uniform Code of Military Justice (UCMJ) contains fair trial provision to be provided in U.S. courts martial. Though the Military Commissions follow rules of the Military Commission Act of 2009 and other Military Commission instruments, the UCMJ is looked to for guidance.

d. U.S. Federal Case Law (U.S. Supreme Court; U.S. Courts of Appeal; U.S. Federal District Courts). Landmark U.S. Supreme Court cases applicable to rights of Guantanamo Bay stakeholders include Miranda v. Arizona, 384 U.S. 436 (1966) (freedom from self-incrimination; right to remain silent) and Gideon v. Wainwright 372 U.S. 335 (1963) (right to counsel). A series of U.S. Supreme Court cases expressly address Guantanamo Bay proceedings, and rights to be afforded to detainees. See, e.g., Hamdan Rasul, Hamdi,

60 Some of the customary international law fair trial rights contained in this instrument are identified in the rights charts of Appendix ABC.

61 Some of the customary international law fair trial rights contained in this instrument are identified in the rights charts of Appendix ABC.

62 Some of the customary international law fair trial rights contained in this instrument are identified in the rights charts of Appendix ABC.

63 Some of the customary international law fair trial rights contained in this instrument are identified in the rights charts of Appendix ABC.

64 See infra, pp xx – yy; see also (cite U.S. Supreme Court cases). Though the 14th Amendment applies to these rights as related to U.S. states, the jurisprudence of the 14th Amendment is instructive.

65

66 Other Military Commission operative documents also contain fair trial provisions, including:

67 See, e.g.,
Boumediene. U.S. federal courts in Washington, DC have also addressed Guantanamo Bay U.S. Military Commission issues, as have other federal courts.

e. **Presidential Executive Orders.** These would include, for example, the Presidential Military Order of November 2001 that called for the creation of the first U.S. Military Commission at Guantanamo Bay, Cuba. A draft Executive Order circulated in January / February 2017 that addressed issues related to Guantanamo Bay, including, for example, the U.S. Military Commissions. If an official Executive Order is issued on this topic, it will be incorporated into the Appendix to the *Guantanamo Bay Fair Trial Manual*.

I. **Rights not covered in this Guantanamo Bay Fair Trial Manual**

This *Guantanamo Bay Fair Trial Manual* does not cover a range of rights associated with criminal trials, including right to compensation due to miscarriage of justice for those detainees held for many years then released without charges, or for detainees tried and acquitted. These rights are beyond the scope of this publication.68

---

VI. Roles & Responsibilities of NGO Observers of U.S. Military Commissions at Guantanamo Bay, Cuba.

a. The Why and How of NGO Observers

The U.S. government invites non-governmental organizations to nominate representatives to observe (NGO Observers) to monitor U.S. Military Commission hearings presumably to demonstrate to the U.S. and international community that the rules under which the Commissions operate are legal under U.S. law and international law, and that these rules are being applied in compliance with U.S. and international law. The Pentagon seeks to have NGOs travel on site presumably to examine whether the rights of all Military Commission stakeholders are being fully afforded to them, under U.S. and international law, and to confirm that these rights are being so fully afforded. The Pentagon has a process in place to select NGO Observers that they presumably believe will be able to monitor the hearings, analyze and critique the hearings and the process, and report their findings.

The Pentagon has indicated a desire for the Military Commissions to be transparent. A goal is that any Guantanamo Bay justice the U.S. seeks to mete out or actually does mete out is seen as being fair and pursuant to the rule of law. This is consistent with the military commission statutory requirement that “military commissions shall be publicly held”.

The Pentagon thus granted a number of non-governmental organizations (NGOs) a status that permits those NGOs to nominate individuals to be “NGO Observers” to monitor U.S. Military Commissions held at Guantanamo Bay, Cuba. For each round of Military Commission hearings, NGOs are permitted to nominate NGO Observers to travel to Guantanamo Bay, Cuba for the hearings. NGO Observers may also be nominated

---

69 Pentagon / Department of Defense / Office of Military Commissions
70 E.g., in compliance with the U.S. Constitution and federal statutes.
71 The Pentagon argues that the Military Commissions operate wholly in compliance with treaties and customary international law in the areas of international human rights law, international humanitarian law, and international criminal law.
72 The Pentagon’s stated criteria in selecting NGO Observers include:

(a) the reach of the applicant (e.g., audience size, readership, subscriptions, circulation, viewers, listeners, website hits, writings, broadcasts, professional standing, diversity of audiences, etc.);

(b) the nexus of the applicant’s organizational mission to military commissions, wartime detention or prosecution, international law, and/or human rights; and

(c) the extent to which applicant has provided longstanding and frequent coverage of issues relating to military commissions, wartime detention or prosecution, international law, and/or human rights.

73
74 Rule 806 provides:

(a) In general. Except as otherwise provided in chapter 47A of title 10, United States Code, and this Manual, military commissions shall be publicly held. For purposes of this rule, “public” includes representatives of the press, representatives of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities. Access to military commissions may be constrained by location, the size of the facility, physical security requirements, and national security concerns.
NGOs may have varied reasons for seeking to send NGO Observers to Guantanamo Bay. But, thus far, I (or “we” at The Gitmo Observer) have encountered no NGO that has expressed a motive other than to seek to ascertain whether U.S. and/or international law are being complied with. Some NGOs may have substantive, ideological, functional or other differences that give rise to different perspectives, but no NGO has expressed a desire other than seeking to ascertain for themselves -- based on their own and their representatives’ understanding of the law and their witnessing of facts on the ground – whether the rules governing the Military Commission proceedings are fair or whether the rules are carried out fairly—or, that is, whether the rules are geared towards a fair trial and whether a fair trial is currently being had, has been had, or can be had.

### b. Responsibilities of an NGO Observer

When an NGO nominates a person to be an NGO Observer, and certainly when or after the Pentagon clears the NGO Observer for travel to Ft. Meade or to Guantanamo Bay, the NGO may provide the selected NGO Observer with a set of objectives – a Terms of Reference – to inform the NGO Observer of what they are expected to do or accomplish with their mission to Guantanamo Bay (or Ft. Meade or other viewing site). If the NGO does not inform the Observer what is expected of the Observer, how will the Observer know what to do before, during and after their mission? How will the Observer know what is expected of them? Standard Terms of Reference for Guantanamo Bay missions might include a requirement that the NGO Observer: (1) Attend; (2) Observe; (3) Analyze; (4) Critique; and (5) Report on the proceedings, as follows:

#### 1. Attend Hearings and Trials

NGO Observers must organize logistics of their travel to viewing site, which involves, inter alia, filling out multiple forms and submitting them to the Office of Military Commissions, and making multiple photo copies of documents NGO Observers are

---

75 In September 2014 at pre-trial hearings in the case of Hadi al Iraqi, the judge, at the request of the prosecution, ordered that a new remote viewing site be created at Bulkeley, which is physically located at Guantanamo Bay, a distance away from the Expeditionary Legal Complex which is where the primary Guantanamo Bay Courtroom is located. (Transcript Cite – Hadi al Iraqi hearings) Though NGO Observers are permitted to view proceedings at Ft. Meade, which is also a “public viewing site”, it is unclear whether NGO Observers can also view the proceedings at Camp Bulkeley. It is not clear who the “public” is who will be able to observe proceedings at Camp Bulkeley. On site at Guantanamo Bay, members of the “public” who happen to be present – for example, service personnel stationed at Guantanamo but who have no Military Commission responsibilities – may observe proceedings on a “Space A” basis, that is, if space is available in the courtroom and such a person wants to observe, they may seek permission to sit in on the proceedings in what would otherwise be an empty seat.

During the same September 2014 hearings in the case of Hadi al Iraqi, the judge ordered the opening of an additional viewing site for viewing Military Commission proceedings at Camp Ft. Devins, Massachusetts. This viewing site will not be open to “the public” and is presumably also not open for viewing by NGO Observers. Other sites are available for victims and victims’ families to view in the 9-11 and U.S.S. Cole cases.

Furthermore, several sites are available for members of the press, including the Media Operations Center at the Guantanamo Bay Naval Station.
required to carry to Guantanamo Bay. Develop an observation plan based on the objectives of the NGO regarding the Military Commissions generally, and regarding the specific hearings of the specific Military Commission case the NGO Observer is scheduled to observe. Learn about the law of the Military Commission generally, and specifically about the law related to the case being observed. Transcripts, motion papers, and other court filings related to the case at bar can be found on the Office of Military Commission website (www.mc.mil). Learn about U.S. and international law that governs rights of all stakeholders. Do your homework! Conduct sound, comprehensive research! Visit websites such as www.GitmoObserver.com that contain GTMO Observation Briefing Binders and other useful materials. Read this Guantanamo Bay Fair Trial Manual! There is no need to recreate the wheel, as many resources are available for NGO Observers.

2. **Observe Hearings and Trials** – With an independent, objective, open mind, NGO Observers will witness the Guantanamo Bay proceedings firsthand. You will experience what is happening on the ground. Listen to the substantive arguments, but pay particular attention to the process, both inside and outside the courtroom. Take copious notes as you observe the proceedings and as you soak in the rest of your surroundings – get tuned into, and stay tuned into, with what all that is going on around you.

You will need to refer back to your notes as you are analyzing the proceedings and reporting on them later.76 Talk with stakeholders (prosecutors, defense counsel, press, other NGOs) and learn of their headaches, their challenges, their joys, and their positive accomplishments. Have your own copy of the *Guantanamo Bay Fair Trial Manual* in hand, along with the Manual’s charts of questions and checklists, to trigger in your mind process-oriented and substantive issues you might look out for, or that you might inquire about. Ask questions about anything you do not understand.

There are many resources available for answering questions. Keep an open mind, refrain from pre-judgments, and do not be easily swayed by rhetoric of any stakeholder. And, do not feel pressured to form judgments or to report from any particular perspective. You are an individual and though your experiences and observations will be similar to those of other observers or monitors, your experiences and observations will be unique to you.

3. **Analyze Hearings and Trials** – Recall the specific law governing the right to a fair trial (as found in the *Guantanamo Bay Fair Trial Manual* and elsewhere), and recall the range of rights

---

76 Though transcripts of Guantanamo Bay proceedings are typically available within 24 hours after a hearing day is concluded, NGO Observers, particularly at Guantanamo Bay, will not have easy access electronic or hard copy transcripts.
and interests of stakeholders, and what is required under law for rights and interests to be realized for all the stakeholders. Focus on the procedure and process required in the administration of justice, on how the system is meant to function, and how it actually does function. Recall the facts you witnessed on the ground. Apply the law to the facts. Draw a conclusion as to whether you believe, based on your legal analysis, whether the right to a fair trial is being or can be had at Guantanamo Bay.

Recall that as an NGO Observer, you are not expected to possess expertise in the substantive areas of law (elements of war crimes, applicability of international humanitarian law, or even the law of evidence). However, using the Guantanamo Bay Fair Trial Manual as a guide, you should be able to analyze aspects of U.S. and international law that relate to the right to a fair trial, and you should be able to draw conclusions about adherence or non-adherence to these rules.

Consult the Glossary to the Guantanamo Bay Fair Trial Manual, and its Index. Also, consult the Manual’s Appendix. Check out the Gitmo Observer website – www.GitmoObserver.com, that provides significant resources that may aid you as you carry out your NGO Observer role, and consult websites of other NGOs, the government (e.g., www.mc.mil), and defense teams.

4. **Critique Hearings and Trials** — Based on your application of the law to the facts (your analysis), and on based on your conclusions as to whether a fair trial is being had or can be had by stakeholders, use your critical eye and your expertise (newly-found or otherwise) to identify positive or negative aspects of the process itself, and of the process in practice. If you have concluded that some aspects of the proceedings are fair, identify how and why those aspects of the proceedings are fair. If you have concluded that some aspects of the proceedings are not fair, explain how and why those aspects of the proceedings are not fair. “Critiques” can be positive or negative or both!

5. **Report on Hearings and Trials** — NGO Observers should submit a Final Observation Report to your sending NGO. You are encouraged to publish widely about your Guantanamo Bay experiences on blogs, in law reviews or newspapers, as op eds, or otherwise. Help ensure that what happens at Guantanamo Bay does not stay at Guantanamo Bay.

NGO Observers are the eyes and ears of the outside world as to what happens at Guantanamo Bay. NGO Observers have a unique responsibility to share their experiences, insights and conclusions with the world outside of the remote Naval Base in Cuba. NGO Observers may not serve their host organizations or other interested parties well, and may provide a disservice, if the NGO Observers do not report their findings, and disseminate them widely.

The Pentagon, which selected the NGOs based in part on their “reach” and ability to communicate to the outside world, may not
feel as though NGOs are fulfilling responsibilities assumed when the NGO agreed to participate in the Pentagon’s Military Commission observation program.

Be particularly careful to ensure that your concluding reports, articles, blog posts and other publications reflect your honest assessment of what you observed at Guantanamo Bay. NGO Observers should be free and independent thinkers, capable of formulating sound and reasoned judgments, free from pressure from any individual or group. Some NGO Observers may agree with arguments made by the defense regarding deprivation of certain rights of the defendants, and some NGO Observers may agree with arguments by the prosecution regarding fulfillment of those same rights. That’s fine!

But, ensure that your thoughts are your own.

How helpful is it for an NGO Observer to rubber stamp arguments made by one side or the other in Guantanamo Bay litigation? Similarly, how helpful is it if your NGO host organization has a particular viewpoint, ideology or perspective, and you as an NGO Observer feel compelled to adopt your host organization’s viewpoint, ideology or perspective, even if you disagree with it?

Be independent in your inquiry. Be independent in drawing conclusions. Be independent in reporting your conclusions. The world is counting on your honesty and integrity.

c. NGOs should be true to yourselves!

Each NGO representative who observes or monitors Guantanamo Bay proceedings is an individual person. Each NGO representative who observes or monitors has been able to form sound judgments based on his or her own research, observations, and ability to digest and analyze law and facts and apply the law to those facts. Your viewpoint and observations as an NGO monitor may differ from the viewpoint and observations of the NGO monitor sleeping in the next bed over in your Guantanamo Bay tent, and may differ from that of the NGO monitor who observed at Ft. Meade. After completing your observation, you may find that your views do not align with views of your NGO sending organization, with your professor, with members of the press you encounter on mission, with either the defense or the prosecution, or with any of the other stakeholders with interests in the Guantanamo Bay Military Commissions. You are encouraged to own your views, and to report them as you see them. Be honest and truthful to yourself, and to those to whom you report. Your perspectives and sound judgment are valuable. Honor yourself by reporting without fear.

d. NGO Observers serve an extremely
important role for all stakeholders

NGO Observers serve an extremely important role in promoting and protecting internationally-recognized human rights of the wide range of U.S. Military Commission stakeholders, including the defendants, the prosecution, the victim and victims’ families, the press, JTF-GTMO detention and security staff, and others. All of these stakeholders have legally cognizable rights under international law and U.S. domestic law, and NGO Observers, as independent and objective and knowledgeable and informed outsiders, play a critical role in ensuring these human rights protections.

NGO Observers are the eyes and ears to the outside world about what transpires inside the Guantanamo Bay courtroom, located on a remote island outpost, otherwise inaccessible to the overwhelming number of stakeholders who are not able to observe the proceedings in person. NGO Observers promote play an important role in transparency and the rule of law.
VII. Background & Brief History of the U.S. Military Commissions at Guantanamo Bay, Cuba

a. The 9-11 attacks and the immediate aftermath

On 14 September 2001, three days after the 9-11 attacks on the World Trade Center and the Pentagon, Congress passed the Authorization to Use Military Force (AUMF), which authorized the President “to use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks” against the United States.”. On 13 November 2001, G.W. Bush issued an Executive Order, titled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”. That Presidential Military Order called for the creation of U.S. Military Commissions to try persons suspected of being members of al Qaeda, persons suspected of being involved with international terrorism harmful to the U.S., or persons who harbored members of al Qaeda or persons involved with international terrorism harmful to the U.S.

In furtherance of an unprecedented “war on terrorism”, the U.S. began arresting or capturing men and boys in Afghanistan and elsewhere around the globe, and in January 2002 began delivering these men and boys to Guantanamo Bay, Cuba, and holding them in Camp X-Ray, an outdoor pen constructed of wire and tin.

For over a year after the prisoners began to arrive at Guantanamo Bay, none of the men or boys was granted access to any lawyers, and none of them was charged with any crimes. It is not clear which of them was informed of why he was being held prisoner. During this period the men and boys underwent

Military Commission Act of 2009 Crimes that are Traditional War Crimes

1. Murder of Protected Persons
2. Attacking Civilians
3. Attacking Civilian Objects
4. Attacking Protected Property
5. Pillaging
6. Denying Quarter
7. Taking Hostages
8. Employing Poison or Similar Weapons
9. Using Protected Property as a Shield
10. Torture
11. Cruel or Inhuman Treatment
12. Intentionally Causing Serious Bodily Injury
13. Mutilating or Maiming
14. Murder in Violation of the Law of War
15. Destruction of Property in Violation of the Law of War
16. Using Treachery or Perfidy
17. Improperly Using a Flag of Truce
18. Improperly Using a Distinctive Emblem
19. Intentionally Mistreating a Dead Body
20. Rape
21. Sexual Assault or Abuse.

Military Commission Act of 2009 Crimes that are not Traditional War Crimes under International Law

22. Hijacking or Hazarding a Vessel or Aircraft
23. Terrorism
24. Providing Material Support for Terrorism ((no longer being charged, with convictions for this charged overturned);
25. Wrongfully Aiding the Enemy
26. Spying
27. Attempts
28. Conspiracy
29. Solicitation
30. Contempt
31. Perjury
32. Obstruction of Justice.

77 Federal Register, 16 November 2001 (Volume 66, Number 222), Presidential Documents, Page 57831-57836

78 The U.S. government refers to the men and boys who have been held at Guantanamo Bay “detainees,” and does not refer to them as “prisoners”, presumably because the U.S. government has chosen not to afford prisoner of war status on them, and calling them “prisoners” might cause confusion. Some have suggested that the word “detainee” is inappropriate, as that term suggests a temporary status, and might be a suitable label for a person “detained” by a police officer for a traffic stop, or by an immigration officer while a person is scrutinized while landing at an airport in a foreign country. “Prisoner”, they would suggest, is a label more appropriate for a person who is set to be held in prison indefinitely, and certainly for a person who has been held in a prison under prison conditions for over a decade.

Regarding nomenclature, when the Bush Administration began sending men and boys to Guantanamo Bay, they were labeled “enemy combatants”, which is a term that had not been used before under international humanitarian law or U.S. domestic law, and was used to refer to a person who was part of or who supported a force hostile to the U.S. and who participated in armed conflict against the U.S. Hamdi, 542 U.S. at 516. In 2009, a new category of person, that was also not known in international law or domestic U.S. law, was created – “unprivileged enemy belligerents”. Though “enemy combatant” and “unprivileged enemy belligerents” are essentially defined identically, it should be noted that there is a difference between persons who are subject to trial pursuant to the
interrogation, which included enhanced interrogation, which included water-boarding, which the U.S. government now concedes constituted torture.

Between the 13 November 2001 Presidential Military Order and the Military Commission Act of 2009 that currently governs the Guantanamo Bay proceedings, multiple attempts were had to create a viable Military Commission system, but the U.S. Supreme Court and other authorities intervened, with multiple iterations of the Military Commissions being ruled violative of international and/or domestic U.S. law. The proceedings commenced numerous times, only to be halted when a new authority deemed the proceedings either contrary to the U.S. Constitution, contrary to the Geneva Conventions, or otherwise illegal. The Congressional, Executive Branch and Supreme Court history leading to the MCA of 2009 is well documented, and will not be examined in this Manual in detail. The MCA of 2009 has limited jurisdiction

Much has been written about the failures of these earlier Military Commission iterations, and will


---

80 MCA of 2009 § 948d (titled “Jurisdiction of military commissions”) provides:

> A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war, whether such offense was committed before, on, or after September 11, 2001, and may… A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

---

81 For discussions of the multiple failed attempt to create viable lawful U.S. Military Commissions at Guantanamo Bay between 2001 and 2009, please see, e.g.,

---
not be repeated here in this Manual.

b. Law governing U.S. Military Commissions

The primary U.S. domestic statutory law currently in operation that governs the U.S. Military Commissions at Guantanamo Bay is the Military Commissions Act of 2009, which is accompanied by a U.S. Military Commissions Manual, the U.S. Military Commission Regulations, the U.S. Military Commission Rules of Evidence, and multiple other collateral documents. The Supreme Court held that the government cannot escape U.S. Constitutional obligations by holding proceedings at Guantanamo Bay, which of course is in Cuba, and thus it is appropriate to look for guidance to the U.S. Constitution, other federal statutes, Executive Orders, and decisions of the U.S. Supreme Court and other U.S. federal courts.

The U.S. is also bound to comply with international law obligations that arise under international humanitarian law treaties (e.g., the four Geneva Conventions) and that arise under international human rights law treaties (e.g.: the International Covenant on Civil and Political Rights – ICCPR; the United Nations Convention Against Torture and other forms of Cruel, Inhuman or Degrading Treatment of Punishment; and the International Convention on the Elimination of All Forms of Racial Discrimination). Furthermore, the U.S. is bound to comply with customary international law that provides for rules in the areas of international humanitarian law and international human rights law.82

c. Who can be tried at by a Guantanamo Bay Military Commission?

The Military Commissions Act of 2009 authorizes the following categories of persons to be tried by U.S. Military Commission:

(a) Any “alien unprivileged enemy belligerent,”83 which excludes any “privileged belligerent” who,84
   (1) Has engaged in hostilities against the United States or its coalition partners; or
   (2) Has purposefully and materially supported hostilities against the United States or its coalition partners; or
   (3) Was a part of Al Qaeda at the time of the alleged offense.85

Seven (7) Prisoners Currently Face an Active GTMO U.S. Military Commission*

When the Guantanamo Bay Fair Trial Manual was launched in August 2014, these three Guantanamo Bay cases were holding pre-trial hearings on “war crimes” charges:

i. the al Nashiri case (a/k/a the U.S.S. Cole case) (against Abd al Rahim al Nashiri, an alleged mastermind of the attack on the U.S. naval ship docked in Yemen, killing 17 sailors and wounding over 35);

ii. the 9-11 case (against Khalid Shaik Mohammad and four other alleged masterminds of the World Trade Center and Pentagon attacks of September 2001). The four other defendants in this case are Walid bin Attash, Ramzi bin al Shibh, Ammar al Baluchi, and Mustafa al Hawsawi. Originally 6 defendants were to be prosecuted, which is why there are 6 defense tables in the GTMO courtroom. One defendant was dropped.

iii. the Hadi al Iraqi case (Abd al Hadi al Iraqi, of Ira, is an alleged high level al Qaeda liaison with the Taliban).

*Figures from Pentagon, NGO website, and press (including the Miami Herald & the New York Times).

82 See infra at xxx – yyy.

83 Previous Military Commission permitted trials of “enemy combatants”.

84 A privileged belligerent would include “an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War,” 10 U.S.C. § 948a(6).

85 Some persons subject to trial by Military Commission may also be subject to detention under the AUMF. See Elsea, The Military Commissions Act of 2009, supra, note xyz at 8 – 9 and TAN 51 & 52.
d. Active Guantanamo Bay Military Cases

When the Guantanamo Bay Fair Trial Manual was launched at Guantanamo Bay, Cuba in August 2014, there were three “active” Guantanamo Bay cases convened under the Military Commission Act of 2009 in which pre-trial hearings were ongoing or were scheduled, with these hearings being at varying stages. The three cases were:

i. the al Nashiri case (a/k/a the U.S.S. Cole case) (against an alleged mastermind of the attack on the U.S. naval ship docked in Yemen, killing 17 sailors and wounding over 35). Abd al Rahim al Nashiri, a native of Saudi Arabia, was captured in 20xx, and taken to Guantanamo Bay in xxx. He was arraigned on 9 November 2011 on charges relating to the bombing of the USS Cole (a U.S. warship) on 12 October 2000, the French vessel MV Limburg on 6 October 2002, and the attempted bombing of the USS The Sullivans (a U.S. warship) on 3 January 2000. The nine referred charges, conviction of which could attract the death penalty, are:

- Charge I — using treachery or perfidy (10 U.S.C. § 950t(17));
- Charge II — murder in violation of the law of war (10 U.S.C. § 950t(15));
- Charge III — attempted murder in violation of the law of war (two specifications) (10 U.S.C. § 950t(28));
- Charge IV — terrorism (two specifications) (10 U.S.C. § 950t(24));
- Charge V — conspiracy to commit terrorism and murder in violation of the law of war (10 U.S.C. § 950t(29));
- Charge VI — intentionally causing serious bodily injury (10 U.S.C. § 950t(13));
- Charge VII — attacking civilians (10 U.S.C. § 950t(2));
- Charge VIII — attacking civilian objects (10 U.S.C. § 950t(3));
- and Charge IX — hijacking or hazarding a vessel or aircraft (10 U.S.C. § 950t(23)).

ii. the 9-11 case (against Khalid Shaik Mohammad and four other alleged masterminds of the World Trade Center and Pentagon attacks of September 2001). The five defendants are charged with: conspiracy, attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or hazarding a vessel or aircraft, terrorism. The other four defendants are Walid bin Attash, Ramzi bin al Shibh, Ammar al Baluchi, and Mustafa al Hawsawi. In mid-2014 the military judge ordered the case of defendant bin Attash severed from the other four defendants, but following objections by

---

86 On 16 September 2014, the military judge dismissed without prejudice Specification 2 of Charge IV and Charges VII, VIII, and IX—the charges regarding the MV Limburg bombing. On 13 November 2014, the United States Court of Military Commission Review held oral arguments on the government’s appeal on these dismissals.

87 During the 2014 summer, the judge in the 9-11 case sua sponte severed one of the defendants, who was ordered to stand trial separate from the other defendants in the case. However, the judge reconsidered and then reversed his ruling, with the case proceeding against all 5 defendants. In the same 9-11 case, a different defendant has sought to be severed.
the prosecution the judge ordered the case rejoined for trial against all five defendants. Defendant al Hawsawi requested that the court sever his case from the other four. All five 9-11 defendants are currently scheduled to be tried in one joint trial despite calls for severance.

iii. the Hadi al Iraqi case. Hadi al Iraqi (a/k/a Nashwan al Tamir) is alleged to have been a high-ranking member of al Qaeda Iraq and liaison to the Taliban, and to other groups, and is alleged to have commanded al Qaeda’s insurgency efforts in Afghanistan and Pakistan. He is charged with denying quarter, attacking protected property, using treachery or perfidy, attempted use of treachery or perfidy, conspiracy. He is alleged to be responsible for multiple deaths. Until he was transferred to Guantanamo Bay in 2007, Hadi al Iraqi was in CIA custody. He was arraigned in June 2014, with his first pre-trial hearing in November 2014. This is not a death penalty case. The maximum sentence that Hadi al Iraqi faces is life in prison.

e. U.S. Military Commissions are “War Crimes Tribunals” not “Terrorism Tribunals”

The MCA of 2009 makes it clear that the U.S. Military Commissions are “war crimes courts”, not “terrorism courts”. The MCA of 2009 permits prosecutions for many crimes against the laws and customs of war, as codified in the Geneva Conventions and other international humanitarian law treaties. Most of the MCA of 2009 crimes are squarely violations of conventional and customary international

---

Eight Prisoners Convicted at U.S. Military Commission Trials at GTMO*


(2) Salim Hamdan. Sudanese. Osama bin Laden’s drive. Convicted at trial. Federal court overturned his material support for terrorism conviction as not being a “war crime”. (2012)


(7) Majid Shoukat Khan. Pakistani. Guilty plea. Sentence only after his testimony against other captives. (29 February 2012) (modified guilty plea 13 September 2016 - dropped material support for terrorism charge)


*Figures from Pentagon, NGO website & press (including the Miami Herald) (4 of 8 convictions overturned or disapproved)
humanitarian law, and are thus war crimes. The U.S. considers the remaining crimes to violate the law of war given that the acts underlying the crimes would be perpetrated during hostilities (armed conflict).

f. Torture

There have been many allegations over the years that some Guantanamo Bay detainees were tortured before they were taken to Guantanamo Bay, while in transit to Guantanamo, and while at Guantanamo Bay. The topic of torture has been presented in the cases of multiple detainees who have been charged under the U.S. Military Commission Act, which questions including whether the detainees were tortured, and if they were tortured should that torture have any bearing on the U.S. Military Commission case(s) against them. Should evidence obtained by torture be used against them? Should a tortured defendant who is convicted receive a reduced sentence because he was tortured? More on this topic is discussed in the section of this Manual dealing with torture and cruel, inhuman and degrading treatment or punishment.

In December 2014, a U.S. Senate Select Committee Against Torture issued Concluding Observations on the U.S. report to that Committee and the U.S. appearance before that Committee. The Concluding Observations are reproduced in Appendix XYZ.

[More on the Torture Report & the Committee Against Torture Report is forthcoming.]

g. Period Review Boards (PRBs)

On 7 March 2011 President Obama issued an Executive Order that he noted would help ensure that military detention of individuals held at Guantanamo Bay “continues to be carefully evaluated and justified, consistent with the national security and foreign policy

GTMO Statistics (not fully verified - as of 26 February 2017) *

- 20 -- Number of prisoners on 1st flight 11 January 2002 (Camp X-Ray opens; detainees in orange jumpsuits)
- 779 -- Total number of detainees held at the Guantanamo Bay since 11 September 2001 attacks.
- 740 -- Approximate number of 779 released with no charges since 2002.
- 242 -- Number of detainees at Guantanamo Bay when President Obama took office on 20 January 2009
- 41 -- Number of detainees at Guantanamo Bay when DJ Trump took office on 20 January 2017
- 540 -- Number of detainees released during George W. Bush Administration
- 0 -- Number of detainees released during Trump Administration
- 184 -- Number of detainees released during Obama Administration
- 41 -- Number of 779 detainees still at Guantanamo
- 5 -- Number of detainees US approved for transfer to home or 3rd countries who remain at Guantanamo.
- 41+ -- Approximate number reviewed by Periodic Review Boards (PRB) (and who remain at GTMO)
- 24 -- “forever prisoners” (set for indefinite detention “under the Law of War”, with no charge or trial) (not verified as of 9 February 2016)
- 9 -- Number of detainees who died at Guantanamo Bay
- 8 -- Number of detainees convicted at Guantanamo Bay (after trial or guilty plea) (with 4 of these 8 convictions overturned / disapproved) (see text box on p. xyz)
- 1 -- Number of convicted detainees at Gitmo
- 7 -- Number of 41 detainees currently at Guantanamo facing formal charges with active hearings.

*Figures from Pentagon, NGO websites (e.g., Human Rights First), press (including the Miami Herald), & DoD

NB: All statistics and photographs / images in this Manual will be verified with appropriate permissions sought and citations given.

---

88 The traditional war crimes chargeable under the MCA of 2009 are: (1) Murder of Protected Persons; (2) Attacking Civilians; (3) Attacking Civilian Objects; (4) Attacking Protected Property; (5) Pillaging; (6) Denying Quarter; (7) Taking Hostages; (8) Employing Poison or Similar Weapons; (9) Using Protected Property As A Shield; (10) Torture; (11) Cruel or Inhuman Treatment; (12) Intentionally Causing Serious Bodily Injury; (13) Mutilating or Maiming; (14) Murder in Violation of the Law of War; (15) Destruction of Property in Violation of the Law of War; (16) Using Treachery Or Perfidy; (17) Improperly Using a Flag Of Truce; (18) Improperly Using A Distinctive Emblem; (19) Intentionally Mistreating a Dead Body; (20) Rape; (21) Sexual Assault or Abuse.

89 Crimes chargeable under the MCA of 2009 that are not traditional war crimes include (following the numbering scheme from the previous footnote): (22) Hijacking or Hazarding a Vessel or Aircraft; (23) Terrorism; (24) Providing Material Support for Terrorism (no longer being charged, with convictions for this charged overturned); (25) Wrongfully Aiding the Enemy; (26) Spying; (27) Attempts; (28) Conspiracy; (29) Solicitation; (30) Contempt; (31) Perjury and Obstruction Of Justice; (32) Obstruction Of Justice. For a discussion of conspiracy as not a traditional war crime, see the DC Circuit’s per curiam opinion on al Bahlul (2016).
interests of the United States and the interests of justice". ⁹⁰

Pursuant to that Executive Order, the Periodic Review Board (PRB) process is “a discretionary, administrative interagency process to review whether continued detention of particular individuals held at Guantánamo remains necessary to protect against a continuing significant threat to the security of the United States.” ⁹¹

The PRB panel that makes decisions consists of representatives of a cross-section of the U.S. Government national security community, including one senior official from the Departments of Defense, Homeland Security, Justice, and State; the Joint Staff, and the Office of the Director of National Intelligence. ⁹² The PRB process does not address the legality of a prisoner’s detention. ⁹³

The Executive Order, pursuant to section 1(a) (scope and purpose), provided that “[t]he periodic review described in section 3 of this order applies only to those detainees held at Guantánamo on the date of this order, whom the interagency review established by Executive Order 13492 has (i) designated for continued law of war detention; or (ii) referred for prosecution, except for those detainees against whom charges are pending or a judgment of conviction has been entered.”

Section 1(b) notes that “[t]his order is intended solely to establish, as a discretionary matter, a process to review on a periodic basis the executive branch's continued, discretionary exercise of existing detention authority in individual cases. It does not create any additional or separate source of detention authority, and it does not affect the scope of detention authority under existing law. Detainees at Guantánamo have the constitutional privilege of the writ of habeas corpus, and nothing in this order is intended to affect the jurisdiction of Federal courts to determine the legality of their detention.

Section 1(c) notes that “[i]n the event detainees covered by this order are transferred from Guantánamo to another U.S. detention facility where they remain in law of war detention, this order shall continue to apply to them.”

The Standard for continued detention is described in Section 2, as follows: “Continued law of war detention is warranted for a detainee subject to the periodic review in section 3 of this order if it is necessary to protect against a significant threat to the security of the United States.”

Section 3 speaks to the “periodic review”, which has led to the creation of a “Periodic Review Board”: “The Secretary of Defense shall coordinate a process of periodic review of continued law of war detention for each detainee described in section 1(a) of this order. In consultation with the Attorney General, the Secretary of Defense shall issue implementing guidelines governing the process”.

[More on PRBs can be found at the Periodic Review Board (PRB) Project of Gitmo Observer -- https://gitmoobserver.com/2016/07/04/periodic-review-board-prb-project-of-the-gitmo-observer/. More on PRBs is forthcoming in

---


⁹¹ http://www.prs.mil/AboutthePRB.aspx

⁹² Id.

⁹³ Id.
h. Closing Guantanamo Bay – From 2009 - 2016

On 22 January 2009, just after President Obama took office, he signed an Executive Order calling for the closure of the Guantanamo Bay Detention Facilities. In his 2015 State of the Union Address, President Barack Obama stated:

“As Americans, we have a profound commitment to justice – so it makes no sense to spend three million dollars per prisoner to keep open a prison that the world condemns and terrorists use to recruit. Since I’ve been President, we’ve worked responsibly to cut the population of GTMO in half. Now it’s time to finish the job. And I will not relent in my determination to shut it down. It’s not who we are.”

On 23 February 2016, President Obama announc another plan to close Guantanamo Bay.

The White House summarized President Obama’s February 2016 plan for closing Guantanamo Bay detention facilities, that had been open since January 2002, as follows:

1. "We’ll continue to securely and responsibly transfer to other countries the 35 detainees already approved for transfer. This process involves extensive and careful coordination across our federal government to ensure that our national security interests are met when an individual is transferred to another country. We insist, for example, that foreign countries institute strong security measures."

2. "We’ll accelerate the periodic reviews of remaining detainees to determine whether their continued detention is necessary. Our review board, including representatives from across government, will look at all relevant information, including current intelligence. If certain detainees no longer pose a continuing significant threat, they may be eligible for transfer to another country."

3. "We’ll continue to use all legal tools to deal with the remaining detainees still held under law of war detention. Currently, 10 detainees are in some stage of the military commissions process—a process we reformed in my first year in office with bipartisan support from Congress. Still, these commissions are very costly and have resulted in years without a resolution. We’re therefore outlining additional changes to improve these commissions, which would require Congressional action."

4. "We’re going to work with Congress to find a secure location in the United States to hold remaining detainees. These are detainees who are subject to military


commissions, as well as those who cannot yet be transferred to other countries or who we’ve determined must continue to be detained because they pose a continuing significant threat. We are not identifying a specific facility today." [Emphasis in the original]

[More discussion about closing Guantanamo forthcoming.]

[Draft Executive Order by DJ Trump circulated in early 2017 addressing Guantanamo Bay. If and when an official Executive is issued it will be described / discussed herein.]
VIII. General Information About the Case to Be Observed

1. General information about the case

NGOs have varied reasons to send independent, objective NGO Observers to monitor Guantanamo Bay proceedings. Guantanamo NGO Observers, like traditional “trial observers”, would ordinarily be seeking to ascertain whether Military Commission stakeholders are receiving a fair trial. NGO Observers should be armed with knowledge of the international and domestic U.S. law governing fair trials, should have studied the background of the Military Commissions and the case(s) and proceedings they will observe, and should form independent judgments as they apply existing international and domestic law to the facts they observe on the ground. They should report their findings to their sending NGO, and otherwise disseminate the conclusions they formed. NGO Observers are the eyes and ears to the outside world about what transpires inside the Guantanamo Bay courtroom, located on a remote island outpost, otherwise inaccessible to the overwhelming number of stakeholders who are not able to observer the proceedings in person.

Before NGO Observers and others travel to Guantanamo Bay or Ft. Meade for hearings, they are expected to research the case(s) they will monitor. Many official and unofficial sources provide relevant, useful and accurate information. Among those sources are the website of The Gitmo Observer which contains links to the official Military Commission website and other important sources of information.

It is important to learn about the participants in the case(s) to be monitored. This background may provide insights into questions of law and fact that may arise during the proceedings – pre-charge, post-charge (pre-trial hearings), trial, and post-trial. For example, it is important to know the defendant’s age at the time of the alleged offence, since different law applies to juvenile offenders than to adult offenders.

If the case being observed has more than one defendant, NGO Observers may wish to complete separate checklists for each defendant. General background information, the detention experiences, and interests of one defendant may differ from those of the next. The same or different rules of law may apply, with the same or different results.

Observers should record information about themselves and their missions, as this will be useful to those who may use the Observer’s Post-Observation Report.

<table>
<thead>
<tr>
<th>1. General Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is the name of the NGO Observer?</td>
</tr>
<tr>
<td>What is the NGO Observer’s affiliation?</td>
</tr>
<tr>
<td>What are the NGO Observer’s observation dates?</td>
</tr>
<tr>
<td>Will the NGO Observer observe in the courtroom at Guantanamo Bay, Cuba?</td>
</tr>
<tr>
<td>Will the NGO Observer observe at a remote viewing location (CCTV) at Ft. Meade (Maryland), Ft. Devins (Massachusetts), or Camp Bulkeley (Guantanamo Bay Naval Station), or elsewhere?</td>
</tr>
<tr>
<td>How many other NGO Observers were present at Ft. Meade or Guantanamo Bay?</td>
</tr>
<tr>
<td>Question</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Were there fewer than 13 or 14 NGOs present at GTMO (the maximum number traditionally permitted to travel to GTMO to observe)?</td>
</tr>
<tr>
<td><strong>Understanding Your NGO Observer Mission</strong></td>
</tr>
<tr>
<td>Did the NGO that is sponsoring your NGO Observer provide you with a <strong>Terms of Reference</strong> to outline your goals and responsibilities during your Military Commission observation mission?</td>
</tr>
<tr>
<td>If you are an NGO Observer, are your objectives (per your <strong>Terms of Reference</strong>) to attend, observer, analyze, critique and report on the U.S. Military Commissions at Guantanamo Bay, Cuba?</td>
</tr>
<tr>
<td>If you are an NGO Observer and your objectives (per your <strong>Terms of Reference</strong>) are not to attend, observer, analyze, critique and report on the U.S. Military Commissions at Guantanamo Bay, Cuba, then what are the NGO Observer’s objectives (or <strong>Terms of Reference</strong>) regarding the Military Commissions?</td>
</tr>
<tr>
<td>Do you understand your NGO Observer mission to require you to focus primarily on the criminal justice system process, rather than on the substantive crimes?</td>
</tr>
<tr>
<td>Do you understand your NGO Observer mission to require you not to seek to intervene in the proceedings, but to observe or monitor?</td>
</tr>
<tr>
<td>Do you understand your NGO Observer mission to permit you to express views publicly (to the press or otherwise) on substantive aspects of the case, on procedural aspects of the case, or on both substantive and procedural aspects of the case?</td>
</tr>
<tr>
<td>Do you understand your NGO Observer mission to permit you to evaluate evidence proffered by the government and the defense, or to weigh the evidence and draw conclusions as to whether the prosecution has met its burden of proof on the question of guilt?</td>
</tr>
<tr>
<td>Does your NGO Observer mission require you to focus on the procedural aspects of the case, that is, whether the binding international and domestic law is being applied properly, in accordance with rules governing the right to a fair trial?</td>
</tr>
<tr>
<td>Have you learned what material you will be permitted to take into the Guantanamo Bay courtroom or alternative viewing site so that you can take copious notes of the proceedings?</td>
</tr>
<tr>
<td>What reporting obligations do you as an NGO Observer have pursuant to your <strong>Terms of Reference</strong>?</td>
</tr>
</tbody>
</table>
Have you figured out how you will be able to post blog entries or send reports or updates to your sending NGO or disseminate this information electronically or otherwise?

Will your host NGO Organization reimburse you any costs associated with connecting to the internet in the GTMO NGO Resource Center or connecting using any other GTMO mechanism?

**Preparation for NGO Observer Mission**

How did you prepare for your NGO Observer mission?

Did you review the *Guantanamo Bay Fair Trial Manual*?

Did your visit websites of NGOs that have sent NGO Observers to Guantanamo Bay, Ft. Meade or other Military Commission viewing sites, such as [www.GitmoObserver.com](http://www.GitmoObserver.com) and mc.mil?

Did your sending NGO provide you with a Briefing Book or other sent of substantive materials to help you prepare for your NGO Observer mission?

If you will be observing at Guantanamo Bay, did the Office of Military Commissions send you a copy of the APACS so you could learn the identifies of other NGO Observers on your mission, permitting you to contact other NGO Observers before you travel?

If the Office of Military Commissions did not send you a copy of the APACS, did that office otherwise send you a list of the names, organizations, and contact information for the other NGO Observers on your mission?

Did you contact other NGO Observers before your departure for Guantanamo Bay, to coordinate travel arrangements, to discuss substantive issues, or for other purposes?

If you are an NGO Observer, did you blog or otherwise publish any articles or other items related to your NGO mission before the mission commenced?

Before your departed for your Observation mission, did you feel that you were prepared?

Did your NGO Observation meet your expectations?
## 2. Defendant & Case Information

(Much of this information is readily available at [www.GitmoObserver.com](http://www.GitmoObserver.com) or from U.S. government websites identified on the [Gitmo Observer](http://www.GitmoObserver.com) website, including mc.mil.)

<table>
<thead>
<tr>
<th>Identity and Personal Details of the Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is the defendant’s name (or the name he is commonly known as)?</td>
</tr>
<tr>
<td>If there are co-defendants, who are they?</td>
</tr>
<tr>
<td>What is the defendant’s nationality?</td>
</tr>
<tr>
<td>Does the defendant have more than one nationality?</td>
</tr>
<tr>
<td>What is the defendant’s date of birth?</td>
</tr>
<tr>
<td>Was the defendant a juvenile when he allegedly engaged in the alleged criminal behavior?</td>
</tr>
<tr>
<td>Was the defendant a juvenile when taken into custody?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The Charges Against the Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is the general thrust of the primary allegations against the defendant?</td>
</tr>
<tr>
<td>Was the defendant charged with one or more of the following “traditional war crimes” that are provided for in the Military Commission Act of 2009:</td>
</tr>
</tbody>
</table>


(The numbers of the crimes correspond to their numbers in the MCA of 2009.)
Was the defendant charged with one or more of the following “non-traditional war crimes” that are provided for in the Military Commission Act of 2009:

(22) Hijacking or Hazarding a Vessel or Aircraft; (23) Terrorism; (24) Providing Material Support for Terrorism (no longer being charged, with convictions for this charge overturned); (25) Wrongfully Aiding the Enemy; (26) Spying; (27) Attempts; (28) Conspiracy (no longer being charged, with convictions for this charge overturned); (29) Solicitation; (30) Contempt; (31) Perjury and Obstruction of Justice; (32) Obstruction of Justice?

(The numbers of the crimes correspond to their numbers in the MCA of 2009.)

<table>
<thead>
<tr>
<th>What is the first crime the defendant is charged with?</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is the second crime the defendant is charged with?</td>
</tr>
<tr>
<td>What is the third crime the defendant is charged with?</td>
</tr>
<tr>
<td>What is the fourth crime the defendant is charged with?</td>
</tr>
<tr>
<td>What is the fifth crime the defendant is charged with?</td>
</tr>
</tbody>
</table>

Is the defendant an alleged member of al Qaeda?

Is the defendant an alleged member of the Taliban?

**Defendant’s Custody Period and Location**

<table>
<thead>
<tr>
<th>When was the defendant taken into custody?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where has the defendant been detained?</td>
</tr>
<tr>
<td>Was the defendant at any point held in a “black site” located outside the U.S.?</td>
</tr>
<tr>
<td>Is mental capacity an issue with regard to the defendant?</td>
</tr>
<tr>
<td>Is the defendant considered to be a High Valued Detainee (HVD)?</td>
</tr>
</tbody>
</table>
I. General Categories of Rights of Guantanamo Bay, Cuba, Military Commission

General Categories of Rights of Guantanamo Bay, Cuba, Military Commission

Stakeholders..................................................................................................................57

A. Right to be Presumed Innocent; Right to Have the Burden of Proof on the Prosecution...59
B. Freedom from Retroactive Application of Criminal Laws (No Ex Post Facto Laws)……67
C. Freedom from Double Jeopardy (Ne Bis in Idem).......................................................71
D. Right to Trial by Competent, Independent and Impartial Tribunal.............................75
E. Right to Effective Assistance of Counsel.................................................................89
F. Right to Information & Access to Information............................................................101
G. Rights Related to Classified Information.................................................................113
H. Rights to Adequate Time & Facilities to Prepare a Defense........................................121
I. Right to Prompt Judicial Proceedings....................................................................131
J. Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release; Right to Speedy Trial........................................................................................................133
K. Right to Liberty and Security of Person, including Freedom from Arbitrary Detention and Right to Review of Lawfulness of Detention............................................................137
L. Right to Humane Treatment & Humane Conditions of Detention..............................145
M. Freedom from Torture, and Cruel and Inhuman Treatment or Punishment...............165
N. Freedom from Incommunicado & Solitary Confinement; Right to Access to the Outside World......................................................................................................................167
O. Rights to Interpreter / Translator...............................................................................177
P. Right to Public Proceedings.......................................................................................189
Q. Freedom from Self-Incrimination; Right Not to be Compelled to Testify Against Oneself or to Confess Guilt.........................................................................................199
R. Right to Equality of Arms; Equality Before the Courts; Equal Protection of the Law....207
S. Right to be Present at or Absent From Pre-Trial Hearings..........................................213
T. Right to Defend Oneself in Person or Through Counsel of His Own Choosing..........221
U. Right to Examine and Cross-Examine Witnesses......................................................227
V. Right to Exclusion of Illegally Obtained Evidence.......................................................223
W. Right to Exclusion of Hearsay....................................................................................235
X. Rights of Detainees Who Were Juveniles When Taken to Guantanamo Bay............239
Y. Right to Appeal (Interlocutory, Conviction, Sentence)..............................................241
Z. Rights to a Remedy (Victims, Detainees, Defendants)...............................................245
A. Right to be Presumed Innocent Until Proved Guilty According to Law
(Right to Presumption of Innocence); Right to Burden of Proof Being on the Prosecution

The right to be presumed innocent until proved guilty according to law, or the right to the presumption of innocence, requires the prosecution to prove all elements of the crime beyond a reasonable doubt. Public officials are not permitted to state that a defendant is guilty until and unless his guilt is proved at trial beyond reasonable doubt. The government is not permitted to take actions that suggest a defendant’s guilt, such as requiring him to appear in court in suggestive attire or restraints. The defendant has the benefit of all doubt and should be treated accordingly. A defendant need not prove his innocence, and need not prove that he is not guilty. The prosecution must prove all elements of any alleged offense.

a. General

The right to be presumed innocent is a bedrock principle of the right a fair trial. Pursuant to international and domestic U.S. law, the U.S. is obligated to ensure that all defendants are afforded the right to be presumed innocent before and during trial, with the burden of proof resting squarely and solely on the prosecution who must prove all elements of any charged crime beyond reasonable doubt, with the defendant having the benefit of all doubt.

b. International law and the right to be presumed innocence; Burden of proof on the prosecution

The right to be presumed innocent is expressly provided for the ICCPR, Additional Protocol I and Additional Protocol II of the Geneva Conventions, and the Universal Declaration of Human Rights, and is considered to be one of “the judicial guarantees which are recognized as indispensable by civilized peoples” required in criminal tribunals per Common Article 3 of the Geneva Conventions), which binds the U.S. 96

ICCPR Article 14(2) provides:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

This right is provided for under customary international law as reflected in numerous international, non-binding treaties, such as the 97 Additional Protocol I and Additional Protocol II to the Geneva Conventions of 1949.

Additional Protocol I to the Geneva Conventions, article 75(4)(d) provides:

Anyone charged with an offence is presumed innocent until proved guilty according to

96 Treaties that address presumption of innocence that bind the U.S. include: International Covenant on Civil & Political Rights (ICCPR), article 14(2); Common Article 3 to the 4 Geneva Conventions of 1949; ICTY Statute, article 21(3) (“The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute”); and ICTR Statute, article 20(3) (“The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute”).

97 Treaties that address presumption of innocence that do not bind the U.S. include: American Convention, article 8(2) (“Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.”) (The U.S. signed this treaty, but did not ratify it.); European Convention on Human Rights, article 6(2) (“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”); EU Charter of Fundamental Rights, Article 48(1) (“everyone who has been charged shall be presumed innocent until proven guilty according to law”); and ICC Statute, article 66(1) (“Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.”)
law.

Additional Protocol II to the Geneva Conventions, article 6(2)(d) provides:

anyone charged with an offence is presumed innocent until proved guilty according to law

This right is also provided for in non-treaty, non-binding international instruments.\(^{98}\)

c. International jurisprudence.

International courts and tribunals, in interpreting treaty terms, have reaffirmed presumption of innocence incorporated into U.S. statutory and case law.

The United Nations Human Rights Committee, that overseas implementation of the ICCPR which binds the U.S., in General Comment 32, interpreted the ICCPR and noted that “Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals.”\(^{98}\)

The United Nations Human Rights Committee, acting as an adjudicative body, found in Dimitry Leonodovich Gridin v Russian Federation,\(^{99}\) that the ICCPR was violated when high ranking government officials’ statements portraying the defendant as guilty were given wide media coverage, noting “a duty for all public authorities to refrain from prejudging the outcome of a trial”.

The European Court of Human Rights, in Allenet De Ribemont V. France,\(^{100}\) found that the presumption of innocence was violated by non-judicial officers who made statements outside of court about the defendant.

In Hulki v. Turkey, the European Court of Human Rights found that the presumption of innocence was violated by a judge’s statements, and that violations can also be found when a judge opines or acts as though a defendant is guilty before the trial is over, and may be violated when non-judicial public officials make statements encouraging the public to believe that the defendants are guilty, before the trial is concluded. The Court noted that officials may comment about a defendant, the officials must use discretion and circumspection, and avoid prejudging the defendant.\(^{101}\)

Secondary non-tribunal sources. Many law review articles and other secondary sources address the right to be presumed innocent.\(^{102}\)

\(^{98}\) Non-Treaty International Instruments that do not bind the U.S. but that incorporate customary international law principles that do bind the U.S. include: UDHR, article 11 (“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”); Body of Principles on Detention or Imprisonment, Principle 36(1); African Commission Resolution, Paragraph 2(D); Cairo Declaration on Human Rights in Islam, article 19(c) (1990) (“A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence”). The African Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, section N(d) (e) provides: “Public officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect”.


\(^{101}\) General Comment 32, para xyz.

\(^{102}\) For further reading on the presumption of innocence, see Shima Baradaran, Restoring the Presumption of Innocence, Ohio State Law Review, 724, at 726 (tracing “the history of the presumption of innocence and its constitutional basis, beginning at ancient texts and continuing through to the common law and finally U.S. cases, with a focus on pretrial rights and bail.”) (http://pgil.pk/wp-content/uploads/2014/04/Presumption-of-innocence-by-Baradaran.pdf); James Bradley Thayer, The Presumption of Innocence in Criminal Cases, 6 YALE L.J. 185, 188–89 (1897) (stating that . . . ); see also François Quintard-Morénas, The Presumption of Innocence in the French and Anglo-American Legal Traditions, 58 AM. J. COMP. L. 107, 126 (2010) (stating that . . . ); 5 John Henry Wigmore, Evidence in Trials at Common Law § 2511, at 504 (2d ed. 1923) (the presumption of innocence “hovers over the prisoner as a guardian angel” from the moment of indictment until the verdict is determined).
d. U.S. Constitution, U.S. Military Commission Act and Military Law & the Right to be Presumed Innocent; Burden of Proof on the Prosecution

Though the phrase “presumption of innocence” or “right to be presumed innocent” does not appear in the U.S. Constitution in, the U.S. Supreme Court acknowledges that this right is entrenched in the due process clauses of the 5th and 14th amendment. 103 U.S. Supreme Court cases have held that the presumption of innocence requires the prosecutor to prove guilt beyond a reasonable doubt (Bell v. Wolfish),104 and that the Due Process Clause of the 14th Amendment provides a “safeguard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt” (Taylor v. Kentucky).105

The Military Commissions Act of 2009,106 the Uniform Code of Military Justice,107 and other U.S. Military Manuals and Regulations require that defendants be afforded the right to be presumed innocent..

e. Denying access to classified information.

A judge’s denial of a defendant’s access to information deemed to be classified is tantamount to the judge determining that the defendant cannot be trusted with that information, and this may be construed as a presumption of guilt, contrary to the require presumption of innocence. Furthermore, if the defendant is not permitted to view this classified information, particularly if the information is exculpatory, the defendant may not be able effectively to rebut the information. The defendant may end up having to prove his innocence on points raised, which is contrary to the presumption of innocence, which requires the prosecution to prove all elements.

f. Burden of proof must be on the prosecution

International and domestic law require that the burden of proving guilt beyond a reasonable doubt lies squarely with the prosecution, and the defendant is not required to prove the non-existence of any element of the crime.108 This right to have the burden of proof on the prosecution is closely related to, and perhaps is a flip side of, the defendant’s right to be presumed innocent until proved guilty in accordance with law.109

If a defendant is forced to prove that he is innocent (or to prove that he is not guilty), then it would be as though the criminal justice system presumes that he is guilty, and that he has the burden of demonstrating that he is not guilty. This is the opposite of the international law and domestic law requirement that when the liberty and security of a defendant are threatened, the prosecution must prove guilt beyond a reasonable doubt.

g. Scope of the right to be presumed innocent.

In both the international and domestic law context, at the heart of the presumption of innocence is the notion that when a defendant’s liberty and security of person are at stake, fairness and justice require the prosecution to prove the case against the defendant. The defendant is shrouded in a range of fair trial rights that permit him, for example, to remain silent.

103 The U.S. Supreme Court has ruled that "The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty". US 1894) (see also more recent U.S. cases).

104 441 U.S. 520, 582 n.11 (1979)

105 436 U.S. 478, 486 (1978)). See also People v. Riley, 33 N.E.2d 872, 875 (Ill. 1941) (“Any person indicted stands before the bar of justice clothed with a presumption of innocence and, as such, is tenderly regarded by the law. Every safeguard is thrown about him. The requirements of proof are many, and all moral, together with many technical, rules stand between him and any possible punishment.”)

106 Military Commissions Act of 2009, article § 949(c) (1) provides: “that the accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond a reasonable doubt”. 107

108

109
i. **Right to remain silent and the presumption of innocence.** If the defendant were required to prove his innocence, or to prove that he is not guilty, the defendant may be forced to compromise his right to remain silent or other right. It would be difficult for a defendant to make a heavy proof at trial while at the same exercising his right to remain silent.

ii. **Burden of proof.** To protect a defendant’s right to be presumed innocent, the prosecution necessarily bears the burden of proving the defendant’s guilt **beyond** a reasonable doubt.\(^\text{110}\) Whether the evidence against the defendant is overwhelming or sparse, the defendant is presumed to be innocent until and unless the prosecutor meets its high burden of proof. The defendant has the right to the benefit of doubt, and all persons must treat defendants accordingly.

iii. **Comments by judge, judicial officer or government official about defendant’s guilt.** No judge, judicial officer, or government official may state that a defendant is guilty, unless the trial has concluded and the official verdict is guilty, and unless and until that guilt was proved beyond a reasonable doubt. Public officials are obligated to not prejudge the verdict. Until and unless a guilty verdict is reached, no judge or other government official is permitted to take actions that suggest a defendant’s guilt or treat the defendant in a way that suggests his guilt.

iv. **Defendant’s courtroom attire.** The government should prevent guilt to be suggested by the defendant’s courtroom attire, courtroom seating arrangements, courtroom shackles or other restraints for the defendants or an unnecessarily overwhelming presence of security guards, or other characteristics or logistical arrangements.

v. **Length of pre-trial detention.** The government might take steps to help ensure that the length of incarceration pre-trial (which at Guantanamo Bay can be over a decade), or statements that even if acquitted the defendants will not be released, are not indications that the defendants are guilty.

vi. **Role of media in presumption of innocence.** The media plays an important role in helping to ensure presumption of innocence, and would be advised not to publish statements or images that suggest guilt.

vii. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree.

---

3. **Right to be Presumed Innocent until proved guilty according to law (U.S. Constitution, 5th & 14th Amendment Due Process Clauses; Military Commission Act of 2009, § ___; ICCPR, art 14(2))**

<table>
<thead>
<tr>
<th>Comments About the Defendant’s Guilt</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comm</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you know whether the prosecution has made comments about the guilt of the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know whether the judge has made public comments about the guilt</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{110}\) See, supra
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer 1</th>
<th>Answer 2</th>
<th>Answer 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you know whether any members of the press have made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know whether defense counsel has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know whether any family members of victims have made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know whether a former the U.S. President has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know whether the current U.S. President has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know whether a former U.S. Secretary of Defense has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know whether the current U.S. Secretary of Defense has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know whether any other current or former U.S. government official has made any public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know whether any government leaders of other countries have made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know whether any other stakeholders of the Military Commissions made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**The Physical Appearance of the Defendant – In the Courtroom**

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer 1</th>
<th>Answer 2</th>
<th>Answer 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did you see the defendant as he was being escorted into the courtroom?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did you see the defendant as he sat at the defense table in the courtroom?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was there anything about the defendant’s appearance that might suggest to</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td>Answer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>--------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant wearing a prison uniform in court, or was the defendant permitted to wear non-prison clothing of his choice?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant wearing shackles on his legs?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant was wearing shackles on his legs, could any member of the jury see the shackles?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Could any person in the NGO Observer Gallery see the shackles?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Could NGO Observers or members of the public viewing the proceedings by secure-video-link at Ft. Meade or elsewhere see the shackles?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant wearing handcuffs?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant was wearing handcuffs, were his hands cuffed in front of his body or behind his back?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>How many uniformed security officers were present in the courtroom guarding each defendant?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were there more than 4 uniformed security officers present in the courtroom for each defendant?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>How close to the defendants were the uniformed security guards sitting or standing?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Right to Remain Silent</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant exercise his right to remain silent during the course of the pre-trial hearings you observed?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge require the defendant to speak at any time?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge ask the defendant whether the defendant understood his right to be present or did the judge ask about any other right of the defendant? If so, did the defendant answer aloud? Did the judge require the defendant to answer aloud?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was there anything to suggest that the judge inferred guilt from the silence of the defendant?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant required to testify under oath?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge inform the jury that the jury must not draw any negative inferences from the defendants choice to remain silent?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
4. **Right to Have the Burden of Proof on the Prosecution (U.S. Constitution, 5th & 14th Amendment Due Process Clauses)**

<table>
<thead>
<tr>
<th><strong>Denying Defendant Access to Classified Information; Excluding Defendant from Portions of the Trial</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you know whether the defendant requested particular information from the prosecution and the prosecution refused to provide the information on the grounds that the information was classified?</td>
</tr>
<tr>
<td>If the prosecution refused to provide information to the defendant on the grounds that the information was classified, to the best of your knowledge was this denial in part due to the presumption of the presumption that the defendant was guilty, untrustworthy, or likely to be noncompliant with the law—even though the prosecution and the court are meant to presume that the defendant is not guilty and has not committed the crime charged?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Length of Pre-Trial Detention</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>How long was the defendant in detention pre-trial?</td>
</tr>
<tr>
<td>Does the length of pre-trial detention suggest that the defendant is not presumed innocent? Or, did the length of pre-trial detention suggest that the defendant was guilty?</td>
</tr>
<tr>
<td>Has the government indicated that if the defendant is acquitted of all charges, that the defendant <em>would be</em> released from Guantanamo Bay?</td>
</tr>
<tr>
<td>Has the government indicated that if the defendant is acquitted of all charges, that the defendant <em>would not be</em> released from Guantanamo Bay?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Role of Media</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you know whether any the media has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?</td>
</tr>
</tbody>
</table>

<p>| <strong>Does the burden of proof lie wholly on the prosecution throughout the process, for each crime charged?</strong> |
|---|---|---|---|
| Yes | No | Don’t Know | Comment |</p>
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the burden of proof lie wholly on the prosecution throughout the process, for each element of each crime charged?</td>
<td></td>
</tr>
<tr>
<td>Are the procedural rules in these proceedings such that the prosecution retains the full burden of proof?</td>
<td></td>
</tr>
</tbody>
</table>
B. Freedom from Retroactive Application of Criminal Laws (No Ex Post Facto Laws; Nullum Crimen Sine Lege; No Crime Without Law)

- **Freedom from retroactive application of criminal laws**, which is a longstanding principle incorporated in domestic and international penal systems, requires that a person can only be convicted of a crime pursuant to a law that was in place before the person engaged in the prohibited act. A person has to be put on notice that a certain behavior is prohibited, and given an opportunity to choose whether to engage in the act (commit the crime) or not. The person does not commit a crime if there is no applicable law at the time of the act, and the person cannot be convicted of a law enacted after the act.

  a. General

Both international law and U.S. domestic law prohibit the U.S. from trying a defendant for behavior engaged in before the behavior was criminalized. This prohibition is known variously as no “ex post facto law”, “nullum crimen sine lege”, or “no crime without law”, with all the terms meaning essentially that the government may not determine that a defendant’s behavior was unlawful after the defendant engaged in the behavior, but must have criminalized the behavior before the behavior. If no criminal statute prohibited the conduct at the time it was engaged in, there can be no prosecution—nullum crimen sine lege (no crime without law).

Article I, Section 9, Clause 3 of the U.S. Constitution bans ex post facto laws, that is, laws with retroactive effect.111

Article 15(2) of the ICCPR similarly provides that defendants have the right to freedom from retroactive application of criminal law, as does Article 11(2) of the Universal Declaration of Human Rights.

Customary international law also provides for the same prohibition of punishing a person for behavior that was not a crime at the time the person undertook the behavior.

The issue of an ex post facto Guantanamo Bay charge was decided in *al-Bahlul v. United States*, 840 F.3d 757, 758, (D.C. Cir. 2016) (en banc). The per curiam opinion in that case follows:

“**Per Curiam:**

Bahlul is a member of al Qaeda who assisted Osama bin Laden in planning the September 11, 2001, attacks on the United States. Bahlul was convicted by a U.S. military commission of the offense of conspiracy to commit war crimes, among other offenses. The U.S. Court of Military Commission Review affirmed Bahlul's conviction.

In a prior en banc decision, we recounted the facts and considered Bahlul's Ex Post Facto Clause objection to the conspiracy conviction. Applying plain error review, we concluded that the Ex Post Facto Clause did not preclude the conspiracy charge against Bahlul. See *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc).

In this en banc case, Bahlul argues that Articles I and III of the Constitution bar Congress from making conspiracy an offense triable by military commission, because conspiracy is not an offense under the international law of war.

We affirm the judgment of the U.S. Court of Military Commission Review upholding Bahlul's conspiracy conviction. Six judges — Judges Henderson, Brown, Griffith,

---

Kavanaugh, Millett, and Wilkins — have voted to affirm. Three judges — Judges Rogers, Tatel, and Pillard — dissent.

Of the six-judge majority, four judges (Judges Henderson, Brown, Griffith, and Kavanaugh) would affirm because they conclude that, consistent with Articles I and III of the Constitution, Congress may make conspiracy to commit war crimes an offense triable by military commission. They would uphold Bahlul's conspiracy conviction on that basis.

Judge Millett would apply plain error review and affirm Bahlul's conviction under that standard of review. She would not reach the question of whether Congress may make inchoate conspiracy an offense triable by military commission.

Judge Wilkins would affirm because he concludes that the particular features of Bahlul's conviction demonstrate that Bahlul was not convicted of an inchoate conspiracy offense. He further concludes that Bahlul's conviction complies with the Constitution because the particular features of Bahlul's conviction have sufficient roots in international law. He therefore would not reach the question of whether Congress may make inchoate conspiracy an offense triable by military commission.

Judges Rogers, Tatel, and Pillard have filed a Joint Dissent. They conclude that Article III of the Constitution bars Congress from making inchoate conspiracy an offense triable by a law-of-war military commission.

Bahlul has also raised First Amendment and Equal Protection challenges to his conviction. The Court rejects those challenges. See Kavanaugh Concurring Op. at 770 n.12; Millett Concurring Op. at 775, 796-97; Wilkins Concurring Op. at 804. The Joint Dissent neither reaches those claims nor adopts the above characterization of the facts.

* * *

We affirm the judgment of the U.S. Court of Military Commission Review upholding Bahlul's conspiracy conviction.

So ordered.

Law review articles that discuss this topic include [to be added to Volume II Appendix]:

1. David Bonner, Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Rights.


[This section on retroactive application of criminal laws is not yet completed. More analysis forthcoming.]

<table>
<thead>
<tr>
<th>5. Freedom from Retroactive Application of Criminal Laws (No Ex Post Facto Laws; Nullem Crime Sine Lege; No Crime Without Law) (ICCPR, art 15(2)).[112]</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Was the law applied or to be applied in this case in force at the time of the alleged commission of the crime?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the charged act punishable by law at the time it was allegedly committed?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the crime charged violate international law at the time the alleged offence was committed?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the crime charged violate domestic U.S. law at the time the alleged offence was committed?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the crime charged violate domestic U.S. law at the time the alleged offence was committed?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is the crime charged a violation of the law of war, i.e., a war crime?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[112] The right to be free from retroactive application of criminal laws is also provided for in the following international instruments: Article 11(2); European Convention, Article 7(1); American Convention, Article 9; African Charter, Article 7(2); and ICC Statute, Article 22(1).
C. Freedom from Double Jeopardy (Ne Bis In Idem).\textsuperscript{113}

The right to freedom from double jeopardy prohibits a government from trying a person more than once for the same crime. Once a person is acquitted (or convicted) of a crime in an international or domestic court that person cannot be tried again, in the original court or another court, for the same criminal offence.

a. General

International and domestic U.S. law provide for the right to freedom from double jeopardy. For example, the Article 14(7) of the ICCPR provides:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Furthermore, the Fifth Amendment to the U.S. Constitution provides:

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb

Thus, the U.S. is prohibited from placing on trial a Guantanamo Bay detainee for a crime if that detainee has already been tried for the same alleged behavior. Once a Guantanamo Bay detainee is acquitted (or convicted) of a crime that person cannot be tried again, in the original court or another court, for the same criminal offence.

It is believed that no Guantanamo Bay detainee has been tried before a non-U.S. court or tribunal for any behavior that falls within the jurisdiction of the Military Commissions. Thus, the issue of whether to honor an overseas conviction will not arise.

However, it is possible that the U.S. government may convene a Military Commission against a defendant, dismiss the Military Commission, then seek to convene a new Military Commission against that same defendant based on similar or identical alleged conduct. A question would arise as to whether jeopardy "attached" in the earlier Military Commission, barring a subsequent Military Commission. In 2004, Australian detainee David Hicks was arraigned at a Guantanamo Bay Military Commission. The 2006, while those charges against Hicks were still pending, the U.S. Supreme Court ruled that the Military Commission system under which Hicks was charged was unlawful. That Military Commission system was scrapped and a new system was created pursuant to the Military Commission Act of 2006, under which Hicks was again charged. Was the U.S. prohibited from prosecuting Hicks following the dismissal of charges in his earlier Military Commission?

Another general double jeopardy question would concern the level of overlap between the charges / alleged criminal conduct in the first and second prosecutions. For example, in the International Criminal Tribunal for the former Yugoslavia, a defendant may be prosecuted, and convicted, of multiple offenses involving essentially the same underlying criminal behavior if the elements of the offenses differ.\textsuperscript{114}

Binding Treaties that discuss Non Bis in Idem include Geneva Convention III, Article 86; ICCPR, Article 14(7); ICTY Statute, Article 10; ICTY R. P. & Evid. Article 13, ICTR Statute, Article 9

\textsuperscript{113} The Fifth Amendment to the U.S. Constitution provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

\textsuperscript{114} See, e.g., Zoran Kupreškid et al., Case No IT-95-16-T, Trial Judgment, 14 Jan. 2000.
Non-Binding treaties that discuss non bis in idem include ICC Statute, Article 20; Statute of the Special Court of Sierra Leone (Article 9); Geneva Convention Protocol 1; Article 75(h); American Convention on Human Rights, Article 8(4); ECHR Protocol 7, Article 4

Other International Instruments that discuss Non Bis in Idem include Schengen Convention, Article 54; Arab Charter on Human Rights, Article 19

Laws of Other Countries that discuss non bis in idem include: Canadian Charter of Rights and Freedoms (Article 11(h)); Constitution of the Federal Republic of Germany (Article 103); Constitution of Japan (Article 39); Constitution of India (Article 20(2)); Constitution of Mexico (Article 23); Constitution of the Republic of Macedonia (Article 14); Constitution of the Republic of Paraguay (Article 17(4)); Constitution of Papua New Guinea (Section 37(8)–(9)); Constitution of the Portuguese Republic (Article 29(5)); Constitution of the Russian Federation (Article 50(1)); Constitution of the Republic of South Africa (Ch. 3, § 25(3)(g)); Constitution of the Republic of South Korea (Article 13(1)); Constitution of the Solomon Islands, (§ 10(5)–(6)); and New Zealand Bill of Rights 1990 (Section 26(2)).

International Cases that discuss non bis in idem include: ICCPR Article 14(7) “prohibits double jeopardy only with regard to an offence adjudicated in a given State.” A.P. v. Italy Communication, 204/1986 (16 July 1986); ICCPR Article 14(7) “proscribes re-trial or punishment for an offence for which the person has already been convicted or acquitted.” Jijon v. Ecuador Communication, 277/1998 (4 August 1992); "[N]e bis in idem is triggered under the ICTY statute only when a person has 'already been tried.'" Prosecutor v. Tadic, Case No. IT-94-I-T (14 November 1995); "The purpose underlying the ne bis in idem principle [in Rome Statute 20] is to ensure that a person is not unfairly retried on accusations that have been fully adjudicated by a court on a previous occasion." Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11 (10 February 2014).

U.S. Constitution, Fifth Amendment addresses non bis in idem.


U.S. Supreme Court cases that discuss Non Bis in Idem include: "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969), overruling Palko v. Connecticut, 302 U.S. 319 (1937); Interests embodied in Double Jeopardy Clause are: (1) principle that state with all its resources and power should not be allowed to make repeated attempts to convict individual for alleged offense, and (2) interest in preservation of finality of judgments. Yeager v. U.S., 557 U.S. 110, 117-18 (2009); "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. U.S., 284 U.S. 299, 304 (1932) (citing Gavieres v. U.S., 220 U. S. 338, 342 (1911)).

U.S. Non-Supreme Court cases the discuss Non Bis in Idem include: "

The Guantanamo Bay Military Commission case of U.S. V. al Nashiri issued parallel rulings touching on double jeopardy in February 2017. Both cases dealt with multiplicitous charges against al Nashiri, and regarding both charges the court found that though the doctrine of multiplicity of charges is rooted in the U.S. Constitution’s protection against double jeopardy, double jeopardy protection extends to protection against being subjected to two punishments for the same offense, and does not protect against being charged multiple times for the same offense.115

The parties agree that the doctrine of multiplicity is rooted in the Constitutional protection against Double Jeopardy, which precludes an Accused from being subjected to two punishments for the same offense. See U.S. Const. amend. V; see also United States v. Sanford, Ltd., 859 F. Supp. 2d 102, (D.D.C. 2012) ("[t]he primary evil of multiplicitous charges is that a defendant will be punished twice for the same offense.") However, as the Second Circuit stated.

---

115 Ruling on Defense Motion To Dismiss Charge VII (Attacking Civilian Objects) For Multiplicity (AE235D), 6 February 2017. The same language is contained in Ruling on Defense Motion to Dismiss Charge VII (Attacking Civilian Objects) For Multiplicity (AE235D), 6 February 2017.
[w]here there has been no prior conviction or acquittal, the Double Jeopardy Clause does not protect against simultaneous prosecutions for the same offense,116

The legislative history reveals that [18 U.S.C. § 4111 (2015)] ‘provides the offender with the same protection against double jeopardy that he would have had had he been sentenced by the court of the jurisdiction seeking to prosecute him.” U.S. v. Patterson, 812 F.2d 1188, 1191 (9th Cir. 1987); “The statute requires us to hypothesize that the first sentence was imposed by a United States District Court. The transfer of Patterson from Mexico to the United States should be analyzed as if it were a transfer between two United States federal courts, not two sovereigns.” Id. at 1191.

[This section on double jeopardy is not yet completed. More analysis forthcoming.]

6. Freedom from Double Jeopardy (U.S. Constitution, 5th Amendment; ICCPR, article XXX)

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Was the defendant previously tried in a non-U.S. court of law on similar or identical criminal charges? If so, was the specific conduct alleged in the earlier prosecution similar or identical to the specific conduct alleged in the later prosecution?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant previously prosecuted in a Guantanamo Bay Military Commission?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant was previously prosecuted in a Guantanamo Bay Military Commission, what is the date of that prosecution? Under what set of Military Commission rules was the first prosecution?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant was previously tried on similar or identical criminal charges, with identical or similar facts underlying the charges, what court was it and what was the outcome of the trial?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

116 The Military Commission cited the following:

[Page Intentionally Blank]
D. Right to Trial by an Independent, Impartial and Competent Tribunal

The right to trial by an independent, impartial and competent tribunal is fundamental to the right to a fair trial. Criminal trial stakeholders will be denied a fair trial if the judge, judicial officers, other actors in the criminal justice system or indeed the criminal justice system itself is incompetent, biased, or subject to improper influences.

The judge, court staff, jury, prosecutor, and others associated with the tribunal not only must be independent, impartial and competent, but also they must be seen to be independent, impartial and competent.

[See Appendices N & O for two Rulings on Executive Branch Undue Influence on the Trial Judiciary – March & February 2015 and one Ruling on Undue Influence of February 2017]

a. General

International and domestic U.S. law prescribes the nature of courts in which criminal trials are held, and further, the ability of judges and judicial officers to be independent, impartial and competent in performing their duties. International and domestic law place high demands on the court, and in the case of Guantanamo Bay, a high demand on the Military Commission and the Commissions personnel, all who are charged with ensuring that every stakeholder receive the fair trial to which they are entitled.

b. Basic Principles on the Independence, Impartiality, and Competence of the Judiciary

**Independence of the Judiciary:**

It is the duty of all governmental and other institutions to respect and observe the independence of the Judiciary. The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law without any restrictions, improper influences, inducements, pressures, threats or interferences both direct and indirect, from any quarter or for any reason.

**Impartial Judiciary:**

Fair and impartial judiciaries are the cornerstones of any legitimate legal system. Impartiality is an objective check on the judicial system in use and on and the actors involved. It is internationally recognized that an impartial judiciary is essential in order to preserve a fair trial for the accused. Human beings have the right to an effective remedy by the tribunal, for alleged criminal acts, a right fundamentally granted to him by law.

**A competent tribunal is one in which a judge is:**

- Properly Trained
- Possesses Adequate Knowledge and Experience
- Able to Carry Out Judging and Judicial Duties with a High Degree of Skill
- Able to Control the Courtroom
- Able to Carry Out Duties with High Degree Professionalism

In order to demonstrate to the international community a high level of competence a Military Commission Judge must be able to execute duties meritoriously and to the highest possible standard available.
c. Binding Treaties which call for Independent, Impartial and Competent Tribunals

- International Covenant on Civil and Political Rights (ICCPR)
- International Criminal Tribunal for the Former Yugoslavia (ICTY)
- International Criminal Tribunal for Rwanda (ICTR)

The right to trial by an independent, impartial and competent tribunal established at law can be found firmly embedded in the “judicial guarantees which are recognized as indispensable by civilized peoples” provided for in International Covenant on Civil and Political Rights (ICCPR) art 14(1)117 and, though not binding, generally accepted by the international community Common Article 3 of the Geneva Conventions118. In each of the international instruments, you will find a clear reference to the requirement to afford the accused a “independent, impartial, and competent trial.”

International Covenant on Civil and Political Rights (ICCPR) article 14(1) expressly calls for a “competent, independent and impartial tribunal”, as follows:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Common Article 3 of the Geneva Conventions prohibits:

> “[T]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

International Criminal Tribunal for the Former Yugoslavia (ICTY)

> Article 13 – Expressly calls for the qualifications of Judges;
> “... [S]hall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.”

> Article 20 – Commencement and Conduct of Trial Proceedings
> “[T]hat proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused ...”

International Criminal Tribunal for Rwanda (ICTR)

> Article 12 – Qualification and Election of Judges
> “Judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.”

---

117 ICCPR article 14 applies to all U.S. criminal courts, including the Guantanamo Bay military commissions. The U.S. is not permitted to deviate from ICCPR requirements due to any special nature or character of the military commissions, as compared to a U.S. federal or state court. See General Comment No. 32, infra, note xyz, para abc (citing Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, art. 64; General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 11 (2004).

118 Common Article 3 does not expressly use the terms “independent”, “impartial” or “competent”, but it does require that criminal courts must afford “all the judicial guarantees which are recognized as indispensable by civilized peoples”, with those judicial guarantees being found to include a competent, independent and impartial tribunal.
Article 19 – Commencement and conduct of trial proceedings
“[T]hat proceedings are conducted in accordance with the rules of procedure and evidence ...”

d. Non-binding treaty that calls for Independent, Impartial and Competent Tribunals

e. Binding Customary International Law Norms calling for Independent, Impartial and Competent Tribunals can be found incorporated into the following international treaties

- American Convention On Human Rights “Pact of San Jose, Costa Rica”
- European Convention On Human Rights
- Rome Statute of International Criminal Court (ICC)
- Geneva Convention: Protocol I & II
- Charter of Fundamental Rights of European Convention
- African (Banjul) Charter On Human and Peoples Rights

Customary international law principles, incorporated into many non-binding international law instruments, and as interpreted in international and domestic jurisprudence, call for independent, impartial and competent tribunals:

119 Rome Statute of International Criminal Court (ICC)

Article 36 – Qualifications, Nomination and Election of Judges

“The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required ...”

“Have established competence in criminal law and procedure, and the necessary relevant experience ...”

“Have established competence in relevant areas of international law ...”

Article 40 – Independence of the Judges

“The Judges shall be independent in the performance of their functions. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.”

Article 45 – Solemn Undertaking

“Before taking up their respective duties ... Shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.”

Article 67 – Rights of the Accused

“[T]he accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially ...”

120 The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is incorporated into the following international instruments: UDHR, Article 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”); Principles on the Independence of the Judiciary, Principle 2 (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”); American Convention, Article 8(1); and European Convention, Article 6(1).

American Convention On Human Rights “Pact of San Jose, Costa Rica”

Article 8 – Right to a Fair Trial
“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law ...”

European Convention On Human Rights

Article 6 – Right to a Fair Trial
“... [E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Geneva Convention - Additional Protocol I, expressly requires an “impartial” court, as follows:

Article 75 – Fundamental Guarantees
No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

Geneva Convention - Additional Protocol II, article 6(2) specifically requires “essential guarantees of independence and impartiality, as follows:

Article 6 – Penal Prosecutions
No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.

Charter of Fundamental Rights of European Convention

Article 47 – Right to an Effective Remedy and to a Fair Trial
“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”

African (Banjul) Charter On Human and Peoples Rights

Article 7
“... [R]ight to an appeal to a competent national organ against acts ...”
“... [R]ight to be presumed innocent until proved guilty by a competent court ...”
“... [R]ight to be tried within a reasonable time by an impartial court or tribunal.”

f. U.S. Statutory Law calling for Independent, Impartial and Competent Tribunals

• United States Constitution
• U.S. Supreme Court
• Military Commission Act of 2009, § 949b,122

122 § 949b is titled “Unlawfully Influencing Action of Military Commission and United States Court of Military Commission”. Section 1-4 of the Regulation for Trial by Military Commissions interprets § 949b and provides:

1-4. Unlawful Influence in Military Commissions Proceedings
10 U.S.C. § 949b, prohibits unlawful influence in military commissions proceedings. All persons involved in the administration of military commissions must avoid the appearance or actuality of unlawful influence and otherwise ensure that the military commission system is free of unlawful influence. In addition, all persons, even those not officially
Almost every binding and non-binding source of international law discussed incorporates some form of Judicial independence, impartiality and competence. Therefore, the international community has accepted these basic common human rights afforded to an accused. Further, the International Community acknowledges the right to be tried by competent Judges who are both independent and impartial to the judiciary they are assigned.

U.S. Constitution

Sixth Amendment
“The Sixth Amendment guarantees the rights of criminal defendants, including the right to a public trial without unnecessary delay, the right to a lawyer, the right to an impartial jury, and the right to know who your accusers are and the nature of the charges and evidence against you.”

U.S. Supreme Court

The Supreme Court rejected a Due Process challenge to the lack of fixed terms for military judges because the; “...[A]pplicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve impartiality so as to satisfy the Due Process Clause.”123

Military Commissions Act of 2009

948d. – Jurisdiction of Military Commissions
“A military commission is a competent tribunal to make a finding sufficient for jurisdiction.”

948k. – Trial Counsel
“... [A] trial counsel detailed for a military commission under this chapter shall be ... [C]ertified as competent to perform duties as trial counsel ...”
“... [A] civilian who is ... a member of the bar of a Federal Court ...”

948k. – Defense Counsel
“[A] military defense counsel detailed for a military commission ... Certified as competent to perform duties as defense counsel ...”

Uniform Code of Military Justice (UCMJ)

Article 37 – Unlawfully Influencing Action of Court
“[N]o person subject to this chapter may attempt to coerce or by any unauthorized means, influence the action of a courts martial or any other military tribunal or any member thereof ...”

Other MC Documents

involved in the commissions process, should be sensitive to the existence, or appearance, of unlawful influence, and should be vigilant and vigorous in their efforts to prevent it.

“[R]equest abatement of proceedings until such time as the Department of Defense establishes and independent trial judiciary ...”124

g. Independence of Tribunal; including the Judge, court staff, the Prosecution, the Jury, and others associated with the Military Commissions such as personnel assigned to the defense

To determine whether the Military Commissions are independent, one should look to two sets of criteria: 1) criteria related to the appointing, assessing and retaining of Military Commission Judges; and 2) whether Military Commission judges are free from undue external influences.125 If the Military Commissions do not satisfy either of these two tests, then they will not be deemed independent.

i. Independence related to appointing, assessing and retaining judges

International law and domestic U.S. law require courts to have in place objective and transparent criteria for selecting, paying, retaining, promoting, transferring, suspending, and removing judges.126 Objective, fair standards should be in place to determine who is eligible to be a judge, what the selection criteria is, how the judge’s performance is evaluated, and how and when any rewards or disciplinary sanctions are provided.127

Even judges who are appointed with life tenure do not have unfettered discretion, and under international and domestic U.S. law should be subject to removal with a showing of good and just cause, following due process.128 Similarly, no higher authority should be permitted to remove judges from proceedings once they have commenced, except for good and just cause.129 Rule 505(e)(1) permits the Military Commission Chief Trial Judge to remove a judge from a case, without cause, at any point in the proceedings up until the jury is sworn.130 However, the MCA of 2009 prohibits the Convening Authority from assessing a trial judge’s effectiveness, fitness or efficiency.131

ii. Independence From Undue External Interference; on the Judge, court staff, the Prosecution, the Jury, and others associated with the Military Commissions such as personnel assigned to the defense132

The U.S. is obligated to protect judges from any form of political influence in their decision-making. Though the Military Commissions are part of the U.S. military, which is part of the Executive Branch of the U.S. Federal Government, a clear distinction must be drawn between them. On the one hand, the role

124 United States v. Abd Al Hadi Al-Iraqi

125 Commentators may “link” the judicial independence and impartiality prongs. See, e.g., Frakt, pp 563 – 64; 562-70.

126 General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, United Nations Human Rights Committee, UN Doc CCPR/C/GC/32 (23 August 2007) (citing Human Rights Committee Concluding Observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.)

127 See id.


129 See id.

130 Military Judges have been removed with replacements assigned several times in the Military Commissions. For example, in June 2014 Chief Trial Judge Pohl, who had assigned himself to preside over the al Nashiri and had done so since proceedings were commence in 2008, removed himself from that case and assigned a new Military Judge to that case.

131 10 U.S.C. 948(j).

132 Appendices N & O – Two Rulings on Executive Branch Undue Influence on the Trial Judiciary – March & February 2015
and authority of the U.S. military chain of command (which requires subordinates to follow orders of superiors), and on the other hand, the Military Commissions as a judicial organization.

The Military Commission is not independent of the Executive Branch (e.g., the President or Vice-President, the Secretary of Defense, or Officers through the military chain of command) can exercise control over Military Commission Judges, Military Commission staff, Military Commission Jurors (who are all military officers), others associated with the Military Commissions such as personnel assigned to the defense, or the Military Commissions itself through some other means or method. The rights that apply in regular U.S. courts should also apply in U.S. Military Commissions.133

1. Example of undue influence and a challenge to the judiciaries independence was litigated in the 911 hearings and the Al Nashiri hearings under motions listed as AE343 and AE332 respectively.

**Change #1**

On 9 December 2014, the Convening Authority successfully lobbied the Deputy Secretary of Defense to amend the Regulation for Trial by Military Commission (R.T.M.C.) in order to make military commissions the exclusive duty of the military Judges. The new rule would Require Judges to be stationed at and live on the military installation at Guantanamo Bay, Cuba.

The order stated that Judges; “shall be issue assignment orders for duty at the venue where the military commissions are to be convened.” The stated reason for altering the regulation by trial judiciary was “to accelerate the pace of litigation[.]” This change, and undue influence argument became known as “Change #1”.135

**Defense Argues**

The Defense teams requested and sought relief against Change # 1 change and argued that the charges against the Defendants should be dismissed based on “Undue Influence.”136

They further argued that the express purpose of this rule change is to affect the conduct of this case by “accelerate[ing] the pace of litigation,” regardless of the government’s actions in disrupting the case and its strategy of denying, delaying, and degrading discovery. The actions of both the Deputy Secretary of Defense and Convening Authority constitute actual and apparent unlawful influence over the trial judiciary, the “mortal enemy of military justice.”138

**The Court’s Order**

---

133 See General Comment No. 26, supra note xyz, para abc. (citing Communication No. 468/1991, Oló Bahamonde v. Equatorial Guinea, para. 9.4.)

134 General Comment No. 32, supra note xyz, para abc (citing See UN Human Rights Committee Communication No. 1172/2003, Madani v. Algeria, para. 8.7.)

135 AE343 (Mohammad, bin ‘Atash, bin al Shibh, al Baluchi); Defense Motion to Dismiss For Unlawful Influence on Trial Judiciary, 30 January 2015; AE343B (Mohammad, bin ’Atash, bin al Shibh, al Baluchi); Joint Defense Reply To Government Response To Defense Motion To Dismiss For Unlawful Influence on Trial Judiciary, 20 February 2015; AE343C – Ruling; Defense Motion to Dismiss For Unlawful Influence on Trial Judiciary, 25 February 2015; AE343D – Government; Government Notice of Rescinding of Change 1 of the Regulation for Trial by Military Commission, 27 February 2015; AE343E – Order; Defense Motion to Dismiss For Unlawful Influence on Trial Judiciary (Denied), 27 February 2015; AE343F Part I-5 - Mohammad et al.; Joint Defense Motion to Disqualify the Convening Authority Due to Unlawful Influence (Granted in part)- 10 March 2015.


137 AE343

Though the Court did not dismiss the case, Colonel Vance H. Spath, the Presiding Judge assigned the case, ordered abatement of the proceedings until a new Convening Authority could be assigned. In his final order, Judge Spath stated:

“The actions by the DEPSECDEF, on the recommendations of the Convening Authority, constitute, at least the appearance of, an unlawful attempt to pressure the Military Judge to accelerate the pace of litigation and an improper attempt to usurp judicial discretion; thereby, compromising the independence of the Military Judge. As such, Change I to R.T.M.C. violates 10 U.S.C. §949b.”

“The Commission believes the only real remedy is to return to the status quo ante before the issuance of Change I. Accordingly, the Commission orders ABATEMENT of the proceedings in this case until Change I to R.T.M.C. is rescinded by proper authority.”

iii. Chain of Command – Independence

The U.S. military operates under the “chain of command”, in which military personnel are obligated to obey orders from those who rank above them in the military hierarchy, all the way up to the Commander in Chief, the President of the United States. All Guantanamo Bay military judges, prosecutors, defense counsel and other personnel associated with the U.S. Military Commissions are obligated to obey orders of higher authorities.

However, each of these individuals has obligations of as “Officers of the Court” or “Officers of the Military Commissions.” The military judge is obligated to carry out his responsibilities independently and impartially. The prosecutor is loyal to his client, the U.S. government, and must zealously carry out his representation on behalf of the U.S. Defense counsel is obligated zealously to represent his client, the Guantanamo Bay detainee. Defense counsel must among other things, keep confidential material he receives or information he learns from his client in the course of his representation.
Though the military judge, prosecutors and defense counsel may all be military personnel, none of them is permitted to follow instructions from superiors within their military chain of command, if those instructions would force a compromise in their obligations to the court or to their clients.

h. Impartiality of the Military Commissions and of Military Commission Judges

For the Military Commissions and Military Commission Judges to be deemed impartial, they must be (a) free from exercising any actual bias or prejudice (subjectively impartial); and (b) free from the appearance of impartiality (objectively impartial).

Impartiality could be manifested in numerous ways, including: inequitable treatment of the prosecution versus the defense; disparate and inequitable application of Military Commission rules; favoritism on discretionary matters; improperly holding lawyers, defendants, witnesses, NGO Observers, media or others in contempt; general favoritism; or the appearance of any of these manifestations of impartiality.

i. Actual Bias or Prejudice (Subjective Impartiality)

Military Commission judges must operate under a high standard that prohibits them from taking actions based on bias for or against the defendant, for or against the prosecution, or for or against any other military commission stakeholder, for example, witnesses, the press, or the general public. The obligation of the judge is to honor the law and fulfill his obligations without favor.

Military Commission judges “must not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.”140

ii. Appearance of Bias or Prejudice (Objective Impartiality)

The Military Commissions and their judges “must also appear to a reasonable observer to be impartial.”141

1. Example of the appearance of bias or prejudicial behavior occurred during hearings in the case of Al Nashiri, which were held in October of 2016.

During hearings the Defense Counsel for Al Nashiri argued that the military’s Convening Authority was biased and unduly prejudicial when releasing Lieutenant Commander Gill from his position as legal advisor. Gill was the only legal advisor authorized to work on the Al Nashiri case after Change #1 was revoked and all remaining legal advisors were removed.

Shortly after the revocation of Change #1, Gill began complaining to superiors at the Convening Authority that his first line supervisors continued to review the Al Nashiri case in violation of the Judge’s order.142 Subsequently Lieutenant Commander Gill was removed from his position even though he had approximately nine months left on his assignment orders.

Defense argues that Lieutenant Commander Gill was unjustly removed from his position as the only Legal Advisor on the Al Nashiri case because his supervisor was bias and prejudicial against him. Through testimony, the Defense has examined officials at the Convening Authority and Gill’s first line supervisor. During those examinations the Defense has focused on the issue that Gill was removed

---

140 General Comment No. 32, id at para xyz. (citing UN Human Rights Committee Communication No. 387/1989, Karttunen v. Finland, para. 7.2.)

141 Id.

142 Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 10/19/2016 from 9:13 AM to 9:46 AM.
without any documented cause or just reason. As of December 2016, hearings and witness examinations continue with regard to Gill’s removal.¹⁴³

i. Competent Tribunal

A competent tribunal is one in which the judge is properly trained, has adequate and appropriate knowledge and experience, is able to carry out substantive judging responsibilities with a high degree of skill and capability, is able to control the courtroom including its decorum and operation, and actually carries out judging responsibilities with a high degree of skill and capability and professionalism.

For a military commission tribunal to be deemed competent not only must the judges possess the requisite qualifications and abilities, the judges must also execute their charges meritoriously, to a very high standard.

A trial judge would be deemed incompetent if she: fails to grasp governing law; is overly forgetful; cannot effectively control the courtroom and its decorum; is unable to exercise control over the parties to the proceedings outside of the courtroom or exercise subpoena or other control over actors such as detention facility personnel, custodians of records, or witnesses; or is unwilling or unable to rule on motions in a timely fashion. A trial judge would be deemed incompetent if he has extreme difficulty in making decisions, and is unable to communicate his decisions in a well-reasoned manner, orally and in writing.

[This section on independent, impartial and competent tribunal is not yet completed. More analysis forthcoming.]

Office of Military Commissions Organizational Chart

<table>
<thead>
<tr>
<th>7. Right to Trial by an Independent Tribunal (Military Commission Act of 2009, § 949b; ICCPR, art 14(1))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Independence of the Judge &amp; Court</td>
</tr>
<tr>
<td>When was the judge assigned to the case?</td>
</tr>
<tr>
<td>When is the judge’s temporary assignment set to expire?</td>
</tr>
<tr>
<td>Was the judge in the case removed, and a new judge assigned as a substitute?</td>
</tr>
<tr>
<td>If the judge in the case was removed, and a new judge assigned as a substitute, was a reason given for the removal / substitution?</td>
</tr>
<tr>
<td>If the judge in the case was removed, a new judge assigned as a substitute, and a reason given for the removal / substitution, what was the reason?</td>
</tr>
<tr>
<td>If the judge in the case was removed, and a new judge assigned as a substitute, did the removal / substitution take place before the jury was sworn?</td>
</tr>
<tr>
<td>If the judge in the case removed and a new judge was assigned as a</td>
</tr>
</tbody>
</table>

¹⁴³ Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 12/12/2016 from 11:01 AM to 12:34 PM.
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did either the prosecution or defense conduct voir dire on the judge to seek to ascertain the level of the judge’s independence?</td>
<td></td>
</tr>
<tr>
<td>Was the judge in the case removed?</td>
<td></td>
</tr>
<tr>
<td>Were you aware of any financial considerations might give rise to actual or an air of lack of independence of the judge, for example, where a judge’s decisions might be or be seen to be influenced by expected remuneration based on non-removal or reappointment?</td>
<td></td>
</tr>
<tr>
<td>The GTMO courtroom has a 40-second delay in transmitting courtroom audio to NGO Observers sitting behind a glass wall. If a trial participant mentions classified information, the judge may flash a red light to signal that the audio will be cut to the Observers. Did the court appear to be in control of the 40-second audio delay and red light? Did it appear as though individuals aside from the judge or the court security officer caused the red light to flash and the audio to stop transmitting to the NGO Observers?</td>
<td></td>
</tr>
<tr>
<td>Was the judge in the case removed?</td>
<td></td>
</tr>
<tr>
<td>Were you aware of any financial considerations might give rise to actual or an air of lack of independence of the judge, for example, where a judge’s decisions might be or be seen to be influenced by expected remuneration based on non-removal or reappointment?</td>
<td></td>
</tr>
<tr>
<td>The GTMO courtroom has a 40-second delay in transmitting courtroom audio to NGO Observers sitting behind a glass wall. If a trial participant mentions classified information, the judge may flash a red light to signal that the audio will be cut to the Observers. Did the court appear to be in control of the 40-second audio delay and red light? Did it appear as though individuals aside from the judge or the court security officer caused the red light to flash and the audio to stop transmitting to the NGO Observers?</td>
<td></td>
</tr>
<tr>
<td>Independence of the Prosecutor</td>
<td></td>
</tr>
<tr>
<td>Was there any indication that the Chief Prosecutor was not fully independent?</td>
<td></td>
</tr>
<tr>
<td>Independence of any Guantanamo Bay actor</td>
<td></td>
</tr>
<tr>
<td>Were you aware of whether the Department of Justice or other entity outside of the prosecution exerted influence of the prosecution on a decision whether to charge a particular offense, to charge an offense in a particular way, to drop a charge against a defendant, to appeal an adverse ruling, or regarding any other matter?</td>
<td></td>
</tr>
</tbody>
</table>
Were you aware of any incident in which a Military Commission staff member was subject to undue influence by the Department of Justice or any other entity outside of the court staff?

Were you aware of an instance in which the Department of Justice or other entity outside of the defense exerted influence on a person assigned to work for a defense team that might compromise that person’s ability to perform their work independently?

Were you aware of any individual or entity exerted or sought to exerts any undue influence upon a Military Commission jury member?

Were you aware of any air of non-independence on the part of the judge, the Military Commission staff, the prosecution, the jury, an person assigned to work for the defense, or any other person associated with the Military Commission?

Were you aware of any financial considerations might give rise to actual or an air of lack of independence of any Military Commission personnel, for example, where that person’s decisions might be or be seen to be influenced by expected remuneration?

---

### 8. Right to Trial by an Impartial Tribunal (Military Commission Act of 2009, § 949b; ICCPR, art 14(1))

Did any party challenge the judge or any judicial officer on the ground of lack of impartiality? If so, what was the outcome of the challenge?

Did the judge appear to be even-handed, as between the prosecution, defense and other actors?

Did the judge offer all relevant stakeholders an opportunity to be heard on motions and other matters before the court?

Did it appear as though the judge considered the law carefully, and ruled on motions without bias or favor towards any side?

Did the judge make discriminatory comments about any party as to race, color, language, religion, political or other opinion, national or social origin, property, birth or other status?

Were you made aware of any suggestion that the judge or any judicial officer had an interest in the case beyond their traditional role of presiding over the case?

Was there any suggestion that the judge or any judicial officer was motivated by financial gain, political aspirations, or other improper motives in presiding over the case or in any rulings in the case?
<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the judge make any statements or take any actions that might suggest that the judge was biased <em>in favor of</em> the defendant(s)?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge make any statements or take any actions that might suggest that the judge was biased <em>against</em> the defendant(s)?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any ex parte contacts between / among Military Commission stakeholders (e.g., inappropriate contacts between / among the prosecution, the judge, courtroom staff, the defense, family members of the victims, witnesses) that might reflect lack of impartiality on the part of the judge?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the judge have any extraordinary relationship with the Convening Authority, the Secretary of Defense, the White House or other relevant officials?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge act towards the defendant, defense counsel, prosecution, witnesses, the press, NGO Observers, victims or family members of victims, aggressively or in an intimidating or otherwise inappropriate manner?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

9. **Right to Trial by a Competent Tribunal (Military Commission Act of 2009, § 949b; ICCPR, art 14(1))**

<table>
<thead>
<tr>
<th>Competence of the Court</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the prosecution, defense, or other stakeholders challenge the competence of the judge?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the prosecution, defense, or other stakeholder challenged the competence of the judge, what was the outcome of the challenge?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the prosecution, defense, or other stakeholders challenge the competence of other judicial officers or staff?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the prosecution, defense, or other stakeholder challenged the competence of other judicial officers or staff, what was the outcome of the challenge?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did you witness any signs of incompetence on the part of the judge?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge when presiding over the courtroom appear to be competent?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td>Answer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------------------------------------------------------------------------------------------</td>
<td>--------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge exercise proper control over the courtroom and proceedings?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge appear to be knowledgeable?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge appear to act rationally?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge explain all to the defendant matters in a manner calculated for the defendant to understand?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is it your impression that the Military Commission is deciding motions or has decided motions in a timely fashion?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any complaints that the Military Commission is slow in deciding motions or has difficulty making decisions?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are the judge’s oral and writing ruling well-reasoned, reflection a solid command of the law and facts of the case?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are the rulings of the court clear, firm, direct and / or unambiguous?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are the judge’s oral comments and questions in open court clear?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Based on your observations, how would you describe or rate the judge’s communication skills?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did it appear as though the judge was able to follow applicable rules regarding Military Commission procedure?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**General Powers of the Judge and Court**

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the judge issue or threaten to issue any contempt orders?</td>
<td></td>
</tr>
<tr>
<td>Did the judge exercise any subpoena power?</td>
<td></td>
</tr>
<tr>
<td>Did the judge exercise appropriate authority over Guantanamo Bay detention facility staff (JTF-GTMO) regarding conditions of detention or other matters related to the defendants?</td>
<td></td>
</tr>
<tr>
<td>Did the judge appear to pressure the prosecution, defense, or defendant into speeding up the case for scheduling purposes?</td>
<td></td>
</tr>
<tr>
<td>Did you learn of any disputes or tension between / among the judge, court staff, security guards, or detention facility staff? If so, were they resolved? How were they resolved?</td>
<td></td>
</tr>
</tbody>
</table>
E. Right to Effective Assistance of Counsel

The **right to effective assistance of counsel** demands that defendants be afforded counsel of defendant’s choosing, who is able to assist the defendant in preparing his defense. The counsel must be permitted tools of assistance, including adequate facilities, and the cloak of attorney client privilege. The defendant and counsel must be able to communicate with each other to further the goal of preparing a defense. If there is a possibility of the defendant being charged with a capital offense, a death penalty mitigation specialist should be appointed to help persuade the Convening Authority not to charge a death penalty crime. If a death penalty crime is charged, the defendant is entitled to an appointed mitigation specialist to gather and present information to the jury on the question of whether the death sentence should be imposed if there is a conviction. Right to counsel includes the right to be represented before and during trial, and the right attaches no later than once adversarial proceedings have begun.

[The right to effective assistance of counsel introductory section is being developed further. An Indiana University McKinney School of Law student is researching this topic.]

a. General

International and domestic law provide that a criminal defendant is entitled to effective assistance of counsel to help him prepare his defense before and during trial, and to assist with an appeal if there is a conviction. The right to effective assistance of counsel is an umbrella right that envelopes, overlaps and relates to rights such as the right to communicate with counsel of his own choosing; the right to adequate time and facilities to prepare for his defense; the right to attorney-client privilege; the right to death penalty counsel (“learned counsel”) if a death penalty case; the right to death penalty mitigation specialists (if the case is a capital case, or pre-charge if there is a chance that the defendant will be charged with a death penalty offense); and the work-product privilege.

b. International law and the right to counsel (in death penalty & non-death penalty cases - enhancements)

Common Article 3 of the Geneva Conventions includes the right to counsel among the “judicial guarantees which are recognized as indispensable by civilized peoples”, and among those rights that the Military Commissions is obligated to ensure to defendants under international law. [Discussion forthcoming]

The ICCPR, article 14(3) provides:

> “everyone shall be entitled to the following…to defend himself in person or through legal assistance of his own choosing…and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means”.

Other international instruments that bind the U.S. that provide for the right to counsel include Statutes of ad hoc tribunals created by UN Security Council Resolutions that bind the U.S. and that provide for the right to counsel include the *ICTY Statute* and the *ICTR Statute*. Other international instruments that bind the U.S. and that provide for the right to counsel include:

---

144 See Art. 21(4) (“to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”);

145 See Art. 20(4) (“to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so requires, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it”).
Nuremberg Charter\textsuperscript{146} and the Tokyo Charter, Art. 9\textsuperscript{147}

The U.S. is bound by customary international law right to counsel rules that are incorporated into treaties that bind the U.S. such as the Geneva Conventions,\textsuperscript{148} and treaties that do not bind the U.S. such as the Protocols Additional to the Geneva Conventions,\textsuperscript{148} the ACHR,\textsuperscript{149} and the ECHR.\textsuperscript{150} Furthermore, the U.S. is bound by right to counsel customary international law rules that are incorporated into non-binding, non-treaty international instruments such as UDHR\textsuperscript{151} the ACHPR.\textsuperscript{152}

Implicit in the right to adequate facilities is the defendant's right to competent representation,\textsuperscript{153} which according to the European Court of Human rights requires that the defendant receive "effective defense in practice", and not in a manner that is theoretical and illusory.\textsuperscript{154} Further, the European Court of Human Rights has held that the defendants have the right to represent themselves,\textsuperscript{155} the right to counsel of one's own choosing,\textsuperscript{156} and the right to legal aid.\textsuperscript{157} The right to effective assistance of counsel applies before the trial commences (pre-trial),\textsuperscript{158} during trial,\textsuperscript{159} and after trial if there is a conviction and an appeal. The right to counsel is a fundamental right to be afforded to criminal defendants.\textsuperscript{160}

c. Right to Counsel - U.S. Constitutional & common law

The Sixth Amendment of the U.S. Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense”. This right has been reaffirmed by the U.S. Supreme Court, which has indicated that the counsel in question must be able to provide "effective aid in the preparation and trial of the case".\textsuperscript{161} The right to counsel is guaranteed throughout all critical stages of the criminal adjudicatory process and begins pre-trial, continues during

\begin{footnotes}
146 See Art. 16 (d)(“A Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel”).

147 See (“Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.”)

148 See Article 75(4) (“shall afford the accused before and during his trial all necessary rights and means of defense”).

149 See Article 8 (“the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel”);

150 See art. 6(3) (“Everyone charged with a criminal offense has the following minimum rights…to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”)

151 See art. 11 (“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”);

152 See Art. 7(1) (“The right to defense, including the right to be defended by counsel of his choice”);

153 See infra notes abc – xyz and text accompanying notes.

154 See Ocalan v. Turkey; see also Louis Doswald-Beck, Human Rights in Times of Conflict and Terrorism, Oxford University Press 2011, p. 360.

155 Pakelli v. Germany, 6 ECHR 1 (1983)

156 Pakelli v. Germany, 6 ECHR 1 (1983)

157 Pakelli v. Germany, 6 ECHR 1 (1983)

158 S. v. Switzerland, 14 ECHR 670

159 Quaranta v. Switzerland, Series A No. 205

160 Poitrimol v. France, 18 ECHR 130

\end{footnotes}
trial, and is present post-trial upon appeal if there is a conviction.\textsuperscript{162}

The right to counsel was guaranteed as a fundamental right and applicable onto the states via the Fourteenth Amendment for all indigent criminal defendants facing felony charges.\textsuperscript{163} This right was broadened and extended to criminal defendants facing felony and misdemeanor charges in which the potential sentencing carried at least one day of prison.\textsuperscript{164} The right to counsel is well-grounded in the due process clause and equal protection clauses of the Constitution and the Supreme Court has held that the right to counsel is available on first appeal..\textsuperscript{165}

d. Right to Self-Representation – U.S. Constitutional & common law

Criminal defendants have an implied right to refuse counsel and to self-representation pursuant to the Sixth Amendment.\textsuperscript{166} A defendant may prefer to represent himself throughout the criminal adjudicatory process for a variety of reasons. In such a scenario, the defendant must voluntarily, knowingly and intelligently waive his Constitutional right to counsel in a manner sufficient to establish that he is aware of the dangers and disadvantages of self-representation with eyes wide open.\textsuperscript{167} Additionally, based on the factors surrounding the nature of the waiver, a judge is responsible for assessing the individual’s voluntariness of the actual waiver. If the judge concludes the waiver to be knowing and voluntary, the judge must then assess whether the defendant is competent to waive the right to counsel.\textsuperscript{168} Though this standard for competent self-representation has not been established, the Supreme Court has held that it does not require a heightened standard of competence to waive the right to counsel (as compared to competence to stand trial or competence to waive any other right) and a defendant’s ability or inability to represent himself and his technical legal knowledge (or lack thereof) does not affect his competence to waive the right to counsel.\textsuperscript{169} If a judge may appoint standby counsel or reject the pro se movement altogether if he determines the defendant to be incompetent to waive the right to counsel or finds that the waiver is not knowing and voluntary, he may appoint standby counsel or reject the pro se movement all together.

The right to defend oneself or through counsel of one’s own choosing serves many interests. Most importantly it helps achieve the goal of providing a fair and reliable determination of guilt or innocence. In this way it serves the interests of both the accused (in that the right provides them their best opportunity for justice) and the judiciary institutions (by legitimizing the results of the proceedings). Some of the Guantanamo Bay detainees have stated their belief that they have a better chance of receiving a fair trial if they represent themselves. Some detainees mistrust Americans and, in particular, American servicemen/women, including those who wear U.S. military uniforms when representing the detainees. Many detainees have requested self-representation.

The history of the right to self-representation goes back before the creation of the Military Commissions Act that governs the current U.S. Military Commissions.\textsuperscript{170} \textit{Ali Hamza Ahmad Suliman al-Bahlul} was one of the first detainees to be transferred to Guantanamo Bay.\textsuperscript{171} He was accused of being Osama bin Laden’s “media secretary”, and allegedly while in that position he made recruitment

\begin{itemize}
\item \textsuperscript{162} E.g., \textit{Brewer v. Williams}, 430 U.S. 387 (1977), etc.\textsuperscript{162}
\item \textsuperscript{163} \textit{Gideon v Wainwright}, 372 U.S 335 (1963).
\item \textsuperscript{165} \textit{Douglas v. California}, 372 U.S. 353 (1963).
\item \textsuperscript{166} \textit{Faretta v. California}, (422 U.S. 806 (1975).
\item \textsuperscript{167} Id. at 815.
\item \textsuperscript{168} \textit{Godinez v. Moran}, 509 U.S. 389 (1993).
\item \textsuperscript{169} Id.
\item \textsuperscript{170}
\item \textsuperscript{171}
\end{itemize}
videos for Al Qaeda glorifying the bombing of the USS Cole and video wills for two of the 9/11 hijackers. When his request for lawyer from his native Yemen was denied he requested to represent himself rather than have an American attorney appointed to defend him. This request was denied as well. The case was ultimately thrown out by the Supreme Court which declared the initial military commissions unlawful. After this Congress passed the Military Commissions Act of 2006. When al-Bahlul made his first appearance before the new military commission he once again refused representation and boycotted the proceedings. He chose instead to sit mute for the duration of the trial. The al-Bahlul case established the right for the Guantanamo Bay detainees to represent themselves but with his insistence on staying mute at the proceedings the extent of the right in Military Commissions remains unclear.

One case that established some of the limits of this right was United States of America v. Khalid Sheik Mohammed et al. Khalid Shaid Mohammed, and 4 others, are charged with being the masterminds of the 9/11 attack on the World Trade Center and Pentagon. The 5 accused in this case were granted the right to self-representation. While acting pro se, the defendants requested a number of materials to help them prepare their defense. The Military judge granted in part and denied in part the requested materials. The materials that were granted were as follows:

1. Writing materials that comport with detention facility security standards;
2. A laptop style computer loaded with discovery materials (with review software) and word processing software; and
3. Copies of the MCA, MMC, MCTJ RCs, and the Regulation for Trial by Military Commissions

The Government had already agreed to make computer resources available to the pro se accused and so the Military Judge additionally granted the following materials:

1. Electronic versions of the MCA, MMC, MCTJ, RCs, and the Regulation for Trial by Military Commissions;
2. A copy of the U.S. Constitution, the Detainee Treatment Act, and the Geneva Conventions; and
3. A legal dictionary

The Military Commission determined that the requested materials unnecessary for preparation of defense for the accused:

1. Internet access;
2. Powerpoint software;
3. A DVD writer;
4. Printers and scanners;
5. Special provisions regarding telephone contact with family members; or
6. Special provisions regarding contact with stand by counsel or civilian consultants

Subsequent detainee defendants have requested to defendant themselves, with mixed results. These cases are important as they go hand in hand. The result of the al-Bahlul case showed that the right to defend oneself was legal but to the extent of which this right was allowed was still unknown. In the Khalid Sheik Mohammed case we learned to the extent of which materials would be granted in order for the detainees to have a fairer trial. As mentioned, these are only two of the cases where these issues have been presented, and the full scope of this right is yet to be determined.

e. General right to effective assistance of counsel – U.S. Constitution & common law

The right to counsel begins pre-trial, continues during trial, and is present post-trial upon appeal if there is a conviction.
The right to counsel would be feckless if the criminal defendant were offered no genuine effective assistance. The right to effective assistance of counsel includes opportunities for the defendant to spend sufficient time with counsel and a meaningful opportunity to develop a defense.

The 14th Amendment's Due Process Clause requires criminal defendants to "have sufficient time to advise with counsel and prepare his defense" and a court violates the due process clause of the Fourteenth Amendment by failing to grant defendants reasonable time and opportunity to secure counsel. In Milton v. Morris, the Court found that a defendant's due process rights were violated "when he was tried without having had any meaningful opportunity to prepare his defense." Though the defendant made timely and reasonable requests for means to prepare as a pro-se party, the lower court "materially impeded use of the minimal tools for defense preparation," including access to a telephone.

f. General right to effective assistance of counsel - U.S. Military Law & Military Commission Law

The Military Commissions Act of 2009, § 948k provides that “defense counsel shall be detailed for each military commission”.

Rule 506 of the Manual for Military Commissions (MCM) sets out rules for military and civilian counsel for the defendant. MCM Rule 506(a) provides:

(a) In general. The accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, by military counsel detailed under R.M.C. 503, or by military counsel of the accused's own selection, if reasonably available. Except as otherwise provided by section (b) of this rule, the accused is not entitled to be represented by more than one military counsel; however, the person authorized under regulations prescribed by R.M.C. 503 to detail counsel, in such person’s sole discretion, may detail additional military counsel to represent the accused.

The Uniform Code of Military Justice, art. 27, provides that “defense counsel shall be detailed for each general and special court-martial”. Similarly, the Uniform Code of Military Justice, article 38, section b provides for detailed defense counsel in courts martial.

g. Learned Counsel – U.S. Military Law & Military Commission Law

According to the Military Commissions Act of 2009, if a defendant is charged with a capital offense punishable by death, he is entitled to an appointed Learned Counsel, who is a person knowledgeable, skilled in, and with experience in defending death penalty cases.

h. Death Penalty Mitigation Specialist - U.S. Military Law & Military Commission Law

If a Military Commission defendant is charged with an offense that carries the death penalty, he has the right to be appointed a “death penalty mitigation specialist” who is a lawyer trained to seek out and gather information that the “learned counsel” (the death penalty counsel) and other defense counsel may submit on behalf of the client in efforts to persuade the Military Commission jury not to impose the death penalty after a conviction. The American Bar Association Guidelines provide that a mitigation specialist is “an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have.” Mitigation specialists may also work before the charges are filed by the death penalty.

177 Milton v. Morris, 767 F.2d 1443 (9th Cir. 1985)
178 Id.
179 Military Commissions Act of 2009, section xyz
180 American Bar Association Guidelines
181 United States v. Pinson, 56 MJ 489
Mitigation specialists are counsel to the defense and should have access to the defendant. The government is obligated not to interfere with the mitigation specialists’ ability to meet with their client, and establish and maintain an attorney client privilege. Mitigation specialists should be granted appropriate security clearances in a timely manner, and should be provided reasonable opportunities to gather relevant information and present it to Military Commission authorities.

i. Right to Self-Representation - U.S. Military Law & Military Commission Law
The right to self-representation at Guantanamo Bay is currently in the process of being evaluated.182

Military Commissions Regulations, Art. 9 provides:

“All accused shall have a qualified military defense counsel detailed to the accused at government expense during every stage of the proceedings. Should the military judge approve the request of an accused to represent himself, detailed defense counsel may act as standby counsel at the direction of the military judge. Should the accused retain civilian counsel, a military defense counsel shall remain detailed to the accused”.

The Military Commissions Act of 2009, § 948k provides that “defense counsel shall be detailed for each military commission”.

j. Relationship between right to counsel and other fair trial rights
International and domestic law provide defendants with the right to effective assistance of counsel. This right, in the context of the Military Commissions, requires, among other things, for:183

i. the general right to effective assistance of counsel,184 including the right to counsel without payment if he does not have sufficient means to pay for it, and including right to military counsel and civilian counsel;185

ii. the right to communicate with counsel of his own choosing;186

iii. the right to adequate time and facilities to prepare for his defense;187

iv. the right to attorney client privilege;

v. the right to death penalty counsel (“learned counsel”) if a death penalty case;

vi. the right to death penalty mitigation specialists (if the case is a capital case, or pre-charge if there is a chance that the defendant will be charged with a death penalty offense);

vii. the work-product privilege.

182 In Re Walid Bin Attash, the Military Commission at Guantanamo Bay recently denied Mr. Attash’s motion to proceed pro se and without the assistance of his defense attorney, Cheryl Bormann. As it turns out, Judge Pohl concluded that Bin. Attash’s reasons for proceeding pro se failed to establish “good cause”. Thus, Mr. Attash will be forced to retain his court appointed attorney. Judge Pohl did order that the Chief Defense Counsel appoint independent counsel to assist Bin Attash on this issue alone. “UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT, Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing Dated 2/17/2016 from 9:35 AM to 11:00 AM, p. 10242 at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(k%20(TRANS17Feb2016-AM1).pdf

183 For more on the right to effective assistance of counsel, see, for example, Clayton, Richard & Tomlinson, Hugh, FAIR TRIAL RIGHTS, pp. 181-184 (Oxford Univ. Press 2010); Stefan Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS, pp. 242-290 (Oxford Univ. Press 2005); see also Tessa McKeown, The Nuremberg Trial: Procedural Due Process at the International Military Tribunal, 45 Vict. U. Wellington L. Rev. 109 (2014)

184 U.S. Constitution, Sixth Amendment

185 (ICCPR, art 14(3)(d)); The right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; the right to be informed, if he does not have legal assistance, of this right; and the right to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it is also provided for in the following international instruments: American Convention, Articles 8(2)(d), 8(2)(e); European Convention, Article 6(3)(c); ICC Statute, Article 67(1)(d); ICTY Statute, Article 21(4)(d).

186 ICCPR, Article 14(3)(b)

187 ICCPR, article 14(3)(b)
These are addressed below:

i. **Right to Effective Assistance of Counsel**

Implicit in the right to adequate facilities is the defendant's right to competent representation. This right requires that the defendant's lawyer be available at every relevant portion of the proceedings. To determine whether counsel has been competent, the European Court determines whether the defendant received "effective defense in practice." In *Ocalan v. Turkey*, the European Court stated that these rights must not simply be theoretical and illusory. Rather, they must be *practical and effective.*

ii. **Right to Communicate with Counsel of Defendant's Own Choosing**

Article 14(3)(b)) of the ICCPR provides that the defendant has the right to communicate with counsel of his own choosing, without undue or unreasonable interference by the government or any other individual or entity. Furthermore, the defendant has the right to communicate with his counsel confidentially, without the government gaining access to those communications.

iii. **Right to Adequate Time and Facilities to Prepare for His Defense**

Full enjoyment of a defendant’s right to counsel requires that adequate time and facilities be available for consultation between the defendant and his client. For example, in *U.S. v. Verderame*, the U.S. Court of Appeals for the 11th Circuit noted "Implicit in the right to counsel is the notion of adequate time for counsel to prepare a defense."

iv. **Attorney-Client Privilege**

Defendants are entitled to be able to have free, open and frank discussions with the lawyer of their choice without fear of these conversations being overheard, accidentally or otherwise, by civilian or military police, by detention personnel, by judicial officers, by the prosecution, or by others. Conversations between the defendant and his lawyer are highly-prized, privileged communications that facilitate the defendant’s being able effectively to participate in his own defense. The defendant should feel free to disclose to his lawyer any information he chooses, without fear of the lawyer revealing that information to others, and without fear of others accidentally or deliberately intercepting those communications.

v. **Work Product**

When a defense lawyer prepares documents or other materials related to the case, those documents...
or other materials are protected by the defendant’s work product privilege, which prohibits the government from gaining access to those materials and prohibits the use of those materials at trial. Of course the defendant may choose to reveal to the prosecution the existence of or contents of defense work product, but the government may not compel that this information be turned over.

Similarly, the prosecution has the right to protection of its internal documents, with limited exceptions, such as when the prosecution must provide to the defense documents that contain information that might tend to exculpate the defendant. (Discussed elsewhere in this *Guantanamo Bay Fair Trial Manual*).

**vi. Access to prisoner**

If defense counsel is unable to have access to his client (the Guantanamo Bay prisoner), then the defense counsel is not able to provide his client with effective assistance of counsel. Defense counsel access to Guantanamo prisoners is at the pleasure of the U.S. government. If a defense lawyer wants to communicate with his client, he cannot do so by phone or fax or e-mail. The defense lawyer must ask permission from the Pentagon to travel to Guantanamo, and once permission is granted, logistical arrangements must be made for the lawyer to travel from the mainland U.S. to Guantanamo, a trip that can only be done on military aircraft or military charter flights. Arrangements must be made with JTF-GTMO for the transfer of the prisoner from his cell to the special room where attorney client meetings are held, and these meetings can only be held on certain days at certain times.

### 10. Right to Effective Assistance of Counsel

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Was the defendant informed of the right to assistance of counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant provided counsel at no cost to the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was counsel provided at a time and in a manner such that the counsel could effectively assist the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does counsel have access to all the resources necessary to properly advise and provide a defense for the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant provided a choice of counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does it appear as though defendant is receiving “effective” assistance of counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 11. Right to Death Penalty Counsel (“Learned Counsel”) if a Death Penalty Case

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>N o</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the defendant have representation by special death penalty-qualified “Learned Counsel” if it is a death penalty case?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Does it appear as though the “Learned Counsel” have access to all the resources necessary to provide a defense to the death penalty charges?  

Does it appear as though “Learned Counsel” is actively involved in the defense?

| 12. Right to Communicate with Counsel of His Own Choosing (ICCPR, art 14(3)(b)) |
|---|---|---|---|---|
| **Yes** | **No** | **Don’t Know** | **Comment** |
| Does the defendant have the ability to consult with his counsel in confidence? |  |  |  |
| Were you aware of any allegations of improper hurdles in place that prevented full and frank communications between the defendant and his counsel? |  |  |  |
| Are you aware of any improper hurdles currently in place that prevent full and frank communications between the defendant and his counsel? |  |  |  |
| Does the defendant have the ability to communicate with his counsel via e-mail? |  |  |  |
| Does the defendant have the ability to communicate with his counsel via telephone? |  |  |  |
| Has the defense alleged that the prosecution has interfered with defense counsel ability to communicate with their client? |  |  |  |
| Does the defendant have the ability to communicate with his counsel via skype or other video-conference mechanism? |  |  |  |
| Does the defendant have the ability to communicate with his counsel via letters (mail, post)? |  |  |  |
| Must defendant wait until counsel travels to Guantanamo Bay, Cuba for the defendant to communicate counsel? |  |  |  |
| Are all means through which defendants can communicate with counsel protected interception, screening, or improper review by detention staff or other governmental authorities? |  |  |  |
| Do all communications between defendant and counsel have the required level of confidentiality? |  |  |  |
### 13. Right to Attorney Client Privilege

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does it appear as though the right to attorney client privilege has been and is being respected?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does it appear as though the defendant has been given all appropriate resources to be able to consult with counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does it appear as though the prosecution, the court, the detention facility staff have interfered with or are interfering with the attorney / client relationship?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have the attorneys been free to meet with clients to facilitate the exchange of information?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have communications between the defendant and his counsel been monitored?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are there allegations that the defense team has been compromised, for example, with a government official becoming a mole or spy on the defense team?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have there been allegations that listening devices, bugs or other audio-detection equipment has been present in attorney / client interview facilities, unbeknownst to the attorney and client?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any claims that the defense is aware that the prosecution has reviewed computers used by defense counsel and that might contain work product or other privileged material?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any claims that the defense is aware that the prosecution has reviewed computers used by the defendant and that might contain work product or other privileged material?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know whether the defendant’s legal materials (which could have included work product) was subject to examination by the government during the Baseline Review? (See Glossary)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 14. Right to Death Penalty Mitigation Specialist

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td>Yes</td>
<td>No</td>
<td>Unclear</td>
<td></td>
</tr>
<tr>
<td>--------------------------------------------------------------------------</td>
<td>-----</td>
<td>----</td>
<td>---------</td>
<td></td>
</tr>
<tr>
<td>If this is a death penalty case, was the defendant provided effective assistance of a death penalty mitigation specialists to gather information and present it to try to convince the Convening Authority not to charge a crime that carries the death penalty?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If this is a death penalty case, has the defendant provided effective assistance of a death penalty mitigation specialists to gather information and present it to try to convince the jury, should there be a conviction, to try to convince the jury not to impose the death penalty?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does it appear as though the prosecution, the court, the detention facility staff have interfered with or are interfering with the relationship between the death penalty mitigation specialist and the client?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have claims been made that any death penalty mitigation specialist was denied a security clearance in a timely fashion or was otherwise inhibited from developing or maintain an attorney client relationship?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
F. Right to Information & Access to Information; Right to Classified Information

The right to information and access to information requires that different criminal trial stakeholders be provided with certain information at designated times. The defendant is entitled to receive certain information from the prosecution, in order for the defendant’s lawyer to prepare the defendant’s case. The prosecution is entitled to receive certain information from the defense. Victims and Victims’ families are entitled to certain information. The general public and press is entitled to certain information made available to them through FOIA (Freedom of Information Act) and other administrative mechanisms. Finally, some information is deemed classified and only available to parties with the specified security clearance. Similar to the defendant’s access to unclassified information, procedures exist whereby the defendant’s lawyer can request access to certain classified materials (necessary to prepare the defendant’s case).

[This Right to & Access to Information section is being developed further. An Indiana University McKinney School of Law student is assigned to research this topic.]

1. Binding Treaties that address the right to Information that bind the U.S. include:
   - Common Article 3:

   General – Right to Information; Access to Information; Right to Classified Information

   All of the detainees at Guantanamo Bay require different ranges of information in order to prepare their respective cases for trial. Without this information then the defendants would likely receive an unfair trial or be prejudiced, as the government is withholding certain information that is necessary for the defendant’s case.

   What types of information must be provided to the defendant in these military commissions? What types of information must be provided to the government by the defendant in these military commissions?

   How is this information to be accessed or when does the government or defendant have an obligation to turn over certain information? What procedures change when the information is classified in nature? All are important questions involving the access to information and the defendant’s right to information. International and domestic law require criminal defendants to be afforded certain information and access to certain information at different stages of the criminal proceedings. Defendants are entitled to be informed about certain rights that they hold and are entitled to discovery of certain information possessed by the prosecution. One category of information the defendant is entitled to receive from the government is exculpatory information, or information that would tend to demonstrate the lack of guilt of the defendant.

   The right to information includes the right to be informed in some manner of your rights, which can be done either orally, in a “letter of rights,” or in another appropriate manner. This traditionally must be completed when individuals are arrested and must be in a language they understand. Some of the areas that a defendant traditionally must be informed of under international law include: the right to a lawyer, right to remain silent, and nature of the charge, among other rights.

---

195 The other rights include: entitlement to medical assistance if necessary, right to have consular authorities and one other person informed of their arrest, any right to legal aid, interpretation and translation facilities if necessary, right to a prompt proceeding and information on the maximum possible period of detention, and the right to have access to their case file (free of charge). Justice in Europe, “Improving defence rights in Europe: the right to information in criminal proceedings,” Fair Trials International, Oct. 22, 2012.
b. Right to Information/Access to Information under International Law – Sources of Law

Under international law, each of the Guantanamo Bay detainees has a right to access certain information in order to prepare their respective case. The freedom of information has been called not only a “fundamental human right,” but additionally “the touchstone of all freedoms to which the United Nations is consecrated.”\(^{196}\) The ICCPR in Article 14(1)(a) provides that:

\[\text{[I]n the determination of any criminal charge against him, the defendant shall have the right “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.}\]

Multiple other treaties to which the US is bound additionally provide for an analogous right to information.\(^{197}\) The right to information and access to information is included in multiple other treaties that are non-binding on the United States, and included as a matter of customary international law.\(^{198}\) One of these instruments that has increasingly been called upon is the European Convention on Human Rights, specifically Articles 5(2) and 6(3). Although it is not a binding document on the United States, Article 5(2) provides that:

Right to Liberty and Security: Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

Article 6(3) provides in relevant part that:

Right to a Fair Trial: Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

The Statute of the International Criminal Tribunal for Rwanda Statute, Article 19 provides:

A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

The Statute of the International Criminal Tribunal for the former Yugoslavia Statute, Article 20(1) provides:

A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

2. Non-Binding Treaties

Treaties that do not bind the U.S. but address the right to Information include:

- **American Convention on Human Rights**, Part I, Chapter 2:
  
  Article 7(4):
  
  Anyone who is detained shall be informed of the reasons for his detention and shall be

---


\(^{197}\) These other international treaties include: the Geneva Conventions, Common Article 3; International Criminal Tribunal for Rwanda, Article 19; and International Criminal Tribunal for the Former Yugoslavia, Article 20(1).

\(^{198}\) The following international instruments include a right to information/access to information provision: American Convention on Human Rights, Article 7(4). Article 8(2)(b); European Convention on Human Rights, Article 5(2); Article 6(3)(a); ICC Statute, Section VI; Additional Protocol I of the Geneva Conventions, Article 75; and Additional Protocol II of the Geneva Conventions, Article 6.
promptly notified of the charge or charges against him.

Article 8 (titled Right to a Fair Trial)
2. . . During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
(b) prior notification in detail to the accused of the charges against him.

- **European Convention on Human Rights**, Section I: Rights and Freedoms
  2. Article 5(2)
  Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

  - Article 6: Right to a Fair Trial
  3. Everyone charged with a criminal offence has the following minimum rights:
    (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

- **The ICC Statute**, Section VI provides that the accused shall be notified of confirmation of charges (Rule 129 of the ICC xyz)

- **Article 75 of the Protocol Additional I to the Geneva Conventions of 1949 provides:**
  the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

**Article 6 of the Protocol Additional II to the Geneva Conventions of 1949 provides:**
the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

3. **Other International Instruments**
Non-Treaty International Instruments that **do not bind the U.S.** but address the right to Information include:

- **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**

Multiple international instruments do not bind the U.S., but codify customary international norms that do bind the U.S., and that deal with an individual’s right/access to information and the scope of these rights. One of these instruments is the **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment** and provides:

**Principle 10:**

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

**Principle 11 (2):**

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

**Principle 12:**

1. There shall be duly recorded:
   (a) The reasons for the arrest;
(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
(c) The identity of a law enforcement officials concerned;
(d) Precise information concerning the place of custody.
2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 23:

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.
2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) provides:

a) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her.

Multiple other international instruments address these issues.

d. International Cases on the Right to Information/Access to Information

Multiple international cases have focused on the right to information and what it constitutes. Especially when dealing with cases of terrorist offenses, one must take into account the difficulty inherently surrounding an individual’s right to information. In these cases involving “individuals arrested or detained for suspicion of terrorism, a few hours can make a difference, bearing in mind the need to consider national security reasons.”

---

199 Resolution on the Right to Recourse and Fair Trial of the African Commission on Human and Peoples’ Rights (1992) provides:

“the right to fair trial includes, among other things, the following:

Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them”.

The Standard Minimum Rules for the Treatment of Prisoners provides:

“Upon admission, prisoners shall be informed of the regulations they are to live by and of authorized channels for seeking information and making complaints”.

Arab Charter, Article 14 provides:

1. Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members.

2. Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.


police may be called upon, in the interest of public safety, to arrest a suspected terrorist on the basis of information which is reliable but which cannot be disclosed to the suspect or produced in court without jeopardizing the informant.202

Despite all of this precautions, “the respondent Government [still] ha[s] to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offense.”203 The person arrested:

must be told, in simple, non-technical language that he can understand the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness . . . Whilst this information must be conveyed “promptly” . . . it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.204

This duty to inform the arrestee/detainee “is a mechanism to avoid illegal or arbitrary detentions, from the very moment when a person is deprived of his or her liberty.”205 No requirement exists that the information be provided in writing206.

Further cases held “[t]he obligation to inform someone of the reasons for his arrest remains even if the arresting officer believes that the detained person is aware of them.”207 Additionally, the ICTY held that “[t]he chambers will automatically exclude interviews where investigators failed to adequately inform the defendant of the charges against him prior to questioning.”208 Multiple of these cases have stated how long is too long, after arrest to inform the arrestee of the charges against him. Different cases have held seventy-six hours unreasonable, seven days unreasonable and nine days unreasonable delays between the arrest and the informing of the defendant of the charges against him.209

e. Right to Information/Access to Information under Domestic U.S. Law and Military Law

Under Domestic U.S. law, a defendant has an analogous right to information/access to information. The Sixth Amendment to the U.S. Constitution specifically addresses the right to information and in relevant part states:

in all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation . . .

The right to information/access to information is contained throughout large portions of the Military Commissions Act of 2009 and the 2012 Rules for Military Commissions, as highlighted through the rules to discovery in each. Additionally, the Military Rules of Evidence apply to this right as they concern classified information and government – privileged information.

i. 2012 Manual for Military Commissions on Right/Access to Information

Some of the more important sections of the 2012 Manual for Military Commissions will be examined here, the other relevant sections under Rule 701: Discovery will appear in the appendix. Parties

202 Id.
203 Id.
204 Fox, Campbell, and Hartley v. United Kingdom, Judgment, ECHR, Oct. 28, 1994, § 40.
206 X v. Austria, 2 DR 68, ECommHR (1975) (All that Article 6(3)(A) of the ECHR requires is that the accused is given “sufficient” communication orally).
209 Saadi v. United Kingdom, Judgment (Chamber), ECHR, July 11, 2006, §§5 (Information given seventy-six hours later was excessively delayed); Rights International v. Nigeria, Com 215/98, HRC, Nov. 15, 1999, §29 (Information given nine days later was deemed a breach); Peter Grant v. Jamaica, Com 597/1994, Views, HRC, Mar. 22, 1996, § 8.1 (Information given seven days later was deemed a breach).
obligations to “provide discovery is continuing,” thus if either party finds new information subject to disclosure then they shall promptly notify the other party or judge of such material.210 The military judge may limit discovery with conditions when he deems it necessary for “the interests of justice, the protection of national security, or safety of the witnesses.”211 Multiple items are listed within Rule 701 that the government must provide the defense, such materials include “[p]apers accompanying charges; convening orders; [certain] statements,”212 witness lists,213 and “[p]rior convictions of accused offered on the merits.”214 Further rules describe what documents, tangible objects and reports that the government must allow the defense to examine215 and what information the government must make available to the defense if it is to be offered at sentencing.216 The government must as soon as reasonably practicable disclose exculpatory evidence to the defense, so that they can prepare for trial.217

Certain evidence is considered classified to which the government can claim a national security privilege, this prevents the evidence from being disclosed to anyone that lacks the proper security clearance. In order for evidence to be withheld under this privilege, the military judge must determine that under the Military Rules of Evidence 505 and 506 that such evidence is properly withheld.218 The military judge will authorize to the extent practicable: the deletion of certain classified information, substitution of a portion or summary for classified information, or a substitution of a statement admitting relevant facts.219 Multiple other provisions apply to the national security privilege within Rule 701 of the 2012 Manual for Military Commissions.220

The defense is also required to disclose certain materials and information to the government. The defense counsel shall provide the government with a list of witnesses, notice of certain defenses, certain documents and tangible objects, and reports of examination and tests.221 Additionally, “[e]ach party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence.”222 Multiple regulations and procedures exist to control discovery and the access to information which include the judge specifying the time, place and manner of discovery, the judge issuing protective and modifying orders when proper, and providing remedies for instances when one party fails to comply with an “appropriate” discovery request.223 Such remedies include ordering the party to permit discovery, granting a continuance, prohibiting the party from introducing the evidence, calling that witness, or raising the non-disclosed defense, and entering such other order as may be appropriate.224 These discovery rules in no way limit the defendant’s right to testify on his own behalf.225

The appendix contains full sections of the provisions of Rule 701 highlighted here, in addition to other

\[\text{References:}\]
\[\begin{align*}
210 \text{Manual for Military Commissions, Rule 701 (a)(5) (2012).} \\
211 \text{Manual for Military Commissions, Rule 701(a)(3) (2012).} \\
212 \text{The rule states “(1) Papers accompanying charges; convening orders; statements. As soon as practicable after service of charges the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to examine:} \\
(A) \text{Any paper which accompanied the charges, when they were referred to military commission including papers sent with charges upon a rehearing or new trial;} \\
(B) \text{The convening order and any amending orders; and} \\
(C) \text{Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.”} \\
\text{Manual for Military Commissions, 701(b)(1) (2012).} \\
213 \text{The rule states “[b]efore the beginning of trial on the merits the trial counsel shall notify the defense of the names of the witnesses the trial counsel intends to call: (A) In the Prosecution case-in-chief; and (B) To rebut a defense of alibi or lack of mental responsibility, when trial counsel has received timely notice under this rule.” Manual for Military Commissions, 701 (b)(2) (2012).} \\
214 \text{The rule states “Before trial on the merits, the trial counsel shall notify the defense of any records of prior criminal convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to examine such records when they are in the trial counsel’s possession.” Manual for Military Commissions, 701(b)(3) (2012).} \\
215 \text{Manual for Military Commissions, 701(c) (2012). See Appendix for full rule.} \\
216 \text{Manual for Military Commissions, 701(d) (2012). See Appendix for full rule.} \\
217 \text{Exculpatory evidence is evidence that tends to negates guilt, reduce degree of guilt, or reduce punishment. Manual for Military Commissions, 701(e) (2012).} \\
218 \text{Manual for Military Commissions, 701(f)(1) (2012).} \\
219 \text{Manual of Military Commissions, 701(f)(2)(a)-(c) (2012).} \\
220 \text{Please refer to the appropriate appendix section for further provisions of Rule 701(f), which likely would become relevant in any discussion of classified information and provide reasons why sessions might be closed off to the public.} \\
221 \text{Manual for Military Commissions, 701(g)(1)-(4) (2012).} \\
222 \text{Manual for Military Commissions, 701(j) (2012).} \\
223 \text{Manual for Military Commissions, 701(l) (2012).} \\
\end{align*}\]
provisions of Rule 701 not highlighted above but relevant to the right of information.226

ii. Military Commissions Act of 2009 and Classified Information

The Military Commissions Act provides important details on what procedures to follow when classified information is involved in a case. The act defines classified information as the following,

[a]ny information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security.227

Some of these rules include case law, the Military Rules of Evidence, and the 2012 Manual for Military Commissions (discussed above). The defendant may retain civilian counsel if it has been determined that said counsel is “eligible for access to information classified at the level secret or higher.”228 If said defendant utilizes this right to civilian defense counsel then said counsel will:

[p]rotect any classified information received during the course of representation of the accused in accordance with all applicable law governing the protection of classified information, and may not divulge such information to any person not authorized to receive it.229

Importantly, each attendee must know that a “military judge may close to the public all or a portion of the proceedings” for two stated reasons.230 These include to ensure the physical safety of individuals and to protect information from disclosure that “could be reasonably expected to cause damage to the national security.”231 Look to these provisions for a possible explanation on why feeds or sound might become unavailable while you are attending these proceedings.

Under the Military Commissions Act of 2009, the defendant is entitled to a copy of the record of the proceedings, as soon as they are authenticated.232 If classified material is discussed in the record or if there is a classified annex then the defendant will be provided a redacted version of the record.233 The unredacted record will be provided to defense counsel under regulations prescribed by the Secretary of Defense.234

The Military Commissions Act of 2009 additionally highlights how classified information will be protected from unauthorized or unexpected disclosure. The act states:

[c]lassified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.235

The judge must additionally prohibit unauthorized disclosure of any information deemed classified, under any circumstances.236 The defendant shall be provided with “[a]ny information admitted into evidence pursuant to any rule, procedure, or order by the military judge.”237 The government counsel shall work to declassify materials to the maximum extent possible, consistent with national security requirements.238 The procedures for a pretrial conference to discuss classified information are outlined in the Military

---

226 See the following sections/pages of the Appendix for further provisions of Rule 701 that might come up in particular right to information/access to information portions of the military commissions proceedings.
229 Military Commissions Act of 2009, 949(c)(7).
230 Military Commissions Act of 2009, 949(d)(2). Although not relevant for matters at hand, if further information is wanted on sessions/proceedings and what they entail under the Military Commissions Act, then one can look generally at 949(d)(1).
238 For more information on declassification see the full provision, highlighted above, in the appendix. Military Commissions Act of 2009, 949p-1(c).
Commissions Act of 2009.\textsuperscript{239} The judge shall issue a protective order upon motion by the government counsel, for all information that is classified that has been disclosed by the United States or that has been otherwise provided or obtained by the defense.\textsuperscript{240} Additionally, these rules provide for the limitations of access to classified information, usually under the justification of damage to the United States’ national security interest.\textsuperscript{241} Even if limited due to possible damage to the national security interest, the military judge may authorize disclosure if such classified information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution’s case, or to sentencing, in accordance with standards generally applicable to discovery of or access to classified information in Federal criminal cases.\textsuperscript{242}

If the military judge authorized disclosure above, then subsection (b) of 949p-4 lays out the procedures and requirements to be followed, those relevant provisions will be excerpted in the appendix.\textsuperscript{243} The procedures for notice to the accused of an intention to disclose classified information,\textsuperscript{244} procedures for cases involving classified information,\textsuperscript{245} and introduction of classified information into evidence,\textsuperscript{246} all are excerpted in the appendix. These provisions are relevant to some of the intricacies involved when classified information is brought up, so please refer to the appendix if any questions about the commission procedures for classified information arise. The Military Rules of Evidence are also relevant to the military commissions occurring at Guantanamo but all relevant portions have already been covered under either the Military Commissions Act of 2009 or the 2012 Manual for Military Commissions.\textsuperscript{247}

\textbf{iii. Uniform Code of Military Justice (UCMJ) on the Right to Information/Access to Information}

The Uniform Code of Military Justice additionally has relevant sections that apply to the right to information involving the military commissions and Guantanamo detainees. The first is on charges and specifications and states:

1. Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.\textsuperscript{248}

The provisions internationally and domestically make clear that these detained individuals need to be informed in an efficient and immediate manner of the charges against them. Another relevant section states:

(a) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel . . . \textsuperscript{249}

\textsuperscript{239} The relevant provisions of 949p-2 on pretrial conferences are listed in the appendix. Military Commissions Act of 2009, 949p-2.  
\textsuperscript{240} Military Commissions Act of 2009, 949p-3. \textit{See} the full provision listed in the appendix.  
\textsuperscript{241} Military Commissions Act of 2009, 949p-4(a)(1). \textit{See} the full provision listed in the appendix.  
\textsuperscript{242} Military Commissions Act of 2009, 949p-4(a)(2). \textit{See} the full provision listed in the appendix  
\textsuperscript{243} Military Commissions Act of 2009, 949p-4(a)(2), 949p-4(b). \textit{See} appendix for the provisions under (b).  
\textsuperscript{244} Military Commissions Act of 2009, 949p-5. \textit{See} appendix for the provisions that apply to notice of an intention to disclose classified information.  
\textsuperscript{245} Military Commissions Act of 2009, 949p-6. \textit{See} appendix for provisions on the procedures for cases involving classified information.  
\textsuperscript{246} Military Commissions Act of 2009, 949p-7. \textit{See} appendix for provisions on how to get classified information into evidence.  
\textsuperscript{247} Similar and analogous rules and procedures are discussed under rules 505 and 506 that apply to Classified Information and Government Information other than Classified Information. Since this information in relevant part has already been excerpted above, it will not be included in this chapter. The analogous rules are the Rules of Military Evidence 505 and 506.  
\textsuperscript{248} 10 U.S.C.A. § 830, Article 30.  
\textsuperscript{249} 10 U.S.C.A. § 803, Article 32.
Likely problems of access to information will arise if the individual is being held indeterminately without being advised of the charges that are brought against him.

f. Domestic Jurisprudence on the Right to Information/Access to Information

A seminal case on the right to information and government privilege was United States v. Reynolds, decided in 1953. The case claimed “the privilege against revealing military secrets [is] a privilege which is well established in the law of evidence.” The privilege must be asserted by the government and cannot be claimed or waived by a private party. The government must make a formal claim of privilege “lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.” It is the court’s obligation to determine whether the circumstances warrant a claim of privilege, and must complete this action without an unauthorized disclosure of the information, which the government seeks to protect. The court found it relevant to compare this type of privilege to an analogous privilege, the privilege against self-incrimination, when a court makes a determination while simultaneously preventing unauthorized disclosure.

Other cases from lower courts have further discussed the right to information. In United States v. Aref, the 2nd Circuit stated:

[i]f evidence is discoverable but the information is privileged, the court must decide whether the information is helpful or material to the defense, i.e., useful "to counter the government’s case or to bolster a defense." Ultimately, whatever interest the government has in protecting classified information cannot override the right of a defendant to have a fair trial. If the court deems it appropriate then they can engage in a balancing when addressing issues of discovery.

The procedure for reviewing a motion to withhold classified information involves a district court “first determin[ing] whether, pursuant to the Federal Rules of Criminal Procedure, statute, or the common law, the information at issue is discoverable at all.” If the information is deemed discoverable then the court must next determine whether the government has made a formal claim of the state secrets privilege, “lodged by the head of the department which has actual control over the matter, after actual personal consideration by that officer.”

The court must then "determine whether the evidence is 'relevant and helpful to the defense of an accused.'" If the evidence passes this test then the Classified Information Procedures Act (CIPA) § 4 empowers “the court to determine the terms of discovery if any.” CIPA § 6(c)(1):

authorizes a substitution for classified material in the form of a statement or summary “if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.”

This requirement comes from the U.S. Constitution’s guarantee to criminal defendants “a meaningful
opportunity to present a complete defense.”

The substitution provided:

need not be of “precise, concrete equivalence,” and the “fact that insignificant tactical advantages could accrue to the defendant by the use of the specified classified information should not preclude the court from ordering alternative disclosure.”

The fundamental purpose of any substitution is “to place the defendant, as nearly as possible, in the position he would be in if the classified information . . . were available to him.” In further cases it was declared “[a] defendant becomes entitled to disclosure of classified information upon a showing that the information ‘is relevant and helpful to the defense . . . or is essential to a fair determination of a cause.’” Additionally, a prosecutor does not have to disclose everything that might affect the jury’s decision, he must only “disclose information favorable to the defense that meets the appropriate standard of materiality.”

### 15. Right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (ICCPR, art 14(3)(a))

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Was the defendant informed of a right to remain silent?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant informed of a right to counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant informed of his right to communication with consular representatives from his country?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant informed of his rights under international humanitarian law?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant informed of rights under the Geneva Conventions?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant informed of his right to challenge the lawfulness of his detention?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

263 Id. at 904-05 (quoting Holmes v. South Carolina, 547 U.S. 319, 324 (2006)) (internal quotations removed).
265 Id. (quoting United States v. Moussaoui, 382 F.3d 453, 477 (4th Cir. 2004)) (internal quotations removed); see also United States v. Rezaq, 134 F.3d 1121, 1143 (D.C. Cir. 1998) (“approving substitutions where ‘[n]o information was omitted from [them] that might have been helpful to [the] defense, and the discoverable documents had no unclassified features that might have been disclosed.’”).
267 United States v. Mohamed, 410 F. Supp.2d 913, 917 (S.D. Cal. 2005) (quoting United States v. Gardner, 611 F.2d 770, 774-75 (9th Cir. 1980)).
268 The right to be informed promptly of the charges in a language that the accused understands is also provided for in the following international instruments: European Convention, Article 5(2); American Convention, Article 7(4); Body of Principles on Detention or Imprisonment, Principle 10; 1992 Resolution on the Right to Recourse and Fair Trial of the African Commission on Human and Peoples’ Rights, para. 2(B) (http://www1.umn.edu/humanrts/africa/achpr11resrecourse.html).
Was the defendant informed of his right to bring habeas corpus claims in U.S. federal courts?

Does the defense have access to court records?

<table>
<thead>
<tr>
<th>16. Right to Discovery</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Yes</strong></td>
</tr>
<tr>
<td>Does the defense have equal access to the court?</td>
</tr>
<tr>
<td>Is the defense given timely access to these records?</td>
</tr>
<tr>
<td>Has the prosecution provided all the discovery required?</td>
</tr>
<tr>
<td>Has the prosecution refused to provide discovery?</td>
</tr>
<tr>
<td>Has discovery been provided to defense in a timely manner?</td>
</tr>
<tr>
<td>Has the court made appropriate discovery orders?</td>
</tr>
<tr>
<td>Has the defense turned over any discovery it is required to?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>17. Right to Receive Exculpatory Information (Military Commission Act of 2009, section xxx; ICCPR art. 14)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Yes</strong></td>
</tr>
<tr>
<td>Has the prosecution withheld exculpatory information?</td>
</tr>
<tr>
<td>Are you aware of any complaints that the prosecution has withheld any exculpatory information?</td>
</tr>
</tbody>
</table>

---

269 An NGO Observer will likely not be aware of the existence of any exculpatory information that the prosecution might have and that the prosecutor may have withheld from the defense. As a reminder, the questions in the Guantanamo Bay Fair Trial Manual do not presuppose that there has been any violation of any rights, that there has been any negligent, improper or unlawful behavior on the part of any actors, or that any allegation made is either true or false. The questions are intended to trigger thoughts related to a range of rights and duties. NGO Observers and others who use the Guantanamo Bay Fair Trial Manual may be prompted to ask further questions after being reminded of international and domestic law sources, and being exposed to facts on the ground at Guantanamo Bay or Ft. Meade.
G. Rights Related to Classified Information

The defendant is entitled to certain information at different stages of the proceeding. Though the government may withhold certain classified information, for example, in the interests of national security, the defendant may not be convicted solely on the basis of secret information that is withheld from him.

The U.S. has the right to protect information for national security purposes. However, defendants at Guantanamo Bay have rights related to classified information, for example, if that classified information will be used against the defendant.

4. “Elements” of the Right: Requirements of the Right; Facts to Consider

- A criminal defendant has the following rights related to the Right to Information:
  - To be informed in a language he can understand:
    - In simple, non-technical language;
    - The charges against him;
    - The reason(s) should:
      - Be sufficiently detailed of the offences or acts imputed to the defendant and their possible liabilities, as well as all possible legislation; and
      - Include a clear explanation of both the legal and factual basis for depriving him of his liberty.
    - His right to remain silent;
    - His right to challenge the lawfulness of his detention;
    - The following rights to:
      - Legal representation (right to counsel);
      - Examination and treatment by a doctor;
      - Have a relative nor friend notified of their arrest or detention;
      - Communicate with or notify their consulate (in the case of foreign nationals) or a competent international organization (in the case of refugees or persons who are stateless or under the protection of an intergovernmental organization);
      - Be provided with information on how to avail themselves of such rights.
  - To any information:
    - Admitted into evidence pursuant to any:
      - Rule;
      - Procedure; or
      - Order by a military judge.
  - To move for a pretrial conference to:
    - Consider matters relating to classified information that:
      - May arise in connection with the prosecution.
  - To have any hearing held (or any portion of such hearing specified in the request of a knowledgeable United States official) in camera if:
    - A knowledgeable United States official:
      - Possessing authority to classify information
    - Submits to the military judge:
      - A declaration
        - That a public proceeding may result in the disclosure of classified information.
  - The military judge:
    - Shall issue a determination in writing:
      - As to the disclosure of each item of classified information.
  - Before any hearing is conducted:
Trial counsel shall provide the accused with notice of the classified information at issue:

- Identifying the specific classified information at issue
  - Whenever the U.S. has previously made the information available to the accused.

When the United States has not previously made the information available to the accused in connection with the case:

- The information may be described by generic category, in such forms as the military judge may approve, rather than by identification of the specific information of concern to the United States.

- When trial counsel seeks to introduce evidence before a military commission and the Executive branch has classified the sources, methods, or activities by it acquired the evidence:
  - The military judge shall only permit introduction the evidence, including a substituted evidentiary foundation, while protecting from disclosure information identifying those sources, methods, or activities, if:
    - The evidence is otherwise admissible; and the military judge finds that:
      - The evidence is reliable; and
      - The redaction is consistent with affording the accused a fair trial.

- The military judge shall:
  - Reviews any such classified evidence to assess its relevance.
    - On finding it relevant, the judge may:
      - Order redactions; or
      - Substitute unclassified or summarized versions that protect any sensitive national security information.
  - Issue a determination in writing:
    - As to the disclosure of each item of classified information.

The government has the following rights related to the Right to Information:

- Immediate interlocutory appeal of any disclosure order relating to classified information.
- Classified information must be:
  - Stored securely; and
  - Only handled by individuals with security clearances.

5. U.S. Cases: Supreme Court cases that discuss the right to Information include:

- United States v. Reynolds, 345 U.S. 1, 6–8, (1953).
  - “the privilege against revealing military secrets [is] a privilege which is well established in the law of evidence.”
  - “The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. The latter requirement is the only one which presents real difficulty. As to it, we find it helpful to draw upon judicial experience in dealing with an analogous privilege, the privilege against self-incrimination.”

6. U.S. Cases: Non-Supreme Court cases that discuss the right to Information include:

- United States v. Aref, 533 F.3d 72, 80 (2d Cir. 2008) (quoting United States v. Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993)). (“If the evidence is discoverable but the information is
privileged, the court must next decide whether the information is helpful or material to the defense, i.e., useful ‘to counter the government’s case or to bolster a defense.’”)

- **United States v. El-Mezain**, 664 F.3d 467, 523-24 (5th Cir. 2011). (The government’s interest in protecting classified information cannot override a defendant’s right to a fair trial.)
- **United States v. Sarkissian**, 841 F.2d 959, 965 (9th Cir. 1988). (“[o]n issues of discovery [of classified information], the court can engage in balancing.”)
- **U.S. v. Sedaghty**, 728 F.3d 885, 904-05 (9th Cir. 2013)
  - “When considering a motion to withhold classified information from discovery, a district court must first determine whether, pursuant to the Federal Rules of Criminal Procedure, statute, or the common law, the information at issue is discoverable at all.” (United States v. Rewald, 889 F.2d 836, 847–48 (9th Cir. 1989) (quoting United States v. Reynolds, 345 U.S. 1, 7–8, (1953)). If the material at issue is discoverable, the court must next determine whether the government has made a formal claim of the state secrets privilege, ‘lodged by the head of the department which has actual control over the matter, after actual personal consideration by that officer.’” United States v. Klimavicius–Vilia, 144 F.3d 1249, 1261 (9th Cir. 1998)). Once a court concludes that the material is discoverable and that the state secrets privilege applies, then the court must determine whether the evidence is “relevant and helpful to the defense of an accused.” Roviaro v. United States, 353 U.S. 53, 60–61 (1957); United States v. Gurolla, 333 F.3d 944, 951 (9th Cir. 2003). If the information meets the ‘relevant and helpful’ test, CIPA § 4 empowers the court to determine the terms of discovery, if any. 18 U.S.C. app. 3 § 4.”
  - “CIPA § 6, which applies to both pre-trial and trial proceedings, guides the procedures for making ‘determinations concerning the use, relevance, or admissibility of classified information....’ 18 U.S.C. app. 3 § 6(a). Specifically, CIPA § 6(c)(1) deals with substitutions and provides that a court may authorize a substitution for classified material in the form of a statement or summary. ‘If it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.’ 18 U.S.C. app. 3 § 6(c)(1). This requirement arises out of the Constitution’s guarantee that all criminal defendants must have ‘a meaningful opportunity to present a complete defense.’ Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). Indeed, the “need to develop all relevant facts in the adversary system is both fundamental and comprehensive. United States v. Nixon, 418 U.S. 683, 709 (1974).”
  - “The substitution need not be of ‘precise, concrete equivalence,’” and the “fact that insignificant tactical advantages could accrue to the defendant by the use of the specified classified information should not preclude the court from ordering alternative disclosure.” H.R. Rep. No. 96–1436, at 12–13 (1980) (Conf. Rep.), reprinted in 1980 U.S.C.C.A.N. at 4310–11. Nevertheless, the fundamental purpose of a substitution under CIPA is “to place the defendant, as nearly as possible, in the position he would be in if the classified information ... were available to him.” United States v. Moussaoui, 382 F.3d 453, 477 (4th Cir. 2004); see also United States v. Rezaq, 134 F.3d 1121, 1143 (D.C. Cir. 1998) (approving substitutions where “[n]o information was omitted from [them] that might have been helpful to [the] defense, and the discoverable documents had no unclassified features that might have been disclosed”).
- **United States v. Abu-jihada**, 2008 U.S. Dist. LEXIS 7653, at *11 (D. Conn. 2008) (quoting United States v. Moussaoui, 382 F.3d 453, 472 (4th Cir. 2004)). (A defendant becomes entitled to disclosure of classified information upon a showing that the information ‘is relevant and helpful to the defense . . . or is essential to a fair determination of a cause.’”)
- **United States v. Mohamed**, 410 F. Supp. 2d 913, 917 (S.D. Cal. 2005) (quoting United States v. Gardner, 611 F.2d 770, 774-75 (9th Cir. 1980)) (“The prosecution does not have a constitutional duty to disclose every bit of information that might affect the jury’s decision; it need only disclose information favorable to the defense that meets the appropriate standard of materiality.”)
7. International cases that discuss the right to Information include:

- **Dikme and Others v. Turkey**, Application No. 20869/92, Judgment, ECHR, November 7, 2000, §§ 61-64.
  - With regard to the right to information, account must be taken of the particular difficulty inherent in terrorist offenses. In the case of individuals arrested or detained for suspicion of terrorism, a few hours can make a difference, bearing in mind the need to consider national security reasons.
  - “In that context, terrorist crime poses particular problems, as the police may be called upon, in the interest of public safety, to arrest a suspected terrorist on the basis of information which is reliable but which cannot be disclosed to the suspect or produced in court without jeopardising the informant.”
  - “[T]he respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offense.”

  - “. . . it was not sufficient simply to inform [him] that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him.”

  - “. . . any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness . . . . Whilst this information must be conveyed ‘promptly’ . . . it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.”

  - The duty to inform a detainee of the reasons for his detention “is a mechanism to avoid illegal or arbitrary detentions, from the very moment when a person is deprived of his or her liberty.”

  - “. . . the standard imposed by Article 5 § 1(c) [of the ECHR] does not presuppose that the police have sufficient evidence to bring charges at the time of arrest. The object of questioning during detention under sub-paragraph (c) of Article 5 § 1(c) is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding arrest. The facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge which comes at the next stage of the process of criminal investigation.”

  - The obligation to inform someone of the reasons for his arrest remains even if the arresting officer believes that the detained person is aware of them.
  - Information given seven days later considered a breach.

  - “Article 20, sub-paragraph 2 of the Statute of the International Tribunal is analogous to Article 9(2) of the ICCPR, requiring, however, that the person be ‘immediately informed of the charges against him’. The Report of the Secretary-General submitting the draft Statute to the Security Council, referring to that Article, states that ‘[a] person against whom an indictment has been confirmed would . . . be informed of the contents of the indictment and taken into custody.’”

  - The chambers will automatically exclude interviews where investigators failed to adequately inform the defendant of the charges against him prior to questioning, as required under ICTY Statute Art. 21(4)(a).

Information given nine days later considered a breach.

- **Saadi v. United Kingdom**, Judgment (Chamber), ECHR, July 11, 2006, §55.
  - Information given seventy-six hours after initial detention was excessively delayed.
  - There is no requirement that the information be provided in writing; Article 6(3)(a) of the ECHR will be complied with where the accused has been given sufficient communication orally.

[This Rights Related to Classified Information introductory section is being developed further. An Indiana University McKinney School of Law student is assigned to research this topic.]

### 18. Right to Access to Classified Information

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Have any stakeholders complained about inadequate access to classified information?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have classified information issues been adequately addressed?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have there been complaints that information has been withheld from any stakeholder due to arbitrary classification?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the government intend to use classified information against the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the government informed the defendant of its intent to use the classified information?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has any stakeholder moved for a pre-trial conference to determine the discovery of any classified information?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If any stakeholder moved for a pre-trial conference to determine the discovery of classified information did the judge issue a written determination as to the disclosure of each piece of classified information?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was all the information that was admitted against the defendant discovered?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant informed in a language he could understand of the charges against him?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
If the defendant was informed in a language he could understand of the charges against him, when was that notification made?

If the defendant was informed in a language he could understand of the charges against him, was that notification made as soon as reasonably practicable?

Was the defendant informed (in a language he/she could understand) of his right to have a relative or friend notified of their arrest or detention?

Was the defendant provided with information in a language he/she could understand on how to avail himself of his rights?

Was the information provided to the defendant general or specific in nature?

Has any stakeholder moved for a pre-trial conference to determine the discovery of various items of classified information?

If any stakeholder moved for a pre-trial conference regarding the discovery of classified information, did the judge issue a written determination re disclosure of each piece of classified information?

Has the trial judge refused to grant access to any stakeholder of classified information?
19. Right not to have Classified Information Used Against defendant

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has the prosecution used classified information against the defendant without informing the defendant of the content of the classified information?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the government stated an intent to use classified information against the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the government informed the defendant of its intent to use the classified information?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the judge permitted any classified information to be admitted against the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

A “cover sheet” or “place holder” from the website of the Office of Military Commissions.
H. Right to Adequate Time & Facilities to Prepare a Defense

The rights to adequate time and adequate facilities to prepare a defense overlap and are often considered jointly in substance. These rights in turn overlap with other defense rights discussed in this Guantanamo Bay Fair Trial Manual, and are accordingly also discussed elsewhere herein. These rights require the court to examine wide-ranging criteria to ensure that the defendant, the defense counsel, and the entire defense team are afforded what is needed to prepare for the defense.

a. General

Under international and domestic law, U.S. Military Commission defendants have the right to prepare a defense against the crimes charged, or to have a defense prepared on their behalf. Article 14(3)(b) of the ICCPR, to which the United States is a party, states that Defendants must be afforded both adequate time and adequate facilities to prepare their defense. The President of the United States has also by executive order ordered the implementation of International Human Rights Treaties to which the United States is bound. He wrote,

It shall be the policy and practice of the of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.

The right to adequate time and facilities apply both to the defendant and the defendant's counsel and extend to the entire defense team. Generally, ascertaining whether there has been a breach of the rights to adequate time and facilities to prepare a defense requires an examination of the facts of the specific case. According to legal scholars, the term "a defense" in this context should "include all proceedings where an accused's interests may have been adversely affected, namely plea proceedings, the conduct of the trial, presentation of evidence in mitigation of sentence, and appeal or review proceedings."

This part of the Guantanamo Bay Fair Trial Manual discusses how the rights to adequate time and facilities overlap with other rights discussed in this Manual (section b), how international and domestic law consider time and facility jointly when assessing adequacy (section c), international law and the rights to adequate time and facilities (section d), criteria under international law for adequate time to prepare a defense (section e), and criteria under international law for adequate facilities to prepare a defense (section f); and domestic U.S. law and the rights to adequate time and facilities to prepare a defense (section g).

---

271 Id.
272 This right requires that the defendant's lawyer be available at every relevant portion of the proceedings. (General Comment 32, § 38)
273 See Namakula, Catherine, LANGUAGE AND THE RIGHT TO FAIR HEARING IN INTERNATIONAL TRIALS at 84 (stating that "The defense is considered as a team; adequacy of facilities is judged on the basis of the team's capacity.")
274 For example, the European Court has stated that "the issue of time and facilities afforded to the accused must be assessed in the light of the circumstances of each particular case." (Iglin v. Ukraine, no. 39908/05 § 65, ECHR (2012) The court in Iglin wrote that "the accused must have the opportunity to organize his defense in an appropriate way and without restriction as to the opportunity to put all relevant defense arguments before the trial court and thus to influence the outcome of the proceedings. Furthermore, the facilities available to everyone charged with a criminal offense should include the opportunity to acquaint himself with the results of investigations carried out throughout the proceedings for the purpose of preparing his defense"
275 See Steytler, Constitutional Procedure at 234.

Not to be Quoted or Reproduced Without Permission --- This is a Preliminary Draft. © 2017

E-mail - GitmoObserver@yahoo.com  @GitmoObserver The Gitmo Observer (of Indiana U McKinney School of Law)
b. “Adequate time and facilities” overlap with other rights

The concept of “adequate time and facilities” is broad and overlaps with other defense rights, including rights discussed elsewhere in this Guantanamo Bay Fair Trial Manual. For example, the right to adequate time and facilities to prepare a defense are closely linked to the right to effective assistance of counsel, since to be effective, counsel needs adequate time and facilities. The right to adequate time and facilities is also closely related to the following rights:
- the right to trial without undue delay;
- the right to equality of arms; and
- the right to notice and other information.

277 See, e.g., Right to Effective Assistance of Counsel (p. 5), Right to Information & Access to Information (p. 13), Rights Related to Classified Information (p. 17), and Right to Equality of Arms (p. 39).

278 See, e.g., U.S. v. Verderame, US Court of Appeals, 11th Circuit (1995) (Considering the 6th and 14th Amendments to the U.S. Constitution, noting that “Implicit in right to counsel is notion of adequate time for counsel to prepare defense.”); Summers v. U.S., 5th Circuit, 1976 (“Time which attorney spends preparing defense is one of several relevant items to be considered in determining whether defendant has received effective assistance of counsel.”); and Doughty v. Beto, 396 F.2d 128 (5th Cir. 1968) (“In order to render effective assistance counsel for an accused must devote time sufficient to insure an adequate defense.”)

279 Indeed, commentators have noted a potential tension between the right to adequate time to prepare a defense on the one hand, and the right to a trial without undue delay on the other. Trechsel, Human Rights in Criminal Proceedings, p. 216; Harris, O'Boyle, and Warbrick (1995) 252 et. seq.

280 The Human Rights Committee note that the right to adequate time and facilities includes access to evidence, timely notice of charges, and adequate notice of upcoming hearings so that s/he will be able to “adequately prepare his arguments and consult with a lawyer.”


defense.”

d. International law and rights to adequate time and facilities to prepare a defense.

First, it should be noted that the rights to adequate time and facilities to prepare a defense are included among the “judicial guarantees which are recognized as indispensable by civilized peoples” provided for in Common Article 3 of the Geneva Conventions, and thus, the U.S. is obligated to ensure that U.S. Military Commission defendants are afforded adequate time and facilities to prepare their defense.284

The rights to adequate time and facilities to prepare a defense are also provided for in other treaty law that binds the U.S., including the ICCPR that in Article 14(3)(b) provides:

In the determination of any charge against him, everyone shall be entitled … to have adequate time and facilities for the preparation of his defence”.285

These rights are also provided in numerous international instruments that do not bind the U.S.286

In Wright v. Jamaica,287 the Human Rights Committee, which is the United Nations body that oversees implementation of the ICCPR, addressed the rights to adequate time and facilities to prepare a defense.

The right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case.

In Can v. Austria,288 the European Court of Human Rights held that under article 6(3)(b) of the European Convention on Human Rights the defendant has the right to "the opportunity to organize his defense in an appropriate way and without restriction as to the possibility to put all relevant defense arguments before the trial court" and that this extends to all “substantive defense activity” the defense needs to prepare for trial. The court ruled that relevant defense arguments are those that could influence the outcome of the proceedings.

The European Court has also held that the right to adequate time and facilities applies as soon as the defendant is arrested or otherwise substantially affected by the charges against him.289 Alternatively, the right to adequate time and facilities applies whenever the defendant has been given notice of the charges

284 See, e.g.,

285 See ICCPR Article 14(3)(b).

286 Though the U.S. is not bound to the following international instruments, these instruments incorporate the adequate time and facilities rights as principles of customary international law. European Convention, Article 6(3)(b); American Convention, Article 8(2)(c); African Commission Resolution, Article 2(c)(1); ICC Statute, Article 67(1)(b); Arab Charter, Article 16(2); Statute of the Special Court for Sierra Leone 2002, Article 17(4)(b); Statute of the Special Tribunal for Lebanon, Article 16(4)(b); European Union Charter of Fundamental Rights, Article 48(3)(b); African Commission Resolution 4, Article 2(e)(1). Furthermore, the adequate time and facilities rights are incorporated into the Universal Declaration of Human Rights (UDHR), Article 11: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public law at which he has had all the guarantees necessary for his defense.”


288 No. 930/81 § 53, ECHR-II (1984). See also Khoroshenko v. Russian Federation, 29 March 2011, UN Human Rights Committee, 1304/2004 (violation of ICCPR article 14(3)(b) when defendant was not permitted to meet privately with counsel during pre-trial proceedings, and defendant was denied access to documents that counsel believed were necessary for the defendant’s defense.

289 Clayton, Tomlinson, FAIR TRIAL RIGHTS at 180. Also see X and Y v. Austria (1978), 15 DR 160, Ecomm HR.
against him. According to the ECHR, this right (like all Convention rights) cannot be set aside due to the gravity of the charge, even if that charge involves terrorism.

The Basic Principles on the Role of Lawyers, Principle 8 provides:

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Scholars have observed that the right to "adequate time and facilities" was not included in the original draft of the ICCPR, but was added following the recommendations of both the Secretary General and a British proposal that had been based on the ECHR's text.

e. Right to adequate time to prepare a defense – Criteria under international law

When determining whether a defendant has received "adequate time" to prepare his defense, international courts, tribunals and other bodies appear to consider a range of factors specific to those cases. Some of these factors, along with factors deemed relevant by commentators, include:

1. The complexity of the case's law and facts, considering, for example the "amount of materials to be studied, files of the investigation on the one hand, textbooks, cases, and other legal materials on the other." If counsel feels reasonably certain that s/he lacks sufficient preparation time, s/he must request that the trial be adjourned.

2. The importance of the activity that requires time;

3. Equality in arms

4. Whether the defendant receives as equal time to prepare his case as the prosecution has to

---

290 Campbell and Fell v. UK, Application no. 7819/77 (1984). In this case, the Commission found that the defendant's right to adequate time and facilities under Article 6 of the ECHR had been violated because (1) the Board charging him did not make the charges public, and (2) the defendant was not provided legal assistance at or before the Board's hearing.


292 See infra notes 221 and text accompanying notes. Commentators have also listed some of these factors. E.g., Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 220-21.

293 In HUMAN RIGHTS IN CRIMINAL PROCEEDINGS, p. 221 Stefan Trechsel lists various factors courts have used to determine whether a defendant has been given adequate time to prepare a defense. See also FAIR TRIAL RIGHTS by Richard Clayton and Hugh Tomlinson at 180.

294 Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 221, infra. Also Ross v. United Kingdom, Application 11396/85. The court writes that "although Article 6 ... does not guarantee an appeal in criminal proceedings, where the opportunity to lodge an appeal in regard to the determination of a criminal charge is provided under domestic law, the guarantees of Article 6 ... continue to apply to the appeal proceedings, since those proceedings form part of the whole proceedings which determine the criminal charge at issue ...”

295 Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 221; Trechsel, Human Rights in Criminal Proceedings, p. 221. Also see Ross v. United Kingdom above.

296 Trial Observation Manuel for Criminal Proceedings, Practice Guide No. 5 International Commission of Jurists (2009), p. 91. The article goes on to place a correlating duty on the presiding court: "the tribunal or court has an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation...is needed." Id.

297 Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 221; Samer v. Germany, Application 4319/69.

prepare its case;\textsuperscript{299}

5. The importance of the proceeding’s stage being prepared, with more time needed for trial preparation than preparation for a non-trial hearing;\textsuperscript{300}

6. "The level of knowledge defense counsel is expected to have of the issue at hand;\textsuperscript{301}

7. The stage in the proceedings\textsuperscript{302};

8. The accused's representation of himself;\textsuperscript{303}

9. The number of hours counsel work, with no expectation that lawyers work extra hours on a case;\textsuperscript{304} and

10. The time needed for new counsel to research and comprehend the case’s arguments and history should earlier counsel be replaced.\textsuperscript{305}

f. \textbf{Right to adequate facilities to prepare a defense – Criteria under international law}

Commentators have stated that the right to adequate facilities requires that "the accused must have the opportunity to organize his defence appropriately, with the view to enabling him to put all relevant arguments before the trial court."\textsuperscript{306} When determining whether a defendant has received "adequate facilities" to prepare his defense, international courts, tribunals and other bodies appear to consider a range of factors specific to those cases. Some of these factors, that define or give meaning to the term “facilities” or “adequate facilities” include\textsuperscript{307}:

1. Access to an attorney without delay\textsuperscript{308}

\textsuperscript{299}The European Court has held that the principle of "equality of arms," as it relates to the "time" element, requires the defense to receive the same amount of preparation time as the prosecution. (\textit{U. v. Luxemburg Application} 10142/82.) Though generally the defendant should receive as much time to prepare his defense as does the prosecution, the prosecution would necessarily have more time than the defendant since the prosecution may begin preparing its case before the defendant is notified of the charges against him and before he is charged.

\textsuperscript{300}Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 22.

\textsuperscript{301}Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 221; \textit{Id.}, see also \textit{Huber v. Austria}, Application 5523/72. See infra.

\textsuperscript{302}\textit{Huber v. Austria}, (1974) 46 CD 99 ("The time necessary to prepare a defence must indeed be estimated on a different basis at the various stages of the proceedings."). In \textit{Huber}, the defendant was only granted 14 days to prepare a plea of nullity after the service of judgment. The Commission found that, while the 14-day limit was rather short and could in some cases constitute a violation of a defendant's right to adequate time and facilities under Article 6(3)(b) of the ECHR statute, the circumstances in \textit{Huber} did not result in such a violation.

\textsuperscript{303}Clayton, Tomlinson, FAIR TRIAL RIGHTS at 180, which discusses factors courts have used to determine whether a defendant was granted adequate time to prepare a defense.

\textsuperscript{304}Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 221; \textit{Id.}

\textsuperscript{305}Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 221; \textit{Id.}

\textsuperscript{306}Clayton, Tomlinson, FAIR TRIAL RIGHTS at 180. Clayton refers to \textit{Can v. Austria}, (1985) 8 EHRR 121 as a legal precedent for the quoted requirement implicit in the right to adequate facilities.

\textsuperscript{307}See General Comment 13, para 9; Basic Principles on Lawyers, Principles 8, 21. "It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time."

\textsuperscript{308}Basic Principles on the Role of Lawyers (1990), Principle 8. "...Principle 8 of the Basic Principles on Lawyers requires the authorities to ensure that all arrested, detained or imprisoned persons have adequate opportunities to be visited by and to communicate with their lawyer without delay, interception or censorship, in full confidentiality. When the lawyer and his or her client meet they
2. Ability to communicate with, to be visited by, and to consult with an attorney 

3. Ability to communicate with an attorney without interception or censorship and in full confidentiality, not within the hearing of law enforcement officials (though the consultation may be within sight of law enforcement officials)

4. Physical facilities that permit confidential communication with counsel of defendant’s choice

5. Access to appropriate and necessary information, documents, files and other evidence needed to prepare his defense

6. Access to the prosecution's files, including access to the results of preliminary investigations

7. Access to exculpatory material

8. Access to medical examinations

may be in sight of a law enforcement official, but cannot be within hearing range.”

309Cubas v. Uruguay, 70 I.L.R. at 286 (U.N.H.R.Comm.1982). The Human Rights Committee noted that, because the defendant was unable to communicate with her court-appointed attorney, the defendant was not afforded her right to adequate time and facilities as protected by Article 14(3)(b) of the ICCPR.

310Trial Observation Manual for Criminal Proceedings, Practice Guide No. 5 International Commission of Jurists (2009), p. 92. The author notes that "such interviews or telephone calls may be conducted in sight, but not within the hearing of, law enforcement officials.”

311The UN International Criminal Tribunal for Rwanda (ICTR) stated that a fundamental part of the accused's preparation is free and confidential communication with counsel. Prosecutor v. Casimiro Bizimungu, ICTR-99-50-I. Lawyers should also "be able to advise and represent persons charged with criminal offences in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter." Namakula, Language and the Right to Fair Trial Hearing in International Criminal Trials, Springer International Publishing 2014, p. 85. See also Basic Principles on the Role of Lawyers (1990), Principle 8; Trechsel, Human Rights in Criminal Proceedings, p. 237-8;

312Basic Principles on the Role of Lawyers (1990), Principle 8.

313But see Lietzow v. Germany, Application 24479/94, § 9. (European Court of Human Rights conceding that "information collecting during [criminal proceedings must] be kept secret in order to prevent suspects from tampering with evidence."); Prosecutor v. Vujadin Popovic and ors, IT-05-88-PT (2006) (Decision on Joint Motion seeking the Trial Chamber to order the Registrar to provide the Defense with BCS Transcripts of Proceedings in two past cases before the International Tribunal)

314Lamy v. Belgium (1989) 11 E.H.R.R. 529, § 29 (access to prosecutor’s files at as habeas corpus hearing). The defendant’s access to prosecutorial files and other materials is not absolute. Though the prosecution may have valid reasons to withhold information from the defense to, for example, protect national security or other classified information, "this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defense." (HRCte, General Comment 32, § 38) The Court concluded that

"information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer." Id.

315Clayton, Tomlinson, FAIR TRIAL RIGHTS at 181. See also Kremzow v. Austria (1993), 17 EHRR 322. In this case, the defendant complained that the prosecution failed to provide him with the croquis at an early enough stage in the proceeding. The Commission found that the defendant may have been somewhat disadvantaged by the shortness of the period between the service of the croquis and the initial hearing (three weeks), the length did not constitute a violation of the right to adequate time and facilities under Article 6 of the UCHR.

316Trial Observation Manual for Criminal Proceedings, Practice Guide No. 5 International Commission of Jurists (2009), p. 91, Article adds that this exculpatory material must not only include "material establishing innocence but also any other evidence that could assist the defence case (for instance, indications that a confession was not voluntary)."

317Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 222-230, which goes into detail on various factors courts have used to determine whether adequate facilities were provided to defendants.
9. Notification of consular rights^{318}

10. "[A]ll aspects that facilitate effective participation such as interpretation, legal assistance and legal aid, among others."^{319}

g. Domestic U.S. law

The U.S. Supreme Court has ruled that in the context of the right to counsel, the 14th Amendment's Due Process Clause requires criminal defendants to "have sufficient time to advise with [sic?] counsel and prepare his defense." (Powell v. State of Alabama, 287 U.S. 45 (1932).

Other federal courts have helped to clarify this notion using the terms "adequate time" and "adequate facilities". For example, in *Doughty v. Beto*, 396 F.2d 128 (5th Cir. 1968), the Fifth Circuit stated that "in order to render effective assistance counsel for an accused must devote time sufficient to insure an adequate defense." Similarly, the Ninth Circuit implies a due process right to adequate facilities in *Milton v. Morris*, 767 F.2d 1443 (9th Cir. 1985) in which the court found that a defendant's due process rights were violated "when he was tried without having had any meaningful opportunity to prepare his defense."

The rights to adequate time and facilities are also provided for in the Military Commission Act of 2009, and in various international treaties and other instruments, and in various domestic U.S. law sources.^{320}

[This Right to Adequate Time & Facilities to Prepare Defense introductory section is being developed further. An Indiana University McKinney School of Law student is assigned to research this topic.]

<table>
<thead>
<tr>
<th>20. Right to Adequate Time to Prepare Defense (ICCPR, art 14(3)(b))</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>Yes</td>
</tr>
<tr>
<td>-----</td>
</tr>
<tr>
<td>Has the defendant complained about lacking adequate time to prepare a defense?</td>
</tr>
<tr>
<td>Has the defendant's counsel complained about lacking adequate time to prepare a defense?</td>
</tr>
</tbody>
</table>

^{318}Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 222-230, *Id.*

^{319}Catherine S. Namakula, Language and the Right to Fair Hearing in International Criminal Trials, p. 82.

^{320}The right to adequate time and facilities to prepare a defense is provided for in the statutes of the ICTY and ICTR ad hoc tribunal statutes that were created through the United Nations Security Council. *See ICTY Statute*, article 21(4)(b) ("The accused shall be entitled to guarantee, in full equality, to have adequate time and facilities for the preparation of his or her defense and to communicate with counsel of his or her own choosing"); *ICTR Statute*, article 20(4)(b) ("The accused shall be entitled to guarantee, in full equality, to have adequate time and facilities for the preparation of his or her defense and to communicate with counsel of his or her own choosing."). *See also Report on the Mission of the Special Rapporteur [on the Independence of Judges and Lawyers, Dato Param Cumaraswamy] to the United Kingdom of Great Britain and Northern Ireland, UN Doc E/CN.4/1998/39/Add.4, March 5, 1998, para 46. <http://daccessdds.un.org/doc/UNDOC/GEN/G98/107/16/PDF/G9810716.pdf?OpenElement> (last visited xyz November 2014)
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>If defendant or defendant’s counsel have complained about lack of adequate time to prepare a defense, has the Court attempted to remedy these complaints?</td>
<td></td>
</tr>
<tr>
<td>What remed(ies) did the military judge order to remedy any lack of adequate time to prepare a defense?</td>
<td></td>
</tr>
<tr>
<td>Were these remedies of the military judge effective? Was adequate time offered to prepare a defense?</td>
<td></td>
</tr>
<tr>
<td>Does it appear as though the defendant has had adequate time to prepare for his defense?</td>
<td></td>
</tr>
<tr>
<td>Does it appear as though the defense counsel and defendant have been given enough time to meet to prepare for the defense?</td>
<td></td>
</tr>
<tr>
<td>What level of access does the defendant have to his counsel?</td>
<td></td>
</tr>
<tr>
<td>How often is the defendant permitted to meet with his counsel?</td>
<td></td>
</tr>
<tr>
<td>How much time is the defendant permitted to meet with his counsel at any given time?</td>
<td></td>
</tr>
<tr>
<td>Does it appear as though time constraints of meetings may unreasonably limit the preparation of the defense?</td>
<td></td>
</tr>
<tr>
<td>Do the means or modes of communication between the defendant and the defense counsel facilitate smooth and easy communication, or do the means or modes of communication make the communication difficult?</td>
<td></td>
</tr>
<tr>
<td>Has the defendant been provided with adequate time to conduct investigations or to have investigations conducted on behalf of his defense?</td>
<td></td>
</tr>
<tr>
<td>Has the defendant been provided with adequate means to conduct investigations or to have investigations conducted on behalf of his defense?</td>
<td></td>
</tr>
<tr>
<td>Does the amount of time one defendant has to prepare his defense equal the amount of time other defendants have to prepare their defenses?</td>
<td></td>
</tr>
<tr>
<td>Does the amount of time one defendant has to prepare his defense equal the amount of time the prosecution has to prepare its case?</td>
<td></td>
</tr>
<tr>
<td>Have there been any changes in defendant’s counsel or defense team that may affect the amount of time needed to prepare his defense?</td>
<td></td>
</tr>
<tr>
<td>21. Right to Adequate Facilities to Prepare Defense (ICCPR, art 14(3)(b))</td>
<td>Yes</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Has the defendant complained about lacking adequate facilities to prepare a defense?</td>
<td></td>
</tr>
<tr>
<td>Has the defendant’s counsel complained about lacking adequate facilities to prepare a defense?</td>
<td></td>
</tr>
<tr>
<td>If defendant or defendant’s counsel have complained about lack of adequate facilities to prepare a defense, has the Court attempted to remedy these complaints?</td>
<td></td>
</tr>
<tr>
<td>What remedy(ies) did the military judge order to remedy any lack of adequate facilities to prepare a defense?</td>
<td></td>
</tr>
<tr>
<td>Were these remedies of the military judge effective? Were adequate facilities offered to prepare a defense?</td>
<td></td>
</tr>
<tr>
<td>Does it appear as though the defendant have access to his lawyers and other materials needed to prepare his defense?</td>
<td></td>
</tr>
<tr>
<td>Does it appear as though the defendant has adequate facilities to prepare for his defense?</td>
<td></td>
</tr>
<tr>
<td>Does it appear as though the defendant has adequate access to his lawyers to prepare for his defense?</td>
<td></td>
</tr>
<tr>
<td>Does defendant have a physical space in which he can consult with counsel in confidence, preserving the attorney client privilege and in furtherance of his right to counsel of his choosing?</td>
<td></td>
</tr>
<tr>
<td>Are facilities such that the defense counsel can communicate with counsel in confidence, preserving attorney client privilege, without monitoring?</td>
<td></td>
</tr>
<tr>
<td>Does the defendant have access to a physical space where he can review documents and other materials?</td>
<td></td>
</tr>
<tr>
<td>Could the guards ever see the defendant while he consulted with his lawyer? If so, was it possible that they could hear the conversation?</td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td>Answer</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>Has the defendant ever had a phone interview with counsel? If so, were guards able to see/hear him while he was speaking to counsel on the phone?</td>
<td></td>
</tr>
<tr>
<td>Are facilities such that the defense counsel can communicate with counsel in confidence, preserving attorney client privilege, without monitoring?</td>
<td></td>
</tr>
<tr>
<td>Does the defendant have access to electronic databases needed for his defense?</td>
<td></td>
</tr>
<tr>
<td>Does the defendant’s counsel have access to the information and documents needed to prepare for the defense?</td>
<td></td>
</tr>
<tr>
<td>Have there been any complaints regarding whether defendants’ defense-related printed material are free from unreasonable searches or monitoring?</td>
<td></td>
</tr>
<tr>
<td>Do the means or modes of communication between the defendant and the defense counsel facilitate smooth and easy communication, or do the means or modes of communication make the communication difficult?</td>
<td></td>
</tr>
<tr>
<td>Has the defendant been provided with adequate means to conduct investigations or to have investigations conducted on behalf of his defense?</td>
<td></td>
</tr>
<tr>
<td>Do the facilities afforded to the defendant to prepare his defense equal the amount of time the prosecution has to prepare its case?</td>
<td></td>
</tr>
<tr>
<td>Do the facilities one defendant has to prepare his defense equal the facilities that other defendants have to prepare their cases?</td>
<td></td>
</tr>
<tr>
<td>Have there been any changes in defendant’s counsel or defense team that may affect the facilities needed to prepare his defense?</td>
<td></td>
</tr>
<tr>
<td>Has defense counsel been forced to work extra hours to compensate for inadequate time?</td>
<td></td>
</tr>
</tbody>
</table>
I. Right to Prompt Judicial Proceedings

When a defendant is arrested or captured, he has the right to prompt judicial proceedings. At a minimum, the government is obligated to bring him before a judge promptly, so that the defendant can be notified of charges against him and so that other rights of the defendant can be afforded to him.

a. General

International and domestic U.S. law require that after a defendant is captured or arrested, he must be brought promptly before a judge in court. When the defendant is brought before the judge, the judge can, inform the defendant of a wide range of rights that the defendant has within the criminal justice system. Upon the prompt commencement of proceedings, the judge can inform the defendant of rights, such as the right to counsel, the right to an interpreter or translator if needed, the right to remain silent, and other rights.

When the defendant appears before the judge, the judge may undertake inquiries that may help identify other protectable interests of the defendant. For example, the judge may inquire about the nationality of the defendant, whether the defendant has more than one nationality, whether the defendant has any medical conditions that should be attended to, or whether the defendant has funds to retain a civilian counsel.

The judge may also determinations on critical rights-related issues, such as whether the defendant is subject to the jurisdiction of the Military Commission, whether the judge needs to issue orders for physical or mental examinations of the defendant, or whether the judge needs to issue an order that facilitates the defendant in making submissions that challenge the lawfulness of his detention.

[This Right to Prompt Judicial Proceedings introductory section is being developed further.]

| 22. Right to be Brought Promptly Before a Judge or Other Judicial Officer (ICCPR, art 9(3) & (4)) |
|---------------------------------------------------------------|-----------------|-----------------|-----------------|-----------------|
| Question                                                      | Yes  | No  | Don’t Know | Comment          |
| Was the defendant brought before a court promptly?             |      |     |             |                 |
| When was the defendant first brought before a court?          |      |     |             |                 |
| Was the court in which the defendant first appeared competent, objective and impartial? |      |     |             |                 |
| Did the court in which the defendant first appeared possess jurisdiction to hear the claims against the defendant? |      |     |             |                 |
| Were any alternative courts or tribunals considered?          |      |     |             |                 |

321 The right to be brought promptly before a court is also provided for in the following international instruments: European Convention, article 5(3); American Convention, article 7(5); African Commission Resolution, Paragraph 2(C); and ICC Statute, Article 59(2). See Body of Principles on Detention or Imprisonment, Principles 11, 38; and Declaration on the Protection of all Persons from Enforced Disappearance, UN General Assembly Resolution 47/133, December 18, 1992, article 10(1).
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Could the defendant have been brought before a federal district court</td>
<td></td>
</tr>
<tr>
<td>in the U.S., instead of a Military Commission at Guantanamo Bay, Cuba?</td>
<td></td>
</tr>
<tr>
<td>Would a U.S. federal district court have had jurisdiction over the</td>
<td></td>
</tr>
<tr>
<td>alleged criminal behavior of the defendant?</td>
<td></td>
</tr>
<tr>
<td>Was the defendant brought before any other type of Guantanamo Bay</td>
<td></td>
</tr>
<tr>
<td>non-judicial tribunal or process (e.g., Combat Status Review Tribunal–</td>
<td></td>
</tr>
<tr>
<td>CSRT)?</td>
<td></td>
</tr>
</tbody>
</table>
J. Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release; Right to Speedy Trial

The right to trial without undue delay, within a reasonable time, or to release; right to speedy trial requires…

a. General
International and domestic U.S. law require criminal trials to be commenced without undue delay, and if trials are not commenced within a reasonable time the defendant is entitled to be released.322 The right to trial without undue delay, within a reasonable time, or to release is not unrelated to the right to a speedy trial as provided for in the Sixth Amendment to the United States Constitution.323 ICCPR Article 9(3) provides:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

b. Military Commissions Act of 2009
The Military Commissions Act of 2009 expressly provides that the right to a speedy trial provision incorporated into the UCMJ “shall not apply to trial by military commission”.324

c. International law

[This Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release introductory section is being developed further.]

<table>
<thead>
<tr>
<th>General Questions</th>
</tr>
</thead>
</table>

322 The right to be tried without undue delay is also provided for in the following international instruments: ICTY Statute, Article 21(4) (c); ICTR Statute, Article 20(4) (c); Body of Principles on Detention or Imprisonment, Article 38; African Commission Resolution, Article 2(e) (ii); ICC Statute, Article 67(1) (c). The right to be tried without undue delay has been interpreted in the jurisprudence of many international bodies, including international criminal tribunals and treaty bodies of the United Nations.

323 The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”.

324 10 U.S.C. § 948b(D)(1)(A). This section provides:

‘(d) INAPPLICABILITY OF CERTAIN PROVISIONS.—
(1) The following provisions of this title shall not apply to trial by military commission under this chapter:
‘(A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts martial relating to speedy trial.
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>When was the defendant captured or arrested?</td>
<td></td>
</tr>
<tr>
<td>When were the charges against the defendant sworn?</td>
<td></td>
</tr>
<tr>
<td>When were the charges against the defendant referred?</td>
<td></td>
</tr>
<tr>
<td>When did the trial against the defendant commence?</td>
<td></td>
</tr>
</tbody>
</table>

**Delay Between Arrest / Capture and the Referral of Charges**

How many years / months transpired between the time the defendant was captured / arrested and the time Military Commission charges were referred against the defendant?

If the defendant’s trial has not yet commenced, how many years / months have transpired between the time the charges were referred against the defendant and today?

Did the judge discuss or make a ruling as to whether any delay between the capture / arrest and the referral of charges was excusable?

Did the judge determine that any delay between the capture / arrest and the swearing of charges was attributable to an individual or entity other than the defendant or prosecution? If so, who?

**Delay Between Time Charges Referred and Today (if the trial has not yet commenced)**

If the trial has not yet commenced, how many years / months have transpired between the time the charges were referred and today?

Did the judge discuss or rule on whether any delay between the referral of charges and the proposed commencement date of the trial is excusable?

Did the judge determine that any delay between the referral of charges and the time the proposed commencement trial date is attributable to the defendant?

Did the judge determine that any delay between the referral of charges and the proposed trial commencement date is attributable to the prosecution?
<table>
<thead>
<tr>
<th>Did the judge determine that any delay between the referral of charges and the proposed commencement date of the trial is attributable to an individual or entity other than the defendant or prosecution? If so, who?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Delay Between Time Charges Referred and the Date the Trial Actually Commenced</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Did the judge discuss or rule on whether any delay between the referral of charges and the commencement date of the trial is excusable?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Did the judge determine that any delay between the referral of charges and the time the commencement trial date is attributable to the defendant?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Did the judge determine that any delay between the referral of charges and the trial commencement date is attributable to the prosecution?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Did the judge determine that any delay between the referral of charges and the commencement date of the trial is attributable to an individual or entity other than the defendant or prosecution? If so, who?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Reasons for any delay?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>What is your understanding of the major causes of any delay in the proceedings?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Is it your understanding that any delay was caused by logistical issues, including, for example, complications in transporting equipment or personnel from the U.S. to Guantanamo Bay, the need to construct courtroom or other facilities at Guantanamo Bay, or other logistical or technical issues?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Is it your understanding that the adjudication of any habeas corpus proceedings or other U.S. federal court proceedings contributed to trial delay? That is, have Guantanamo Bay proceedings been suspended due to pending habeas corpus cases in the U.S.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Does it appear as though any delay has been caused by the judge’s failure to rule on motions in a timely fashion?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Have the prosecution, the defense or other stakeholders expressed concerns about or complained about the failure of the judge to rule on motions in a timely fashion?</th>
</tr>
</thead>
</table>
If there is only one courtroom available for secure proceedings, does it appear as though using only one courtroom has contributed to any delay? That is, has courtroom scheduling contributed to any delay?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Are you aware of any other factors that may have contributed to any delay? If so, what were they?

If the proceedings are currently at the pre-trial hearing stage, has the judge issued orders outlining a fixed hearing schedule between today through the proposed trial date?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

When is the defendant’s trial scheduled to begin?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

In your opinion, is the length of time between arrest / capture / detention and the proposed trial date reasonable?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

---

### 24. Right to Speedy Trial (ICCPR, art 14(3)(c), art 9(3) & (4))

Has the defendant complained about not receiving a speedy trial?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Has the prosecution commented in the issue of a speedy trial?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Has the judge commented in the issue of a speedy trial?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>
K. Right to Liberty and Security of Person, including Freedom from Arbitrary Detention and Right to Review of Lawfulness of Detention

The right to liberty and security of person, including freedom from arbitrary detention and right to review of lawfulness of detention requires that a detainee be informed of the charges against himself when he is detained. The defendant shall not be detained in a manner that is proscribed by law. Not only must national standards be followed when detaining an individual, the international and regional standards must be strictly followed. The individual should be promptly brought before a judicial officer so that a decision can be made on the lawfulness of one’s arrest/detention. The detainee is entitled to release if his detention is unlawful, and just compensation for the deprivation of his liberty. The detainees are not only entitled to judicial determinations before the Guantanamo Bay Military Commissions but additionally lawful detention determinations via habeas proceedings in U.S. federal courts in many cases.

a. General

Every detainee at Guantanamo Bay has a right to liberty and security of person. Oftentimes, this right is most litigated with respect to whether one’s detention is arbitrary and/or whether an individual has a right to some form of review of their detention and whether that detention is lawful. What types of proceedings are those detained at Guantanamo entitled to, under domestic and international law? What rights are granted to detainees that pertain to one’s liberty and security of their person? The problem of arbitrary detention is such a prevalent issue worldwide that the United Nations created a Working Group on Arbitrary Detention that investigates abuses internationally that pertain to the liberty and security of the person.325 The Universal Declaration of Human Rights was one of the first documents to highlight an individual’s right to be free from arbitrary arrest or detention.326 The working group while not defining arbitrary, did state that

it considered as arbitrary those deprivations of liberty which for one reason or another are contrary to relevant international provisions laid down in the Universal Declaration of Human Rights or in relevant international instruments ratified by States.327

Such a right is of extreme importance to detainees as they could possibly face inhumane conditions or torture wherever they are being held. These conditions would easily continue without procedures in place that make officers and other in the legal system accountable for their actions and the detention of these individuals. These accountable individuals must account for the whereabouts of detainees, offer them procedures for which they can challenge their detention, and release them if there exists no legal or sometimes even reasonable grounds for any further detention. If arbitrary detention is not controlled then the right to counsel, right to information, right to proceedings, and many other rights are all lost, as the State would be able to indefinitely detain such an individual without any proceedings, any comment, or accounting.

b. Right to Liberty and Security of Person under International Law

Under international law, each of the Guantanamo Bay detainees has a right to liberty and security of

---

326 Although the UDHR contained such a guarantee, as a universal declaration it is not a binding treaty on parties but many of its concepts have been included in other binding treaties (evidenced below) and incorporated in international law as customary international law.

© 2017
E-mail - GitmoObserver@yahoo.com, @GitmoObserver The Gitmo Observer (of Indiana U McKinney School of Law)

Not to be Quoted or Reproduced Without Permission --- This is a Preliminary Draft.
their person. All persons have the right to freedom from arbitrary detention (ICCPR, art 9(1)). 328 Under ICCPR Article 9(1) everyone is provided:

the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Other provisions of the ICCPR are relevant to liberty and security of the person, such as Article 9(2) which provides: “[a]nyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”329 The ICCPR provides that the defendant shall be promptly brought before a judge or other authorized official, after he is charged and entitled to a trial within a reasonable time.330 This provision is mainly meant to combat against concerns of arbitrary and/or indeterminate detention. The review of the lawfulness of a detention is taken up in ICCPR Article 9(4) which provides:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.331

The ICCPR even provides that victims of unlawful detention or arrest have a right to compensation.332 The ICCPR is binding on the United States as a party to the treaty. Some other international instruments also bind the U.S. and discuss the right of liberty and security of the person.333 There are multiple other non-binding treaties and instruments that mention a right to liberty and security of the person.334 The European Convention on Human Rights mirrors the ICCPR in its language and provisions included. The European Convention goes a step further though and outlines six instances that are an “exhaustive” list when an individual’s liberty can be deprived.335

c. International Judicial Sources on the Right to Liberty and Security of the Person

Multiple international cases have contemplated and evaluated an individual’s right to liberty and security of the person. Many of these cases decided by the European Court of Human Rights have laid

328 The right to liberty and security of person, including a prohibition on arbitrary arrest or detention is also provided for in the following international instruments: UDHR, articles 3, 9; European Convention, article 5(1); African Charter, article 6; American Convention, Article 7(1)-(3); and the ICC Statute, article 55(1)(d).
329 ICCPR, Article 9(2).
330 ICCPR, Article 9(3).
331 ICCPR, Article 9(4).
332 ICCPR, Article 9(5).
333 Geneva Conventions, Common Article 3; Additional Protocol I to the Geneva Conventions, Art. 75(3)(binding as a matter of customary international law that has risen to the appropriate level).
334 Convention on the Rights of the Child, Article 37l International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 16; African Charter on Human and Peoples’ Rights, Article 6; American Convention on Human Rights, Article 7(3); European Convention on Human Rights, Article 51 ICC Statute 7(2)(i), 55(1)(D), 85(1). All of the above were treaties, but two other instruments discuss such a right which include: EU Charter of Fundamental Freedoms, Article 6 and Arab Charter, Article 8 and Article 16.
335 The listed reasons for depriving an individual’s liberty include:

(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;”
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

European Convention on Human Rights, Article 5(1)(a)-(f).
out a framework for evaluating whether this right has been infringed upon. Specifically, whether these rights have been infringed upon under the European Convention of Human Rights but these decisions are equally applicable internationally. In order for a detention to be allowed under international law it must be lawful, “which includes the condition of compliance with a procedure prescribed by law.” 336 There is an obligation “to conform to the substantive and procedural rules” of national law and additionally actions should be consistent with larger regional and international frameworks like the European Convention of Human Rights. 337 Additionally, a “period of detention will in principle be lawful if it is carried out pursuant to a court order.” 338 Under the European Convention of Human Rights, Article 5 § 1, the list of available exceptions to the right of liberty is a narrow and exhaustive list, signaling the importance of this right universally. 339 The list is narrowly construed as “to ensure that no one is arbitrarily deprived of his liberty.” 339

The Nowicka v. Poland decision states that one must balance the need to detain/ability to detain versus an individual’s right to liberty and security of the person. 341 When completing this balancing assessment the Court considers the following points relevant; the nature of the obligation arising from the relevant legislation including its underling object and purpose; the person being detained and the particular circumstances leading to detention; and the length of detention. 342

The court must complete such a balancing act in order to make sure these factors (listed above), and other relevant factors, justify deprivation of an individual’s right to liberty and security of person.

The European Court of Human Rights and other bodies have provided the needed accountability of officials and the acts of detention that they commit. 343 These prompt proceedings “may lead to the detection and prevention of life-threatening measures or serious ill-treatment.” 344 Ultimately, what is at stake in making these determinations is

both the protection of the physical liberty of individuals and their personal security in a context which, in the absence of safeguards could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection. 345

The investigation of terroristic offenses presents special problems but “does not mean that the authorities have carte blanche under Article 5 [or analogous provisions internationally] to arrest suspects and detain them in police custody, free from effective control by domestic courts.” 346 If the detention is unacknowledged then it is “a complete negation of these guarantees [right to liberty and security of person] and a most grave violation of article 5.” 347 The authorities “have a duty to account for his or her whereabouts.” 348

d. Right to Liberty and Security of the Person under Domestic U.S. Law and Military Law

The Fifth Amendment to the U.S. Constitution provides that no accused shall be “deprived of life, liberty, or property, without due process of law”. After a threshold of evidence and suspicion has arisen

336 Vasileva v. Denmark, ECHR, Application No. 52792/99, 25 Sept. 2003 § 32 (Police failed to secure the identity of a detainee for 13.5 hours and was found in violation of ECHR Article 5(1))
337 Id.
338 Id.
339 Nowicka v. Poland, ECHR, Application No. 30218/96, 3 December 2002 § 59
340 Id.
341 Id. at § 61.
342 Id. See S.D. v. Greece, ECHR, Appl. No. 53541/07, 11 June 2009, p. 76 (Turkish asylum seeker suffered violation of Article 3 for degrading treatment and was refused the right to challenge lawfulness of detention)
343 Al Nashiri v. Poland, ECHR, Application No. 28761/11, 24 July 2014 § 528 (Detention lasting for 83 days was excessive and a breach of ECHR Article 5(3))
344 Id.
345 Id.
346 Id. at 529.
347 Id.
348 Id.
against a person, the U.S. government may lawfully and appropriately detain that person. Such deprivation of liberty cannot be arbitrary. This amendment additionally has been expanded to Guantanamo Bay detainees to review the lawfulness of their detention.\(^{349}\) The Authorization to Use Military Force (AUMF) passed in the wake of September 11, 2001, quickly became an important document utilized by the Executive to justify detentions at Guantanamo.\(^{350}\) The relevant provision of the AUMF states:

> [t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.\(^{351}\)

Multiple other military documents and regulations control the detention of individuals at Guantanamo and the deprivation of their right to liberty and security of the person. The relevant documents/regulations that will be examined in this section include: the Uniform Code of Military Justice, and Army Regulation 190-8.\(^{352}\)

i. Army Regulation 190-8: Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees.

This regulation was meant to implement procedures for compliance with both international and customary international law, specifically the Geneva Conventions.\(^{353}\) If there is ever any doubt to whether an individual fits within category that is permissible to be detained, such person will appear before a tribunal that shall determine the status of said person.\(^{354}\) The regulation additionally provides the procedures that will be carried out shortly after capture. They will be protected and safeguarded under this policy, searched, and all property tagged.\(^{355}\) The importance of these regulations to Guantanamo Bay detainees really came after the *Hamdi v. Rumsfeld* decision, when the court determined that the tribunals convened by the Department of Defense should be modeled after those tribunals outlined in Army Regulation 190-8.\(^{356}\)

ii. The Uniform Code of Military Justice and its Provisions on Arrest as they Relate to Deprivation of Liberty.

The Uniform Code of Military Justice (UCMJ) applies to all members of the armed services and serves as a backbone of military law. Although the UCMJ only applies to members of the armed services, it can be used to understand and interpret other military law. The UCMJ defines arrest as “the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits.”\(^{357}\) The UCMJ defines confinement as “the physical restraint of a person.”\(^{358}\) Additionally, the UCMJ provides “[n]o person may be ordered into arrest or confinement except for probable cause.”\(^{359}\) These definitions and requirements provide help when interpreting other areas of military law like the 2012 Rules for Military Commissions and the Military Commissions Act of 2009.

---

\(^{349}\) Section E will demonstrate how the Fifth Amendment has been expanded to Guantanamo Bay detainees through four illustrative habeas cases (these cases are by no means the exhaustive list, but they serve as the seminal cases for securing this right for Guantanamo Bay detainees).

\(^{350}\) Public Law 107-40 (Sept. 18, 2001).

\(^{351}\) The Military Commissions Act of 2009 and 2012 Manual for Military Commissions are also relevant to the Guantanamo Bay detainees but do not contain relevant provisions for the discussion that takes place here.

\(^{352}\) Army Reg. 190-8 (1-1)(b) (1997).

\(^{353}\) Army Reg. 190-8 (1-6)(a)-(b) (1997).

\(^{354}\) Army Regulation 190-8 (2-1)(1997).


\(^{356}\) Uniform Code of Military Justice § 809, Art. 9 (a).

\(^{357}\) Uniform Code of Military Justice § 809, Art. 9 (d).
e. Domestic Jurisprudence on the Right to Liberty and Security of the Person

Multiple cases have been tried domestically that pertain to the right to liberty and security of the person. Four cases were decided between 2004 and 2008, as habeas cases where they delineate the rights afforded to those held at Guantanamo Bay. Specifically, the deprivation of liberty and due process was highly litigated.

The first two cases were decided in 2004: *Rasul v. Bush*, and *Hamdi v. Rumsfeld*. After the *Rasul* case, the federal district courts have been conferred the power to hear applications of habeas corpus of anyone who claims that they are being held in custody in violation of the Constitution, laws or treaties of the United States. This resulted in detainees gaining the ability to file cases relying on international and domestic law when they requested redress for their grievances, which oftentimes in habeas cases by their nature was challenging the lawfulness of one’s detention. The ultimate conclusion of the *Rasul* court was “that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.” Nothing in our common law has said to categorically exclude aliens from the privilege of litigation, quite the contrary “courts of the United States have traditionally been open to nonresident aliens.” The case determined that federal courts do have the jurisdiction to determinate the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.

The Supreme Court soon thereafter heard *Hamdi v. Rumsfeld*. This case additionally involved an individual detainee at Guantanamo Bay and was a habeas case. The court ultimately held that US citizens that are being held as enemy combatants are guaranteed the meaningful opportunity to contest the factual basis for their detention under the due process clause of the Constitution. Interestingly, this case involved a US citizen. The exact holding was that a citizen-detainee seeking to challenge his classification as an enemy-combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decisionmaker.

The same court determined though that aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.

Examples include the allowance of hearsay and a rebuttable presumption in favor of the government’s evidence, but still the detainee continues to be entitled to a chance to challenge the lawfulness of his detention.

---


362 Id.

363 Id. at 485.

364 Id.


366 Id. at 533-534.
The *Hamdi* case was followed two years later by the *Hamdan v. Rumsfeld* case. Another case where the defendant challenged the legality of his detention. In this case they stated:

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict, its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.369

This case contributed to the creation of the Military Commissions Act of 2006. Two years later came *Boumediene v. Bush*. The earlier cases determined that aliens detained at Guantanamo Bay have the right to challenge the legality of their detention through a habeas petition.370 This case determined that detainees are entitled to prompt habeas proceedings even if they have not exhausted all the review procedures available to them.371 This case contributed to the revision of the MCA of 2006 and the issuance of the MCA of 2009.

f. Practical Applications of the Right to Liberty and Security of the Person through Petitions and Transcripts at Guantanamo.

Multiple of the Guantanamo Bay detainees have lodged arbitrary detention or unlawful detention claims whether in Habeas cases (examined above) or through the military commissions.372 Oftentimes these cases will cite to the ICCPR (binding), European Conventions (non-binding), and other international instruments when they classify what the right includes internationally.373 Oftentimes, many of the earlier cases challenged the lawfulness of their detention based on the “enemy combatant” status that they were assigned either upon arrest or detainment.374 According to a memorandum published on the Council of Foreign Relations Website,

[a]n “enemy combatant” is an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict.375

The presidential authority to detain an individual as an “enemy combatant” has been claimed to be covered under the Authorization to Use Military Force (AUMF) passed shortly after September 11, 2001.376 The procedures followed at Guantanamo for the detaining of defendants have been questioned and litigated by multiple groups including the American Civil Liberties Union (ACLU).377 The petition sought to enforce the public’s access to the accused at Guantanamo, which included the right to hear grievances connected to detainment procedures, among other things.378

The framework for evaluating whether an individual’s right to liberty and security of the person has been violated is the Fifth Amendment of the United States Constitution.379 The Khadr appendix explains that those exposed to indefinite detention are highly susceptible to torture, psychological

370 Three of these cases include: *Rasul v. Bush, Hamdi v. Rumsfeld*, and *Hamdan v. Rumsfeld* (all highlighted above).
372 The following cases have lodged such a claim in some fashion: United States v. Hicks, (finish) (This is by no means an exhaustive list, rather it serves as an illustrative list of a few of the cases that have lodged such a claim).
373 While almost all cases will inevitably rely and cite to international law, one example is the David Hicks case. *United States v. Hicks, Record of Trial No. 040001, Vol. VIII (Nov. 1-3, 2004)*, pp. 76, 81, 83.
374 *Id.* at 136.
378 *Id.* at 1.
and physical abuse, and that these individuals carry the “stains” of their detention even after their release.380 All Guantanamo Bay detainees are afforded the due process protections under the U.S. Constitution.381

An example of a case lodged to determine the lawfulness of one’s detention is United States v. Abdul Zahir.382 The defendant in this case claimed that he has never been an “enemy combatant” or other hostile, at any point against the United States.383 Oftentimes these defendants will additionally lodge an Alien Tort Statute claim under 28 U.S.C. § 1350.384

If a government detains a person, international and domestic law further require that the defendant be afforded the right to access to proceedings to determine the lawfulness of his detention. (ICCPR, art 9(4))385

**International Cases**

a. Nowicka v. Poland, ECHR, Applic. No. 30218/96, 3 December 2002: Detention lasting for 83 days was excessive and a breach of ECHR Article 5(3)

[This introductory Liberty, Security, Arbitrary Detention, and Lawfulness of Detention section is being developed further.]

<table>
<thead>
<tr>
<th>25. Right to Liberty and Security of Person, including Freedom from Arbitrary Detention (ICCPR, art 9(1))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does it appear that the defendant’s right to liberty and security of person has been afforded to him?</td>
</tr>
<tr>
<td>Yes</td>
</tr>
<tr>
<td>Does it appear that the defendant’s right to freedom from arbitrary detention has been afforded to him?</td>
</tr>
<tr>
<td>Has the defendant complained about any alleged denial of his right to liberty and security of his person?</td>
</tr>
<tr>
<td>Has the defendant complained about any alleged denial of his right to freedom from arbitrary detention?</td>
</tr>
</tbody>
</table>

---

380 Id. at 20-25.
381 Id. at 32.
383 Id. at 143, 160-61. This is a typical claim lodged at some point in most if not all cases such as United States v. Sufyian Barhoumi, and numerous others.
384 One example is the case of United States v. Sufyian Barhoumi.
385 The right to proceedings to determine the lawfulness of detention is also provided for in the following international instruments: European Convention, article 5(4); American Convention, article 7(6); and Body of Principles on Detention or Imprisonment, Principle 32.
26. Right to Challenge the Lawfulness of Detention (ICCPR, art 9(4))

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has the defendant been provided access to proceedings to determine the lawfulness of his detention?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant permitted to bring habeas corpus or similar proceedings in U.S. federal courts?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant been informed that his right to challenge the lawfulness of his detention is continuing?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant had the opportunity to challenge the lawfulness of his detention in non-judicial, administrative proceedings at Guantanamo Bay?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
L. Freedom from torture, and cruel and inhumane treatment or punishment

The right to freedom from torture, and cruel and inhumane treatment or punishment requires…

[This section of the Guantanamo Bay Fair Trial Manual will be revised following the release of the executive summary of the U.S. Senate’s “Torture Report” on 9 December 2014.386] and the 20 November 2014 United Nations Committee Against Torture’s Concluding Observations on the U.S. Report to the Committee (reproduced in Appendix E on page 279).

a. General

International and U.S. law provide that all individuals have the right to freedom from torture or cruel, inhuman or degrading treatment or punishment during detention (ICCPR, arts 7, 9(1); 10(1)), 387 and this prohibition applies to all Guantanamo Bay defendants before and during any hearings. This prohibition extends to all forms of water boarding, 388 certain methods of “enhanced interrogation”,389 and to some forms of force-feeding.390

A. International law sources

1. Binding international human rights law treaties

The U.S. is bound to comply with two international human rights law treaties that prohibit torture: (a) the Convention Against Torture and Cruel, Inhuman Treatment or Punishment; and (b) the International

---

386 The full title of the Report is the “Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program: Findings and Conclusions”. It was the result of a 5-year study conducted by the Senate Select Committee on Intelligence. It was “approved” 13 December 2012, “Updated for Release” on 3 April 2014, with “declassification revisions” of 3 December 2014. The Executive Summary can be found here: https://pihrlmcop.files.wordpress.com/2014/12/cia-detention-interrogation-senate-select-committee-on-intelligence-executive-summary-released-9-december-2014-redacted.pdf

387 The right to be free from torture or cruel, inhuman or degrading treatment or punishment during detention is also provided for in the following international instruments: UDHR, Article 5; Body of Principles onDetention or Imprisonment, Principle 6 (“No person under any form of detention or imprisonment shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.”) See also Code of Conduct for Law Enforcement Officials, Article 5 (“No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”)

388

389

390
Covenant on Civil and Political Rights:

i. UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)/

Article 2 of the CAT provides:

"Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[391]

Article 3 of the CAT provides:

“No State Party shall expel, return "refouler" or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”[392]

Article 15 of the CAT provides: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

ii. International Covenant on Civil and Political Rights (ICCPR), Articles 7 and 10:

Article 7 of the ICCPR provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 10 of the ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Furthermore, the ICCPR provides that anyone claiming that their rights have been violated shall have an effective legal remedy. Further, no derogation is allowed regarding the right not to be subjected to

---

391 There was significant discussion about whether Guantanamo Bay is a US territory? If Guantanamo Bay is not a US territory, then perhaps the Convention Against Torture does not apply? However, the U.S. put this question to rest on November 27, 2015, when the U.S. conceded that the CAT applies to the U.S. regarding Guantanamo Bay. This concession was in a U.S. response to a UN Torture Committee document titled Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports on Implementation of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The U.S. informed the UN Torture Committee that the U.S. affirmed its understanding that where the text of CAT provides that obligations apply to a State Party in “any territory under its jurisdiction,” such obligations extend to certain places beyond the sovereign territory of the State Party, and more specifically, “territory under its jurisdiction” extends to “all places that the State Party controls as a governmental authority.” Since Guantanamo Bay is under U.S. jurisdiction, the CAT applies there.

392 Comment: “This article requires that no state party expel, return, or extradite a person to another country where there are substantial grounds to believe he would be subjected to torture. Furthermore, Article 3 does not prohibit persons from being removed to countries where they would face cruel, inhuman, or degrading treatment not rising to the level of torture. According to Article 3 of CAT the United States enacted statutes and regulations to prohibit the transfer of aliens to countries where they would be tortured, including the Foreign Affairs Reform and Restructuring Act of 1998, section 2340A of the United States Criminal Code, and certain regulations implemented and enforced by the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Department of State.
torture and other forms of ill-treatment.394

2. Non-binding international human rights law treaties and international instruments

International human rights law treaties and other international instruments that do not bind the U.S. that provide for the right to be free from torture include:

1- University Declaration of Human Rights, articles 5 & 8
2- American Convention on Human Rights
3- Convention on the Protection of the Rights of Migrant Workers and Members of their Families (art. 10).
4- European Convention for the Protection of Human Rights and Fundamental Freedoms (art 3).
5- Article 5 African Charter on Human and Peoples’ Rights.
6- Arab Charter on Human Rights (arts 8).
7- Convention on the Rights of the Child (art. 37).
8- American Declaration on Human Rights
9- Cairo Declaration on Human Rights in Islam (arts. 19-20).

Article 5 Universal Declaration on Human Rights. (UDHR)

Article 5 of the UDHR prohibits all forms of torture. It provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

UDHR, article 8 provides:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

3. International Humanitarian Law

The Geneva Conventions of 1949 and their Additional Protocols of 8 June 1977 contain several provisions that absolutely prohibit torture and other cruel or inhuman treatment and outrages upon individual dignity.

• Geneva Conventions 1 of 1949, common article 3.
• Geneva Convention II of 1949, common article 3.
• Geneva Convention III of 1949, common article 3.
• Geneva Convention IV of 1949, common article 3.

393 ICCPR, Art. XYZ

394 ICCPR, Art. XYZ
The infliction of torture is a "Serious violation "of core international humanitarian law under the Geneva Conventions (in particular, Common Article 3), which are designed to limit the effects of armed conflict. Thus, infliction of torture may constitute a war crime. Under the Geneva Conventions, States are obliged “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed” such acts and are obligated to “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and to bring such persons, regardless of their nationality, before its own courts” if these persons are not extradited to another State Party. The conventions protect both civilians and military personnel from torture. The International Committee of the Red Cross (ICRC) has produced an information kit on National Enforcement of International Humanitarian Law.

4. International cases that discuss freedom from torture, or cruel, inhuman treatment or punishment

European Commission and Court of Human Rights (customary international law):


The applicant, a Tanzanian national from Zanzibar, sought asylum in the United Kingdom. He claimed to be a member of the Civic United Front (CUF) who had been arrested because of his political activities and tortured while in detention.

After he was released he fled to the United Kingdom. The UK rejected his application in the first instance, and rejected his appeal due to lack of evidence and credibility. The UK authorities apparently believed that even if the applicant’s account of events were true, he had an alternative in Tanzania (rather than in Zanzibar).

Before the ECHR, the applicant claimed that his expulsion would violate ECHR Articles 3 (prohibition of torture, inhuman or degrading treatment), 6 (right to a fair trial) and 8 (right to respect for private and family life). He also argued that contrary to Article 13 he had no effective domestic remedy against the decision to deport him.

The ECHR ruled that given the treatment inflicted by the authorities on the members of the CUF, the claimant’s expulsion to Tanzania would violate ECHR Article 3 (prohibition of torture, inhuman or degrading treatment).

ii. Ireland v. The United Kingdom

The European Court of Human Rights listed factors to be considered in determining the severity of treatment, including the age, sex, and state of health of the victim. The Court examined certain interrogation methods, none of which the court found caused acute physical injury. The court found that the following treatment constituted “ill=treatment” not torture: forcing detainees to remain in stress positions for periods of time; subjecting them to noise; and depriving them of food, drink and sleep.

5. International Criminal Charters & Tribunals

i. Rome Statute of the International Criminal Court, adopted on 17 July 1998:

Torture may constitute a “crime against humanity” or “war crime” under international criminal law, such as is mentioned in the Rome Statute of the International Criminal Court (arts. 7 and 8).

ii. ICTY, International Criminal Tribunal for Yugoslavia, Article 5 (Crimes against humanity):

The ICTY may prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: ......
(f) torture.

iii. ICTR, International Criminal Tribunal for Rwanda, (Article 3), Crimes against Humanity:

The International Tribunal for Rwanda may prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds:

a) Murder.

........

f) Torture.

B. Domestic U.S. Law

1. United States Constitution

   i. Eighth Amendment.

   The Eighth Amendment to the U.S. Constitution provides that:

   [C]ruel and unusual punishments [shall not be] inflicted.

   The Eighth Amendment also:

   Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

   ii. Fourteenth Amendment

   The due process clause of the Fourteenth Amendment to the U.S. Constitution bars the states from inflicting such punishment for state crimes, and most state constitutions also prohibit the infliction of cruel and unusual punishment.

2. U.S. Supreme Court

U.S. Supreme Court cases that address freedom from torture, or cruel, inhuman treatment or punishment:


   In September 1995, Azzam Rahim, a U.S. citizen, was tortured and murdered while in the custody of Palestinian Authority intelligence officers in Jericho. The respondents, Jibril Rajoub, Amin Al-Hindi, Twfik Tirawi, the Palestinian Authority, and the Palestine Liberation Organization, did not dispute liability for the torture and murder. The petitioners, Azzam Rahim's widow and children, filed suit against the respondents under the Torture Victim Protection Act.

   The district court dismissed the petitioners' action against the Palestinian Authority and the Palestine Liberation Organization because the Torture Victim Protection Act permits actions against natural persons only. The US. Court of Appeals for the District of Columbia Circuit affirmed the district court's decision.

   The Court held that the word "individual" in the TVPA means a natural person and does not impose any liability against organizations. The Court ruled that a word in a statute will be given its everyday meaning unless Congress gives some indication that it intends the word to have a broader meaning. The
Court further determined that legislative history supported its interpretation. Justice Antonin Scalia wrote no opinion but did not join the Court regarding its analysis of the legislative history.

   **ii.  *Furman v. Georgia, 408 US 238 (1972)***

A Georgian jury convicted Gregg of armed robbery and murder and sentenced him to death. The Georgia Supreme Court affirmed the death sentence except as regards his robbery conviction. Gregg challenged his remaining death sentence for murder, claiming that it was a "cruel and unusual" punishment that violated the Eighth and Fourteenth Amendments.

The Court held that a death sentence did not violate the Eighth and Fourteenth Amendments under all circumstances. In cases such as the one at bar, the careful and judicious use of death sentences may be appropriate if carefully employed. The death penalty statute in Georgia assures judicious and careful use by requiring a guilt proceeding separate from the penalty hearing, specific jury findings regarding the crime’s severity and the defendant’s nature, and a comparison of each death sentence's circumstances with other similar cases. Moreover, the Court deferred to the Georgia legislature's finding that capital punishment was a useful deterrent to future crimes and an appropriate means for retribution against perpetrators.

### 3. U.S. Federal Statutes

   **i. U.S.C. §§ 2340 and 2340A (Torture Convention Implementation Act):**

After the U.S. ratified the Torture Convention, the U.S. enacted section 2340A of the U.S. Criminal Code to criminalize torture occurring outside its territorial jurisdiction. Per section 2340A, any person who commits or attempts to commit torture outside the U.S. is subject to a fine and/or imprisonment for up to 20 years. If death results from the torture, the offender faces life imprisonment or the death penalty. Generally, persons who conspire to commit an act of torture outside the U.S. are subject to the same penalties faced by those who commit or attempt to commit acts of torture, except that they cannot receive the death penalty. The U.S. claims jurisdiction over these prohibited actions when:

1. the alleged offender is a national of the U.S. or
2. the alleged offender is present in the U.S., irrespective of the nationality of the victim or offender.
3. the torture occurred outside the U.S.
4. a public official inflicts several pain or mental pain or suffering.
5. the victim was within in defendant’s custody or physical control.
6. the defendant specifically intended to cause several pain or mental pain or suffering.

   **ii. 18 U.S. Code § 2441 - War crimes**

Common Article 3 Violations:

(1) Prohibited conduct. In subsection (c)(3), the term “grave breach of common Article 3” means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows:

   (A) Torture. The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

   (B) Cruel or inhuman treatment. The act of a person who commits, or conspires or attempts
to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.

iii. Military Commissions Act of 2009

Section 948(r) provides for the exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment, prohibition of self-incrimination; admission of other statements of the accused.395

Section 949(s) provides:

Cruel or unusual punishments prohibited. Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission under this chapter or inflicted under this chapter upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited under this chapter.

Section 950v(b)(11) provides:

Torture.—An alien unlawful enemy combatant who commits an act specifically intended to inflict severe physical pain or suffering or severe mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be guilty of torture and subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death. In this paragraph, the term ‘severe mental pain or suffering’ has the meaning given that term in section 2340(2) of title 18.

Section 950v(b)(11) provides:

Cruel or Inhuman Treatment.—An alien unlawful enemy combatant who commits an act intended to inflict severe physical pain or suffering or severe mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including severe physical abuse, upon another person within his custody or physical control shall be guilty of cruel or inhuman treatment and subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death. In this paragraph, the term ‘severe mental pain or suffering’ has the meaning given that term in section 2340(2) of title 18.

Section 950v(b)(13) provides:

Intentionally Causing Serious Bodily Injury.—An alien unlawful enemy combatant who intentionally causes serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war shall be guilty of the offense of causing serious bodily injury and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death. In this paragraph, the term ‘serious bodily injury’ has the meaning given that term in section 113(b)(2) of title 18.

395 This Article says that no statement obtained using torture or by cruel, inhuman, or degrading treatment, whether or not under color of law, shall be admissible in a military commission, except against a person accused of torture or such treatment as evidence that the statement was made.
Section 950v(b)(14) provides:

Mutilating or Maiming.—An alien unlawful enemy combatant who intentionally injures one or more protected persons, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose, shall be guilty of the offense of mutilation or maiming and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death.

iv. The Detainee Treatment Act of 2005

Sec. 1003. Prohibition on Cruel, Inhuman, or Degrading Treatment or Punishment of Persons under Custody or Control of the United States Government.

(a) In General, no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) Construction. Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) Limitation on Supersedeure. The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

(d) Cruel, Inhuman, or Degrading Treatment or Punishment Defined.—In this section, the term “cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984

v. Military Commission Rules of Evidence (MCRE)

Rule 304. Confessions, admissions, and other statements

(a) General rules.

(1) A statement obtained by use of torture shall not be admitted into evidence against any party or witness, except against a person accused of torture as evidence that the statement was made.

(2) A statement alleged to be the product of coercion may only be admitted as provided in section (c) below.

(3) A statement produced by torture or otherwise not admissible under section (c) may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.

• How the US domestically implemented Article 3 of CAT to protect those who face torture in their countries of removal

CAT-implementing regulations concerning the removal of aliens from the United States are primarily covered under sections 208.16-208.18 and 1208.161208.18 of title 8 of the Code of Federal Regulations (C.F.R.), and prohibit the removal of aliens to countries where they would more likely than not be
subjected to torture.

4. Regulations

- 8 C.F.R. § 1208.16 (withholding of removal)
- 8 C.F.R. § 1208.17 (deferral of removal)
- 8 C.F.R. § 1208.18 (implementation of CAT)

i. C.F.R. § 1208.16: withholding of removal:

(c) Eligibility for withholding of removal under CAT

1. definition of torture – cross reference to 8 C.F.R. § 1208.18(a): (1) “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

ii. 8 C.F.R § 1208.18(a) (Definition Cont.)

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman, or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

- There are important distinctions between the protections afforded to aliens under CAT and under general U.S. asylum law.

Important distinctions exist between protections afforded to aliens under CAT and under general U.S. asylum law. Asylum is a discretionary remedy available to those who have a well-founded fear of persecution abroad. Whereas asylum applicants only need to prove a well-founded fear of persecution because their membership in a particular race, nationality, or social or political group. applicants for protection under CAT must prove that it is more likely than not that they would be tortured if removed to a particular country. In having a higher burden of proof, CAT protection is like withholding removal based on prospective persecution. CAT protections and withholding of removal are also similar in that neither form of relief grants the recipient or his immediate family a legal foothold in the United States.

Additionally, torture” is a more particularized act than “persecution.” However, it is important to note that CAT affords certain aliens broader protection than that provided by general asylum law. An alien generally cannot receive asylum or withholding of removal if he,

1. persecuted another person because the person’s social or political group Membership
2. committed a particularly serious crime, making him a threat to the Community. Or,
3. It is danger to the security of the United States.

5. Other

i. Alien Tort Claims Act (ATCA) of 1789

396 “Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of CAT to prohibit torture.”
The Alien Tort Claims Act (ATCA), grants jurisdiction to US Federal Courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

- **Chiquita Bananas to Face Columbia Torture Claim (March 30, 2012)**

Chiquita, the global banana producer, funded military groups in Colombia that killed and tortured villagers. Earth Rights International and Cohen Milstein have now filed a suit against Chiquita on behalf of victims. The case, originally based on the Alien Tort Claims Act (ATCA). US federal judge Kenneth Marra of Florida allowed the lawsuit to proceed following the prosecutor’s claims that Chiquita violated Columbia law.

Judge Kenneth Marra ruled that the charges of “cruel, inhuman, or degrading treatment; violation of the rights to life, liberty and security of person and peaceful assembly and association; and consistent pattern of gross violations of human rights” would be heard in court.

4- **Torture Victim Protection Act (1992)**

Torture Victim Protection Act is a statute that allows for the filing of civil suits in the United States against individuals who, acting in an official capacity for any foreign nation, committed torture and/or extrajudicial killing. The statute requires a plaintiff to show exhaustion of local remedies in the location of the crime, to the extent that such remedies are "adequate and available." Plaintiffs may be U.S. citizens or non-U.S. citizens.

5- **Civil Remedies**

U.S. law also provides various avenues for seeking civil redress in cases of torture and other violations of constitutional and statutory rights relevant to the Convention. The wide range of civil remedies available may include, where appropriate, injunctions, compensatory and/or punitive damages, and equitable relief.

6- **Guantanamo Case, Motions, and Reports**

Reports

- **Amnesty International Report [citation being provided by student]397**

In the years since 9/11, the U.S. government has repeatedly violated both international and domestic prohibitions on torture and CID in the name of fighting terrorism:

1. The Bush Administration decided the Geneva Conventions would not apply to detainees held in Guantánamo Bay (a decision later overturned by the U.S. Supreme Court) Article III of the Geneva Convention.
2. The Justice Department’s Office of Legal Counsel produced a series of “torture memos,” restrict the definition of torture under U.S. law.
3. -U.S. interrogations of suspects in the “war on terror” have included such cruel and inhuman techniques as prolonged isolation and sleep deprivation, intimidation by the use of a dog, sexual and other humiliation, stripping, hoarding, the use of loud music, white noise, and exposure to extreme temperatures.
4. The CIA used waterboarding – illegal as torture under international and U.S. law – to interrogate three “high-value” detainees.
5. The U.S. began to send detainees for interrogation to countries known to use torture, and George W. Bush stated that several high-level officials in his Administration met secretly to authorize specific interrogation methods otherwise prohibited.

397 [citation being provided by student]
ICRC Report Finds Detainee Abuse in Guantanamo (2004) [citation being provided by student]398

1. The International Committee of the Red Cross charged in confidential reports to the United States government that the U.S. military intentionally used psychological and sometimes physical coercion "tantamount to torture" on prisoners at Guantánamo Bay, Cuba. The finding that the handling of prisoners detained and interrogated at Guantánamo amounted to torture came after a visit by a Red Cross inspection team that spent most of last June in Guantánamo.

2. The ICRC report visit said investigators had found a system devised to break the will of the prisoners at Guantánamo, and make them wholly dependent on their interrogators through "humiliating acts, solitary confinement, temperature extremes, use of forced positions." Investigators said that the methods used were increasingly "more refined and repressive" than learned about on previous visits.

3. The conclusions by the inspection team, especially the findings involving alleged complicity in mistreatment by medical professionals, have provoked a stormy debate within the Red Cross committee. Some officials have argued that it should make its concerns public or at least aggressively confront the Bush administration.

4. The report said that such "apparent integration of access to medical care within the system of coercion" meant that inmates were not cooperating with doctors. Inmates learn from their interrogators that they have knowledge of their medical histories and the result is that the prisoners no longer trust the doctors.

Motions:

- **Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel 13 November 2014 [citation being provided by student]399**

Mr. Muhammad had a religious belief that he may not come into physical contact with women who are not among his closest relatives. On 8 October 2014, the Guantánamo Bay Camp Commander notified Mr. Mohammad and other prisoners of a new policy that female guards would make physical contact with Mr. Mohammad and other detainees, to include forcible touching, during movements to attorney visits, attendance at Military Commission sessions, and movement for medical purposes. On 3 November 2014, Mr. Mohammad, Mr. al Iraqi, and another detainee were being transported to a different facility, Mr. al Iraqi was confronted by a female guard who said she was going to touch him to move him against his will from one door to a vehicle a few steps away. However, Mr. al Iraqi expressed his desire not to be touched by the female guard and asked if one of the male guards standing nearby could conduct the movement instead. The guards refused. Because of that, Mr. al Iraqi was subjected to two violent "forcible cell extraction" type assaults, causing him further physical injuries. All detainees to whom this new policy is directed claim to be victims of torture and cruel, inhuman and degrading treatment by the U.S. Government. These include violation of the prisoner's religious beliefs. They alleged that it creates psychological and physical harm to the prisoners, affects their ability to meet with counsel, and improperly involves sexual humiliation.

- **Motion for Appropriate Relief from Interference with Right to Participate in Own Defense Due to Torture Injuries Filed: 12 August 2016 (the 9/11 case) [citation / quotes being provided by student]400**

According to his lawyers, Mr. al Hawsawi has many health problems. He suffers daily from painful injuries sustained while he was tortured in CIA black sites for three and a half years. These injuries include
bowel problems that caused him not to eat, that led to dangerous weight loss and lowered energy levels in addition to that, Mr. al Hawsawi also suffers from, hearing loss, blood in his urine, sleep problem, and other health problems. However, the pain which Mr. al Hawsawi experiences daily painful during transportation and long periods of sitting. This pain has reduced Mr. al Hawsawi ability to meet with counsel, to attend Commission hearings and to assist and participate in his defense fully and effectively. Because of that, Mr. al Hawsawi specifically requested that the Military Judge order a location for attorney client meetings that does not contain transportation, also Mr. al Hawsawi's request Video Tele Call or telephone access to counsel to communicate regarding strategic matters relating to the ongoing proceedings.

Because of this, his counsel alleged that Mr. al Hawsawi suffered and continues to suffer torture and cruel, inhuman and degrading treatment by the U.S. Government. Because of this degrading treatment, Mr. al Hawsawi right to counsel and to participate in his defense has been compromised. This affects his Sixth Amendment right to assist in his own defense and his right to effective assistance of counsel.

Guantanamo Cases

*United States of America v. Mohammed Jawad* [citation / quotes being provided by student]401

On or about 17 December 2002, in Kabul, Afghanistan, the accused allegedly threw a hand grenade into a vehicle in which two American service members and their Afghan interpreter were riding. All suffered serious injuries. The Afghan police apprehended the accused, at the time under the age of 18, and transported him to an Afghan police station for interrogation. Allegedly the Accused appeared to be under the influence of drugs. Several high-ranking Afghan government officials were at the police station, and most were carrying firearms, that were visible to the Accused. During the interrogation, someone told the Accused, “You will be killed if you do not confess to the grenade attack,” and, “We will arrest your family and kill them if you do not confess,” or words to that effect. The speaker meant what he said; it was a credible threat. According to that, The Military Commission concludes that the Accused’s statements to the Afghan authorities were obtained by physical intimidation and threats of death which, under the circumstances, constitute torture within the meaning of MCRE 304. Consequently, the government cannot use any statements made by the Accused to Afghan authorities on or about December 17, 2002 to secure a conviction.

*Jawad v. Gates, No. 15-5250 (D.C. Cir. 2016)*

After the United States detained Mohammed Jawad at Guantanamo Bay Naval Base for more than six years until he was released and returned to his native Afghanistan, Jawad filed suit alleging that they subjected him to torture while he was in their custody. Therefore, Jawad brings six causes of actions under the ATS and related statutes—the Federal Tort Claims Act (FTCA), and Torture Victim Protection Act (TVPA). Claims 1-3 are brought under the ATS and FTCA:

1. abusive treatment in violation of customary international law and multilateral treaties.
2. torture and inhumane treatment in violation of the Third and Fourth Geneva Conventions.
3. treatment in violation of Articles 6 and 7 of the Optional Protocol on the Involvement of Child Soldiers in Armed Conflict.
5. Claim 5 alleges Bivens liability for violations of the Fifth Amendment.
6. Claim 6 alleges Bivens liability for violations of the Eighth Amendment.

The court held that Military Commission Act stripped federal courts of most claims. Thus, the court had no subject matter jurisdiction.

7- Conclusion

---

401 [citation being provided by student]
The prohibition against torture – the right to physical and mental integrity – is guaranteed in the strongest terms under international law. It is protected as an absolute right, non-derogable even in times of war or public emergency. The main instrument to combat torture within the framework of the United Nations is the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). It is one of the few human rights treaties which makes explicit use of criminal law to prevent and eradicate violations - the main obligation of States parties to the CAT is to ensure that all acts of torture are offences under domestic criminal law and that punishments are appropriate to the grave nature of such crime. The United States ratified CAT subject to certain declarations, reservations, and understandings, including that the Convention was not self-executing, and therefore required domestic implementing legislation to take effect.

In accordance with CAT Article 3, the U.S. enacted statutes and regulations to prohibit the transfer of aliens to countries where they would be tortured, including the Foreign Affairs Reform and Restructuring Act of 1998, section 2340A of the U.S. Criminal Code, and certain regulations implemented and enforced by the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Department of State.

These authorities, which require the withholding or deferral of the removal of an alien to a country where he is more likely than not to be tortured, generally provide aliens already residing within the United States more protection than aliens arriving to the United States who are deemed inadmissible on security or terrorism-related grounds. Further, in deciding whether or not to remove an alien to a particular country, these rules permit the consideration of diplomatic assurances that an alien will not be tortured there. Nevertheless, under U.S. law the removal or extradition of all aliens from the United States must be consistent with U.S. obligations under CAT. On the other hand, many prisoners awaiting trial in Guantanamo Bay are considered guilty until proven innocent. This allows for the infringement of the right of many innocent individuals. Many individuals are tortured, and have been abused because of this system. According to (Amnesty) There hasn’t been much progress in this situation after five years and thus something must be done to resolve this dispute. Hence, The United States need to ensure that their prisons conform to the law and to international law principles.

Addendum:

6. Definition of Torture
   • International Law Definition


Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

• Domestic Law Definition

18 U.S. Code § 2340:
(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.
(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from:
(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) the administration or application, or threatened administration or application, of mind-altering
substances or other procedures calculated to disrupt profoundly the senses or the personality,
(C) the threat of imminent death, or
(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering,
or the administration or application of mind-altering substances or other procedures calculated to disrupt
profoundly the senses or personality.

[Recall that the charts below may trigger questions that you might ask to learn about facts on the
ground regarding treatment of the defendants. After you understand the binding international and
domestic law, you might apply that law to the facts about treatment of the defendants, and then you should
be able reasonably to ascertain whether the law is or is not complied with, that is, whether or not there
is a violation. This section of the Guantanamo Bay Fair Trial Manual does not purport to interpret the
law in the area of torture, and does not seek to apply it. This section of the Manual only seeks to identify
the applicable rules of law and outline the elements or scope of that law.

An Observer may wonder why they need to know whether a defendant had been tortured or subject
to cruel, inhuman or degrading treatment or punishment before the pre-trial hearings, or indeed before
the arraignment, before charges were filed, or perhaps before the government had concluded its
investigation of any alleged criminal behavior of the defendant. Reasons to consider pre-proceeding
maltreatment include triggering in the mind of the Observer to look out for the possibility that information
obtained pursuant to torture might be sought to be introduced, or that torture or other maltreatment might
be considered as a mitigating factor upon sentencing, or that torture or other maltreatment might be
ongoing, and might impair the ability of the defendant to participate in his own defense at the pre-
hearings or at other stages in the proceedings.]

[This Right to Freedom from Torture and Cruel & Inhuman Treatment or Punishment
introductory section is being developed further.]
27. Right to be Free from Torture (ICCPR, arts 7, 9(1); 10(1))

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the defendant allege torture during pre-pre-trial detention?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>What was the nature of any alleged torture during the Pre-Charges (Pre-Pre-Trial) stage?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has it ceased?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>What remedy, if any, did the court order?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the remedy effective?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Prisoner access to international fora to complain about torture?**

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has the defendant raised torture-related claims in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant has not raised torture-related claims in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies, why not?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have defense counsel sought to raise torture-related claims on behalf of the defendant before non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does a protective order or classified information restriction prohibit defense counsel from raising torture-related claims on behalf of the defendant before non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Has the defendant been granted access to persons other than defense counsel who may raise torture-related claims on the defendant’s behalf in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

Has the defendant been directly or effectively prohibited from raising torture-related claims in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

### 28. Right to be Free from cruel, inhuman or degrading treatment or punishment (ICCPR, arts 7, 9(1); 10(1))

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the defendant allege cruel, inhuman or degrading treatment during the Pre-Charges stage?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>What was the nature of any alleged cruel, inhuman or degrading treatment during the Pre-Charges stage?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has it ceased?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>What remedy, if any, did the court order?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the remedy effective?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Prisoner access to international fora to complain about cruel, inhuman, degrading treatment or punishment?**

Has the defendant raised cruel, inhuman or degrading treatment or punishment-related claims in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

If the defendant has not raised cruel, inhuman or degrading treatment or punishment-related claims in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies, why not?
Have defense counsel sought to raise cruel, inhuman or degrading treatment or punishment-related claims on behalf of the defendant before non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

Does a protective order or classified information restriction prohibit defense counsel from raising cruel, inhuman or degrading treatment or punishment-related claims on behalf of the defendant before non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

Has the defendant been granted access to persons other than defense counsel who may raise cruel, inhuman or degrading treatment or punishment-related claims on the defendant’s behalf in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

Has the defendant been directly or effectively prohibited from raising cruel, inhuman or degrading treatment or punishment-related claims in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

### 29. Right to be Free from Water Boarding

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Was the defendant water-boarded at any stage, up to and including the pre-trial hearing stage?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

If so, was this fact communicated to the judge, prosecution, or jury?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

### 30. Right to be Free from Enhanced Interrogation

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Did the defendant undergo enhanced interrogation technique, up to and including at the pre-trial hearing stage?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

If so, was this fact communicated to the judge, prosecution, or jury?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>
If so, are you aware of the nature of the enhanced interrogation that the defendant underwent?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Are you aware of whether the defendant underwent the interrogation method of **rectal hydration**? If so, has it stopped?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Are you aware of whether the defendant underwent the interrogation method of **beating**? If so, has it stopped?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Are you aware of whether the defendant underwent the interrogation method of **bombarding of senses with noise and light**? If so, during what time period did this occur? If so, has it stopped?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Are you aware of whether the defendant underwent the interrogation method of **sensory deprivation**? If so, during what time period did this occur? If so, has it stopped?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Are you aware of whether the defendant underwent the interrogation method of **sexual humiliation**? If so, during what time period did this occur? If so, has it stopped?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Are you aware of whether the defendant underwent the interrogation method of **shaking violently**? If so, during what time period did this occur? If so, has it stopped?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Are you aware of whether the defendant underwent the interrogation method of **sleep deprivation**? If so, during what time period did this occur? If so, has it stopped?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Are you aware of whether the defendant underwent the interrogation method of **stress positions**? If so, during what time period did this occur? If so, has it stopped?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Are you aware of whether the defendant underwent the interrogation method of **temperature manipulation**? If so, during what time period did this occur? If so, has it stopped?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Are you aware of whether the defendant underwent the interrogation method of **threats of harm to person**? If so, during what time period did this occur? If so, has it stopped?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

### 31. Rights Regarding Enteral Feeding (“Forced Feeding” – through tube in the nose to the stomach)

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

---

*Not to be Quoted or Reproduced Without Permission — This is a Preliminary Draft.*

© 2017

E-mail – GitmoObserver@yahoo.com  @GitmoObserver The Gitmo Observer (Indiana U McKinney School of Law)
<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Unsure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is there evidence of current or past “Forced Feeding” of the defendant?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If so, was this fact communicated to the judge, prosecution, or jury?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any videos that exist of the defendant being force fed?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any complaints by the defendant about pain or discomfort associated with his forced feeding?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you know how many days the defendant has been force fed?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any videos that exist of the defendant being force fed?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of whether olive oil was used as a lubricant in the force feeding of the defendant?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is the defendant now on a hunger strike or has the defendant ever been on a hunger strike?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant appear to you to be undernourished?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If so, was this fact communicated to the judge, prosecution, or jury?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of the length of time the defendant is or was on a hunger strike?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the U.S. government deemed classified information about the number of any defendant(s) on hunger strike or the duration of any such hunger strike?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
M. Right to Humane Treatment & Humane Conditions of Detention

The right to humane treatment & humane conditions of detention requires…

[This Right to Humane Treatment & Humane Conditions of Detention introductory section is being developed further.]

General

International and domestic U.S. law require that all individuals be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, arts 7, 9(1); 10(1)), and that all defendants have the right to humane conditions of detention.

a. Dealing with:
   1. Current housing at GTMO
   2. Conditions in camps today – including Camp 7 for the High Value Detainees (HVD)
   3. Non-isolation (see infra)
   4. Conditions in camps if
      a. Prisoner has not been charged
      b. Prisoner has been charged
      c. Prisoner’s Military Commissions are ongoing (hearings, trial)
      d. Prisoner has been convicted (with appeal pending)
      e. Prisoner’s appeal rejected – sentenced.

402 The right to be treated with humanity and with respect for the inherent dignity of the human person is also provided for in the following international instruments: American Convention, Article 5; African Charter, Articles 4-5; Basic Principles for the Treatment of Prisoners, Principle 1; and Body of Principles on Detention or Imprisonment, Principle 1.

403 The right to humane conditions of detention is provided for in the following international instruments: American Convention, Article xxx; African Charter, Articles xxx; Basic Principles for the Treatment of Prisoners, Principle 1; and Body of Principles on Detention or Imprisonment, Principle 1.
32. **Right to be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, arts 7, 9(1); 10(1))**

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has the defendant been treated with the respect for the inherent dignity of the human person?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant been treated with humanity?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

33. **Right to Humane Conditions of Detention – Pre-Trial Hearing Stage**

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>At which specific Guantanamo Bay camp is defendant being held?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>What are the general conditions of the defendant’s detention?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the defendant appear to have access to proper nutrition, and to be properly nourished?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do the defendant’s clothes appear to be clean?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any complaints related to the defendant having access to appropriate and adequate bathing facilities?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any complaints related to the defendant having access to appropriate medical facilities?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any complaints related to the defendant having access to appropriate educational materials?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any complaints related to the defendant having access to appropriate recreational facilities?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant been subject to disciplinary measures while in detention?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant been placed in solitary confinement?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the defendant have access to the outside, or is the defendant kept inside at all times?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
N. Freedom from Incommunicado & Solitary Confinement; Right to Access to the Outside World

The right to freedom from incommunicado & solitary confinement and the right to access to the outside world requires that defendants have the ability to communicate with medical staff, family, other detainees, home representatives, the International Committee of the Red Cross, and defense counsel. It also demands that defendants are not held in solitary confinement for extended periods of time. Defendants may forfeit some of these rights if necessary to prevent self-inflicted harm, to protect other detainees or GTMO staff, or to protect national security.

a. General

Defendants set for trial by Military Commissions are not convicted criminals. International and domestic U.S. law require that they be provided freedom from incommunicado confinement. The freedom from incommunicado and solitary confinement can encompass multiple rights such as the right to communicate with a doctor and/or medical staff, the right to communicate with family, the right to communicate with other detainees, the right communicate with a home country representative, the right to communicate with the International Committee of the Red Cross, and the right to communicate with defense counsel. This rights also effects and overlaps with the right to freedom from solitary confinement and the right to access the outside world.

b. Freedom from Incommunicado confinement under international law

1. Right to communicate with doctor / medical staff

The right to communicate with a doctor and other medical staff is guaranteed through Article 75 of the Geneva Convention granting that detainees shall be provided with “the medical attention required by their state of health.”

2. Right to communicate with family

ICCPR, Article 17 provides that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.” The UDHR guarantees the same right in Article 12.

3. Right to communicate with other detainees

Communication with other detainees may take many forms, including communal living or through religious practice.

The ICCPR guarantees the right to freedom of religion which includes the right to practice in community with other through teaching, practice, worship and observance. The UDHR also provides for this right.

Defendants not only have the right to communicate but they also have the right not to communicate. For example, the ICCPR guarantees that pretrial detainees, except in “exceptional circumstances.”

---

404 Geneva 75 - Article 15: The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.

405 ICCPR, Article 17

406 UDHR, Article 12

407 ICCPR, Article 18(1)

408 UDHR, Article 18, “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others, to manifest his religion or belief in teaching, practice, worship and observance.”
circumstances” are not to be placed with convicted detainees.409

4. Right to communicate with representatives from the detainee’s home country

The Vienna Convention on Consular Relations provides that as soon as a non-citizen is detained, he to be informed that he may be in contact with a consular representative from his home country, and the consular representative is to be informed that their citizen has been detained.410 The detainee’s country, through the consular representative, has the right to communicate with the detainee through correspondence or visitation.411 The purpose of this communication may include to assist the detainee in securing legal counsel.412

5. Right to communicate with International Committee of the Red Cross

Article 75 of Additional Protocol I to the Geneva Conventions provided that there will be “no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.”413

6. Right to communicate with defense counsel

Common Article 3 of the Geneva Conventions and other binding treaties414 guarantee the right to counsel.415 this is discussed in more detail in this Guantanamo Bay Fair Trial Manual.416 Article 14 of the ICCPR provides that defendants are guaranteed the right to communicate with legal assistance of his own choosing,417 with “adequate time and facilities for the preparation of his defense.418 The communication must be “without undue or unreasonable interference by the government or any other individual or entity.”419

The UDHR also provides for the right to communicate with counsel, and guarantees defendants all things “necessary for his defense.”420

409 ICCPR, Article 10(2)(a), “Accused persons shall, save in exceptional circumstances, be segregated from convicted persons”

410 Vienna Convention on Consular Relations, Art 36(1), (“Vienna Convention on Consular Relations, Art 36, “1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State…”)

411 Id.

412 Id.

413 Geneva 75 - Article 9: “The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.”

414 See GTMO Bay Fair Trial Manual at 73. ICTY, Art. 21(4) (“to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”); ICTR, Art. 20(4) (“to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it”)

415 Geneva Conventions, Article 3, “judicial guarantees which are recognized as indispensable by civilized peoples.”

416 Id. See supra 12.

417 ICCPR, Article 14(3)

418 ICCPR, Article 14(2)(b)

419 GTMO Bay Fair Trial Manual at 78.

420 UDHR, Article 11 (“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense”)
c. Freedom from incommunicado detention under U.S. constitutional & common law

1. Right to communicate with a doctor / medical staff

The Guantanamo Bay detainees are not convicted criminals and thus cannot find relief under the Eighth Amendment of the U.S. Constitution. However, “the Fourteenth Amendment Due Process Clause provided for at least the same degree of medical attention to pretrial detainees as the Eighth Amendment provides for inmates,” 421 if not greater.” 422 Medical attention encompasses “adequate medical screening, classification, recordkeeping, sick call procedures and timely access to care.”423

2. Right to Communicate with family

Pretrial detainees have the right to visitation privileges and correspondence with friends and family.424 Detainees may not be stripped of this right as a form of punishment, and the right must not be arbitrarily restricted.425 Communication via phone, mail, and in person can only be restricted for purposes of jail security.426

3. Right to communicate with other detainees

Pretrial detainees may not be placed in the same cell or cell block with persons who have been convicted, whether or not the convicted persons have been sentenced.427

4. Right to communicate with home representatives

Article 8 of the Code of Federal Regulations details the rights of aliens once detained:

“Privilege of communication. Every detained alien shall be notified that he or she may communicate with consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with the following countries require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf. When notifying consular or diplomatic officials, Service officers shall not reveal the fact that any detained alien has applied for asylum or withholding of removal.”428

5. Right to communicate with defense counsel

The concept of communication with defense counsel overlaps with the other rights,

---


422 Simons v. Clemons, C.A.5 (La.) 1985, 752 F.2d 1053. “Scope of due process duty to provide medical care to pretrial detainees is at least as great as duty owed convicted prisoner under Eighth Amendment.”


424 Berch v. Stahl, W.D.N.C. 1974, 373 F.Supp. 412., “Pretrial detainees at county jail may not have their correspondence with friends, relatives, or potential witnesses limited for disciplinary reasons.”

425 Jones v. Diamond, C.A. 5 (Miss.) 1981, 636 F.2d. 1364., “Pretrial detainees must be allowed reasonable visitation privileges and this right may not arbitrarily be restricted.”

426 O’Bryan v. County of Saginaw, Mich., C.A.6 (Mich.) 1984, 741 F.2d 283., “Pretrial detainees at county jail had no constitutional right to contact visitation with their spouses and children where no-contact-visitaton rule was not motivated by desire to punish pretrial detainees and was reasonably related to jail security.”

427 Alberti v. Sheriff of Harris County, Texas, S.D. Tex. 1975, 406 F. Supp. 649. “No pretrial detainee should be held in the same cell or cell block of county jail with anyone who has been convicted of a crime and sentenced.”

428 8 C.F.R. §236.1(e)
specifically the right to counsel. This is discussed elsewhere in the *Guantanamo Bay Fair Trial Manual.*

The right to counsel is provided for by the Sixth Amendment which provides, “in all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense.” This communication must be confidential, without the government gaining access to those communications, and the defendant must have a sufficient amount of time with counsel and a meaningful opportunity to develop a defense. These rights are guaranteed through the Fourteenth Amendment’s Due Process Clause.

The 9th Circuit found that defendant’s Due Process Rights were violated when a court “materially impeded use of the minimal tools for defense preparation.” Materially impeding could include not allowing access to the telephone to call the defendant’s attorney.

d. Freedom from incommunicado detention – U.S. Military Law & Military Commission Law

1. Right to Communicate with Doctor/Medical Staff

The DoDD guarantees that defendants the right to “appropriate medical care and attention required by the detainee’s condition, to the extent practicable.” The defendant carries the burden of proof to establish that he has been denied adequate and necessary medical care during his pretrial confinement.

2. Right to Communicate Family

The DoDD states that defendants must have “reasonable access to the open air, reasonable educational and intellectual activities, and appropriate contacts with the outside world (including, where practicable, exchange of letters, phone calls, and video teleconferences with immediate family or next of kin, as well as family visits).”

Regarding communications of Guantanamo Bay detainees, it was stated that “detainees in compliant status are authorized to write as many letters and postcards they desire, using stationary and pens provided by the staff.” However, if a detainee is under disciplinary status, he is only allowed one hour of day to write letters. Detainees not held in Camp 7 are able to have access to phones. In 2013, Mohammad made a motion to request “permission to have a

429 Guantanamo Bay Fair Trial Manual, Section IX(E) Right to Effective Assistance of Counsel.


432

433 Milton v Morris, 767 F.2d 1443 (9th Cir. 1985)

434 Id.

435 DoDD 2310.01E, 3(b)(1)(d)

436 U.S. v. Harris, U.S. Armed Forces 2008, 66 M.J. 166. “Accused failed to carry his burden of establishing that he was denied adequate and necessary medical care during his pretrial confinement; accused did not complain about his medical care until he discovered blood in his urine, and brig personnel took appropriate action once he reported blood in his urine.”

437 DoDD 2310.01E, (3)(b)(1)(b) “Reasonable access to the open air, reasonable educational and intellectual activities, and appropriate contacts with the outside world (including, where practicable, exchange of letters, phone calls, and video teleconferences with immediate family or next of kin, as well as family visits

438 U.S. v. ABD Al-Rahim Hussein Muhammed Abdu Al-Nashiri, AE171 at 54. (“Defense Motion for Appropriate Relief to Compel Defense Examination of the Accused’s Conditions of Confinement” Sept 1, 2013) (Will be shown as ‘Al-Nashiri, AE171’)

439 Id. at 55

440 Id. at 66
humanitarian one-time audiovisual communication with his family via a phone call, video-teleconference, or recorded video message in order to convey his condolences on the recent death of his father."441 “Following oral argument, where the defense stressed the humanitarian nature of its request and equated the telephone prohibition to a Special Administrative Measure (“SAM”), the commission denied the motion.”442

3. Right to Communicate with other detainees

Detainees are to be provided with “individual or collective accommodations; and, where possible, to group detainees by nationality, language, or custom.” 443 In Guantanamo Bay, Camps 1-6, Echo and Iguana provided detainees with individual cells and/or communal bays with constant communication between detainees available.444 However, detainees can be placed in “closed confinement” for disciplinary reasons. Camp 7 places detainees in “a climate-controlled, single-cell facility currently used to house the High-Value Detainees. The cells in this facility are designed to limit communications between detainees. However, all detainees are allowed up to 4 hours of paired outdoor, fresh air recreation per day.”445 Detainees have the same partner for recreation each day to limit communication between detainees.446

4. Right to Communicate with Red Cross

Detainees have the right to communicate with the ICRC who routinely visit Guantanamo Bay. The ICRC delivers correspondence to the detainees, and carry detainee correspondence outbound.447

5. Right to communicate with counsel

According to the Military Commission Act 2009 §949c, every defendant has the right to at least one attorney.448 The detainee may have communication with their attorney through mail or in person.

There is no limit to the number of letters that a defendant may send to his attorney. He is allowed to keep them all in his cell. The letters are considered “legal mail,” and although guards may search the mail for contraband, “attorney-client privilege is protected.”449

All defendants have the right to meet with their counsel in face-to-face communication. However, “JDG and JTF-Guantanamo Office of the SJA govern all aspects of attorney visitation and communications with their detainee clients, including entry into and exit from the camps.”450

k. Freedom from Solitary Confinement – International Law

The ICCPR provides that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”451 Other international instruments that bind this right in the

442 U.S. v. ABD Al Hadi Al-Iraqi, AE 021A
443 Al-Nashiri, AE171 at 65
444 Id.
445 Id. at 36
446 Id. at 45
447 Al-Nashiri, AE171 at 54.
448 Military Commission Act 2009 §949c
449 Al-Nashiri, AE171 at 54.
450 Id. at 84.
451 ICCPR, Article 7
CAT, “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as … punishing him for an act he … has committed or is suspected of having committed.”

Rome Statute, Art 55(1)(b), “Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.”

Geneva Convention 75, Art. 17


460 Bell, 441 U.S. at 535, 99 S.Ct. 1861.

461 Ahrens v. Thomas, W.D. Mo. 1977, 434 F. Supp. 873. “Imposition of maximum security confinement of pretrial detainees when it is not necessary violates their rights to due process and to be free from cruel and unusual punishment by punishing them even though they have not been convicted and also violates their right to equal protection of the laws by unnecessarily treating them more harshly than those convicted.”

462 42 U.S.C.A. §1983, “Solitary confinement for purpose of achieving the goal protecting the prisoner from self-inflicted injury and protecting the general prison population and personnel from violent acts and preventing escape is not per se an unconstitutional form of confinement, but such goals can be attained without requiring a prisoner to live in inhuman conditions of filth and discomfort.”

2. Post-trial Confinement

If the defendants of Guantanamo Bay are convicted the Eighth Amendment of the U.S. Constitution will protect them from cruel and unusual punishment. Solitary confinement alone does not violate the Eighth Amendment.\(^{464}\) It is only violated when a detainee is deprived of "the minimal civilized measure of life’s necessities."\(^{465}\) "A violation requires proof that the ‘deprivation suffered was sufficiently serious, and that a prison official acted with deliberate indifference in subjecting him to that deprivation.’"\(^{466}\)

f. Freedom from Solitary Confinement - U.S. Military Law & Military Commission Law

Chapter 47 of the Uniform Code of Military Justice provides:

“No person, while being held for trial may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence...”\(^{467}\)

Article 949s of the Uniform Code of Military Justice specifies that there shall be not “cruel of unusual punishment.”\(^{468}\)

The DoDD specifies further that:

“They will be protected against … torture, and cruel, inhuman, or degrading treatment or punishment. They will not be subjected … sensory deprivation intended to inflict suffering or serve as punishment.”\(^{469}\)

According to the DoDD, the confinement of detainees of Guantanamo Bay is ultimately determined “under such regulations as the Secretary of Defense may prescribe...”\(^{470}\) It provides that the policies in place are to ensure safe, humane and lawful detention consistent with Common Art. 3 of the Geneva Convention.\(^{471}\)

U.S. v. Palmeter notes that a “Military magistrate should review at the same hearing the conditions of pretrial confinement as well as the need for pretrial confinement, to determine whether confine has suffered punishment in violation of Article prohibiting pretrial punishment other than arrest or confinement, looking ... to other conditions, including age and physical condition of confinement facility, numbers and classes of prisoners therein, actual ability of confinement officials to segregate or intermix confines from adjudged or sentenced prisoners, and impact of totally separating confines from the general population.”\(^{472}\)

---


\(^{466}\) Lopez v. PA. Department of Corrections, 119 A.3d 1081. Citing Griffin v. Vaughn, 112 F.3d 703, 709 (3d Cir 1997).

\(^{467}\) 10 U.S.C.A §813, Art. 13

\(^{468}\) Military Commission Act of 2009, section 949s, “Punishment by flogging, or by branding, marking or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission under this chapter.”

\(^{469}\) DoDD 2310.01E (3)(b)(2)

\(^{470}\) Military Commission Act of 2009, section 949u(a), Confinement of detainees of Guantanamo Bay are “under such regulations as the Secretary of Defense may prescribe...”

\(^{471}\) U.S. v. ABD Al Hadi Al-Iraqi, AE 021A

Though the conditions of detention at Guantanamo Bay are not fully known to the outside world, reports are that detainees are never held in full solitary confinement or isolation. However, it has been documented that Guantanamo’s Camp 7 detainee cells are single cells that do not allow communication with adjacent cells, that socialization among detainees at Camp 7 is very limited, and that detainees at Camp 7 are allowed four hours of recreation with the same detainee every day and two hours of socialization management weekly.473

g. Right to Access the Outside World – International Law
   The ICCPR provides that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”474 However, certain restrictions may be placed on this right when necessary for the protection of national security.475

h. Right to Access the Outside World – U.S. Constitutional & Common Law
   As addressed supra in Section b(2), pretrial detainees have the right to correspond through mail, phone, and visitation. Detainees also have the right to “receive publications that are available to the public.”476

i. Right to Access the Outside World - U.S. Military Law & Military Commission Law
   The right to access the outside world is limited. According to JTF-GTMO, all defendants have access to mail and defendants not placed in Camp 7 may have access to phone calls and video conferences. All defendants also have access to the services of the ICRC.
   In an exhibit attached to a motion filed by detainee / defendant al Nashiri, al Nashiri and an NGO requested that communication be expanded to allow “authorized organizations, NGOs, and selected personnel from the UN to visit and speak with the detainees” in Camp 7.477 The request was made “in hopes to” enhance the “transparency of operations.”478

[This Right to Freedom from Incommunicado / Solitary Confinement and Right to Access to the Outside World introductory section is being developed further.]

### 34. Prohibition on Incommunicado Detention

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don't Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Can the defendant communicate with family?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Can the defendant interact with other detainees?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

473 Al-Nashiri, AE171 at 63

474 ICCPR, Article 19(2)

475 ICCPR, Article 19(3)

476 72 C.J.S. Prisons §122, “Jail officials generally are entitled to limit the kinds of personal property pretrial detainees can keep in their cells, but such detainees have the right to receive publications that are available to the public.”

477 Al-Nashiri, AE171 at 82.

478 Id.
Can the defendant communicate with consular representatives of his home country?  

Can the defendant communicate with the ICRC (Red Cross)?  

Can the defendant communicate with habeas counsel?  

Can the defendant communicate with lawyers about bringing a claim before non-U.S. tribunals or other inter-governmental organizations?  

### 35. Solitary Confinement – Pre-Trial Hearing Stage

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Can the defendant communicate with other prisoners?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Can the defendant communicate with detention facility staff?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>How many hours per day is defendant locked in his cell without?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 36. Right to Access to the Outside World

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the defendant have access to the outside world?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Can the defendant access a telephone?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Can the defendant’s family visit? Access via Skype?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is the defendant’s defense counsel permitted to share with the defendant information about the outside world?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
O. Rights to an Interpreter / Translator

The **right to an interpreter / translator** requires the Military Commission to ensure that all defendants who need interpreters or translators have access to them as members of their team. The interpreters and translators should be cloaked in attorney-client, work product, or other privileges so that defendants will feel free to communicate with them without fear that the government can force the interpreters or translators to divulge those private communications. The government should provide translators and interpreters without charge to the defendant. The court has a duty to determine whether translators or interpreters are needed, and a duty to ensure that needed translators and interpreters are in place. Interpreters are required when the communications in question are oral. Translators are required when the communications in question are written.

### a. General – Right to an interpreter; Right to a translator

Many of the detainees at Guantanamo Bay do not speak, read or understand English, which is the language spoken at the Military Commissions, and the language in which all official Military Commission documents are written. Most of the professionals who work with or for the Military Commissions do not speak, read or understand most of the languages of spoken by detainees.

How do Military Commission officials communicate with the defendants, for example, how do they inform the defendants of the charges against them? How do the defendants communicate with their lawyers, paralegals, investigators and other members of their defense team?

Can an accused receive a fair trial if he does not speak, read or understand the language of the court, and if that information is not provided to him in a language he speaks, reads or understands? International law and U.S. domestic law provide that for an accused to receive a fair trial, he must be provided the opportunity to understand the charges against him, and understand the proceedings. He must also be able to communicate with his lawyers and with the court, and he has the right, to translators and interpreters at all stages of the proceedings, pre-trial proceedings, at trial, and at post-trial proceedings. The government is obligated to ensure that the defendant has an opportunity to communicate on issues related to the criminal case through both interpretation and translation, and this includes communications from the government to the accused (e.g., the government must provide a translation of the charge sheet), from the accused to the government (e.g., the government must provide a translator to translate documents that the accused might wish to present at trial), and between and among members of the accused’s defense team (e.g., the government must facilitate communications among defense team members who do not read, write or understand English).

Interpreters / translators should be afforded free of charge to the accused at all stages of the criminal proceedings. The court has the duty to determine whether an accused requires the assistance of an interpreter / translator. Interpreters / translators should be competent and capable of performing at a high level.

---

479 Interpretation is the transfer of oral content from one language to another; translation is the transfer of written content from one language to another. Office of Military Commissions, Department of Defense. [http://www.mc.mil/FACILITIES/Services/TranslationInterpretation.aspx](http://www.mc.mil/FACILITIES/Services/TranslationInterpretation.aspx).

480 If an accused does not understand the language used in court proceedings or documents, the defendant must be provided with accurate and clear interpretation and translation to help ensure the fairness of the pre-trial proceedings, the trial, and any post-trial proceedings. Amnesty International, Fair Trial Manual - Second Edition (2014). Chapter 23: Right to an Interpreter and to Translation, Page 169.

481 **Baytar v. Turkey**, (45440/04), European Court of Human Rights (2015). Paragraph 49. (To ensure a fair trial, interpreters / translators should be made available to the defendant for the interpretation and translation of all documents and statements necessary for the accused to understand the proceedings and for the rendition of his or her own documents and statements into the language of the court.) Translators and interpreters should be able to assist defendants who want to learn the substance of words that are spoken or written in a language he does not understand, and when he wants to convey thoughts to another person and the other person does not understand the language spoken or written by the defendant. *Id.* The defendant should be able to possess knowledge of the case against him so he might be able to defend himself, particularly by being able to put forth his version of the events.

*Id.*
b. **Right to an interpreter under international law – Sources of law**

Under international law, Guantanamo Bay defendants have the right to the free assistance of an interpreter if the defendant does not speak English, which is the language used by the U.S. Military Commissions. The interpreter, who works primarily with oral rather than written communications, should be available to interpret for the defendant during court proceedings, during communications between the defendant and his counsel, and between the defendant and others with whom he may wish or need to communicate as he prepares for his defense. This right is expressly provided for in the ICCPR, to which the United States is bound. Article 14(3)(f) of the ICCPR provides:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (f) To have the free assistance of an interpreter if he cannot understand the language used in court.

The right to the free assistance of an interpreter is also provided for in non-binding international treaties, in other non-treaty, non-binding international instruments, and as a matter of customary international law.

**c. Right to an interpreter – Criteria and international jurisprudence**

Numerous international cases have ruled on the question of whether defendants were afforded their internationally recognized right to an interpreter (for oral communications). The international law criteria for determining if the right to an interpreter is provided can be gleaned from international jurisprudence. These criteria are discussed in detail below.

i. **Right to interpretation applies at all stages of the criminal proceedings**

The defendant has the right to an interpreter at all stages of the criminal proceedings, from pre-trial, through the trial itself, and, if necessary, upon appeal of a conviction and sentence. UN Human Rights Committee General Comment 32 provides that “the right to have the free assistance of an interpreter . . . arises at all stages of the oral proceedings.” In *Luedicke, Belkacem, and Koç v. Germany*, the European Court of Human Rights rejected Germany’s argument that the text of Article 6(3)(e) of the European Convention should apply only to court hearings, not preliminary hearings or other interpretation costs. Eleven years later, in *Kamasinski v. Austria*, the European Court clarified its earlier decision by expressly providing that “the right . . . to the free assistance of an interpreter applies not only to oral statements made at the trial but also to documentary material and the pre-trial proceedings.” In a more recent case, *Baytar v. Turkey*, the European Court had the opportunity to address the applicability of the right to an interpreter while an accused is in police custody. The Court determined that, “like the assistance of a lawyer, that of an interpreter should be provided from the investigation stage.” The Court reasoned that because a person who is detained in police custody has rights, the decision to waive those rights can only

---

482 Amnesty International, *supra* n. 1 at 169.
484 Other treaties that address the right to an interpreter that bind the United States, in addition to Article 14(3)(f) of the ICCPR, include: *Third Geneva Convention*, Articles 96, 105, and 126; and *Fourth Geneva Convention*, Articles 72, 123, and 143.
485 The right to have the free assistance of an interpreter if he cannot understand or speak the language used in court is provided for in the following international instruments: Convention on the Rights of the Child, Article 40(2)(b)(vi); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Articles 18(3)(f) and 16(8); European Convention on Human Rights, Article 6(3)(e); American Convention, Article 8(2)(a); African Commission Resolution, Paragraph 21(E)(4); ICTY Statute, Article 67(1)(f); ICTR Statute, Article 21(4)(f); IICT Statute, Article 20(4)(f); Statute of the Special Tribunal for Lebanon, Articles 15(d) and 16(4)(g); and Statute of the Special Court for Sierra Leone, Article 17(4)(f).
486 Human Rights Committee General Comment, *supra* n. 3 at Paragraph 40.
487 (6210/73; 6877/75; and 7132/75), European Court of Human Rights (1978). Paragraph 48.
489 Baytar, *supra* n. 4 at Paragraph 50.
be properly made if the individual understands the charges he or she is facing so that he or she is able to assess the advisability of waiving his or her rights. 490 Thus, the Article 6(3)(e) of the European Convention was violated when the Government failed to provide Baytar with an interpreter while she was in police custody. 491 Furthermore, Sobhraj v. Nepal provides an example of the Human Rights Committee’s interpretation of Article 14(3)(f) of the ICCPR. In that case, Sobhraj was not provided with an interpreter from the time of his arrest and through the proceedings up until when the judgement was handed down. 492 The Committee found a violation of Article 14(3)(f). 493 Thus, defendants must have the assistance of an interpreter at all stages of the criminal proceedings.

ii. Interpreters should be provided at no cost to the defendant

Interpreters should be provided to the defendant and the defense team at no cost. In Luedicke, Germany argued to the European Court that while Article 6(3)(e) “exempts the accused from paying in advance for the expenses incurred by using an interpreter, it does not prevent him from being made to bear such expenses once he has been convicted.” 494 The Court, relying on the Vienna Convention on the Law of Treaties, found that the term “free” as used in that Article has a clear and determinate meaning – “in English, ‘free’ means ‘without payment, gratuitous’ (Shorter Oxford Dictionary), ‘not costing or charging anything, given or furnished without cost or payment’ (Webster’s Third New International Dictionary).” 495 According to the Court, the term “free” does not denote a conditional remission or a temporary exemption, but a “once and for all exemption or exoneration.” 496 The Court further reasoned that the interpretation advanced by Germany would have repercussions on the right to a fair trial in that “the appointment or not of an interpreter might depend on the attitude taken by the accused, which might in turn be influenced by the fear of financial consequences.” 497 Therefore, the costs incurred for the services of an interpreter in a criminal proceeding cannot be charged to the accused; it is of no importance whether the proceedings ended with an acquittal or a conviction.

iii. The court decides whether the defendant requires an interpreter

The court has the duty to determine whether an accused requires the assistance of an interpreter. In Cuscani v. Italy, the judge was aware that the accused had comprehension problems but nevertheless “allowed himself to be persuaded by [Cuscani’s] counsel’s confidence in his ability to ‘make do and mend’ without the assistance of an interpreter.” 498 The Court was of the opinion that “the verification of [Cuscani’s] need for interpretation facilities was a matter for the judge to determine in consultation with [Cuscani]. . . . The onus was thus on the judge to reassure himself that the absence of an interpreter . . . would not prejudice [Cuscani’s] full involvement in a matter of crucial importance for him.” 499 It went on to say that “the ultimate guardian of the fairness of the proceedings was the trial judge” and noted that domestic courts require judges to treat an accused’s interest in the services of an interpreter with ‘scrupulous care.’ 500 Thus, there is an obligation upon the court to inquire into the accused’s need for an interpreter.

490 Id. at Paragraph 53.
491 Id. at Paragraph 59.
493 Id.
494 Luedicke, supra n. 10 at Paragraph 38.
495 Id. at 40.
496 Id.
497 Id. at 42.
499 Id.
500 Id. at Paragraph 39.
iv.  Interpreters must be competent and must interpret accurately

For the right to an interpreter to be meaningful, interpreters must be competent and interpret accurately.\(^{501}\) A court’s obligation in respect to providing an interpreter to the defendant therefore extends to the adequacy of the interpretation provided.\(^{502}\) A trial judge must ensure that the defendant “does not encounter difficulties stemming from a lack of interpreting facilities.”\(^{503}\) In Baytar for example, the judge, after finding that Baytar did not have a sufficient understanding of the Turkish language, asked a member of Baytar’s family to serve as an interpreter.\(^{504}\) The European Court considered the fact that the judge “failed to verify the skills of the interpreter” in rendering its decision that a violation of the European Convention had occurred.\(^{505}\) Thus, defendants should bring to the attention of the court questions regarding an interpreter’s competency. In turn, the court has the obligation to “ensure that the quality of the interpretation is adequate.”\(^{506}\)

In regards to the competency of interpreters and the Military Commissions at Guantanamo Bay, some problems have arisen. “[T]he quality of the translation has been uneven, and at times, inadequate, due to the shortage of highly skilled interpreters with appropriate security clearances.”\(^{507}\) Because accurate interpretation and translation are so vital to ensuring a defendant is afforded a fair trial, such problems must be addressed.

d.  Right to an interpreter – The preference limitation

The right to an interpreter does not require that a person who adequately understands or speaks the language of the court be provided with an interpreter merely because he or she would prefer to speak another language. Under such circumstances, there is no obligation to provide an accused with an interpreter. According to UN Human Rights Committee General Comment 32, “accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.”\(^{508}\) In interpreting the ICCPR, the Human Rights Committee has found that the fair trial requirement does not mandate States parties “to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if the citizen is capable of expressing himself adequately in the official language. Only if the accused or the defense witnesses have difficulties in understanding, or in expressing themselves in the court language, must the services of an interpreter be made available.”\(^{509}\)

Whether an accused understands the language used by the court sufficiently thus that he or she is not entitled to an interpreter is a difficult question. An accused’s knowledge of everyday words and phrases in the language of the tribunal does not necessarily mean that he or she has an understanding of the legal terminology or the complexities of the case. In Hermi v. Italy, the European Court held that, when making decisions about whether to appoint an interpreter, a court must not only consider the defendant’s knowledge of the language, but must also consider “the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court.”\(^{510}\) The ICC

\(^{501}\) Amnesty International, supra n. 1 at 170.

\(^{502}\) Kamasinski, supra n. 11 at Paragraph 74.


\(^{504}\) Baytar, supra n. 4 at Paragraph 19.

\(^{505}\) Id. at Paragraph 57.

\(^{506}\) Amnesty International, supra n. 1 at 170.


\(^{508}\) Human Rights Committee General Comment, supra n. 3 at Paragraph 40.


has found that courts should err on the side of caution, holding that “the language requested [by the accused] should be granted unless it is absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court and is abusing his or her right under Article 67 of the [Rome] Statute.”511 The ICC continued, “If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated. Ultimately, the Chamber in question is responsible for ensuring the fair trial of the accused.”512

e. Right to a translator under other sources of international law – American Convention of Human Rights, Rome Statute of the ICC

International law also requires Guantanamo Bay defendants to have the right to the free assistance of a translator to translate documents used in court if the defendant cannot understand or read them. This translator should be available to translate documents presented in court, and to translate documents generated or used in the preparation of his defense. The accused’s right to have relevant documents translated free of charge is expressly provided for in the American Convention on Human Rights and the Rome Statute.

Article 8(2)(a) of the American Convention provides:

During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court.

Article 67(1)(f) of the Rome Statute provides:

In the determination of any charge, the accused shall be entitled . . . to the following minimum guarantees, in full equality: . . . (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks.

In addition to these two documents, various international courts and tribunals have found the right to a translator and translation services implicit in either the right to an interpreter or in other fair trial guarantees.513

Geneva Conventions provisions . . .

f. Right to a translator – Criteria, limitations, and international jurisprudence

The right to an interpreter and the right to a translator share several criteria that should be considered in determining whether each right was properly implemented in a specific case. For example, like the right to an interpreter, the right to a translator should be provided free of charge to the defendant and translators must also be competent and able to translate documents accurately.514 Similarly, much like the right to an interpreter has a preference limitation attached to it, the right to a translator is also limited in the sense that a defendant does not have the right to have every document translated. In Luedicke, the European Court emphasized that the right to translation of documents covers only those documents an accused must understand in order to have a fair trial.515 The Court clarified that holding in Kamasinski. It held that Article 6(3)(e) of the European Convention “does not go so far as to require a written translation

512 Id.
513 For example, in Luedicke, the European Court found the “right to the free assistance of an interpreter for the translation . . . of . . . documents” implicit in the right to the free assistance of an interpreter provided by Article 6(3)(e) of the European Convention. Luedicke, supra n. 10 at Paragraph 48.
514 Id.
515 Id.
of all items of written evidence or official documents in the procedure.”516 The Court reasoned that because not every document is essential to an accused’s understanding of the proceedings, thus enabling him or her to have the benefit of a fair trial, an accused has no right to have every piece of written evidence translated.517

Additionally, the UN Human Rights Committee in Harward v. Norway, found that the right to have documents translated under the ICCPR does not necessarily require that a defendant who does not understand the language of the court “has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel” and the lawyer is able to fully capable of reading and understanding the contents of the relevant documents.518 The Committee reaffirmed this principle in Hill v. Spain.519 Similarly, the European Court in Kamasicsi found that oral explanations by the defendant’s counsel of the charges in the indictment and the final judgment were sufficient thus that the right to have these documents translated was not violated.520

In contrast to the approach of the European Court and the Human Rights Committee – each holding rather generally that an accused has the right to the translation of those documents the defendant must understand in order to ensure a fair trial – the international criminal tribunals and the ICC take a different approach. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both limit the right to translation to specific documents, as opposed to stating broadly a general right to have every document that is necessary to ensure a fair trial translated.521 For example, Rule 66 of the Rules of Procedure and Evidence of the ICTY and Rule 110 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon (STL) obligate the Prosecutor to disclose the indictment and any supporting materials to the defense in a language the accused understands. Similarly, Rule 47(G) of the Rules of Procedure and Evidence of the ICTR and Rule 52(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (SCSL) also require the Prosecutor to disclose to the defendant the indictment in his or her own language. Unlike the indictment, the ICTY and the ICTR have held that all other court filings only need to be filed in one of the Tribunals’ working languages.522 However, the ICTY has deemed it essential for an unrepresented defendant to receive translations of relevant documents into a language he or she can readily understand.523

With regard to incriminatory evidence, the Rules of the ICTY require the Prosecutor to disclose “copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92” to the defense in a language the accused understands.524 The Rules of the STL similarly require the Prosecutor to make available to the defendant in a language he or she understands witness statements and certain other statements, depositions, and transcripts.525 In Prosecutor v. Delalic, the ICTY made it clear that the following documents must be translated into the defendant’s language: documents referring directly to facts constituting “the grounds of the charges in the Indictment,” documents referring directly to the accused, and documents concerning the “specific area where the crimes were allegedly committed in the time frame set out in the Indictment.”526 The ICTY even went further in Prosecutor v. Ljubicic when it held that an accused has the right to the production of exculpatory materials in a language he or she understands.527 In contrast, The Rules of the ICTR and the SCSL also require the disclosure of statements

516 Kamasicsi, supra n. 11 at Paragraph 74.
517 Id.
520 Kamasicsi, supra n. 11 at Paragraphs 81 and 85.
522 For ICTY, see Prosecutor v. Delalic, Case No. IT-96-21-T (1996). However, see also Prosecutor v. Seselj, Case No. IT-03-67-PT (2003) and Prosecutor v. Karadzic, Case No. IT-95-5/18-PT (2008) (holding that court filings should be filed in the defendant’s own language when he or she is acting pro se). For ICTR, see Prosecutor v. Muhimana, Case No. ICTR-95-1-B-1 (2001).
523 Prosecutor v. Miroslav and Others IT-98-30-1-A.
524 Rule 66(A)(ii).
525 Rule 110(A)(ii).
526 Delalic, supra n. 43 at Paragraph 8.
527 Case No. IT-00-41-PT (2002).
and transcripts, but they do not specify that they be provided in a language understood by the accused.\footnote{ICTR Rule 66 (A)(ii) and SCSL Rule 66(A).} For example, in \textit{Prosecutor v. Muhimana}, the ICTR held that while the defendant is entitled to all evidentiary matters relating to the Trial Chamber’s determination of the charges against him in a language he understands, he is not entitled to receive in his language materials that will not be presented at trial, even if they would otherwise be subject to disclosure by the Prosecutor.\footnote{\textit{Muhimana}, supra n. 43 at Paragraph 21.} Finally, as to evidence submitted to the court, both the ICTY and the ICTR have held that such evidence must be provided to the defendant in a language he or she understands.\footnote{\textit{Id.} at 816.}

Like the European Court and the Human Rights Committee, the international tribunals have also held that when an accused’s counsel speaks and understands the language of the tribunal, the accused is not entitled to the written translation of all documents as “oral translation” by the lawyer will usually suffice.\footnote{\textit{Ljubicic}, supra n. 47.} For instance, in \textit{Ljubicic}, an ICTY case, the tribunal held that the defendant was not entitled to have all documents translated because his attorney was fluent in the language of the tribunal.\footnote{\textit{Id.} at para. 33.} Thus, in cases where a defendant who does not speak the language of the court is represented by counsel that does speaks the language, a defendant need not be provided with translations so long as counsel receives the relevant documents.\footnote{Amnesty International, supra n. 1 at 169.}

\textbf{g. Interpretation / Translation interaction and overlap with other fair trial rights}

The right to an interpreter / translator overlaps and interacts with many other fair trial rights. The free and competent assistance of an interpreter / translator “is vital for the effective exercise of the rights to assistance of counsel, adequate facilities to prepare and present a defense, equality before the law and courts and the principle of equality of arms. Without such assistance an accused may not be able to participate fully and effectively in the preparation of their defense and during the proceedings. Because documents may contain information essential to the preparation of the defense and an accused may be questioned about the contents of documents, the right to translation of important documents is vital to a fair trial.”\footnote{\textit{Guesdon}, supra n. 30 at Paragraph 10.2.} The presence of an interpreter and translator, when needed, also helps ensure that the defendant’s right to equality of arms is satisfied.\footnote{Namakula, \textit{Language and the Right to Fair Trial Hearing in International Criminal Trials}, Springer International Publishing 2014, p. 85.} Furthermore, because defendants do not always speak the same language as the presiding court, international tribunals have been forced to balance the linguistic difficulties of the defendant with the need for a speedy trial.\footnote{Wolfgang Schomburg, “The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights.” Northwestern Journal of International Human Rights. Fall 2009. Page 12.} The interaction and overlap of the right to an interpreter / translator with several of these fair trial rights are discussed more fully below.

With regard to the right to adequate time and facilities for the preparation of a defense, provided for in Article 14(3)(b) of the ICCPR, it is difficult to set time limits on this right “as the time necessary for appropriate translation varies significantly from case to case.”\footnote{\textit{Id.}} It is vitally important to provide sufficient time for accurate translation and interpretation because “a lack thereof is one of the primary reasons for a miscarriage of justice in an international context.”\footnote{\textit{Id.}} Thus, interpretation and translation needs must be considered in assessing the amount of time required for the adequate preparation of an accused’s defense.

Related to the right to adequate time and facilities for the preparation of a defense is the right to be
tried without undue delay provided for in Article 14(3)(c) of the ICCPR. International cases often have thousands upon thousands of pages of documents, so “the work required to sort through, organize, classify and then submit the required documents to the Registry for translation in any given case is substantial. The time it takes to translate these documents can cause significant delays, infringing on the accused’s right to be tried without undue delay. For this reason, the right to translation of documents only extends to those documents necessary to ensure a fair trial in order to balance this right to a fair and expeditious trial with an accused’s right to an interpreter / translator. When these rights are in conflict, “the accused’s ability to understand the evidence (through translation) has been placed ahead of any concerns regarding expediency, judicial efficiency, and costs.”

Finally, the right to communicate with counsel, also provided for in Article 14(3)(b) of the ICCPR, interacts with the right to the assistance of an interpreter. In Lagerblom v. Sweden, the European Court of Human Rights dealt with the denial of an accused request to have his appointed counsel replaced with a lawyer who could speak the accused’s language. Because the accused “had a certain command of the language,” the Court was unable to find that the defendant “was so handicapped that he could not at all communicate with” his appointed counsel. This holding implies that “had communication not been possible, the right for an interpreter or to a change in counsel would have existed.”

h. Right to an interpreter / translator under domestic U.S. law

An accused’s right to an interpreter / translator also exists under domestic law. The right is implied in the 5th, 6th and 14th Amendments to the United States Constitution. It is also provided for in the Military Commissions Act of 2009, the Military Commission Rules of Evidence, the Regulations for Trial by Military Commissions, and the Uniform Code of Military Justice. Additionally, a federal statute, the Court Interpreters Act, deals precisely with this issue. Finally, Title VI of the Civil Rights Act can be construed so as to provide for criminal defendants the right to an interpreter / translator.

Under the Court Interpreters Act, the Director of the Administrative Office of the United States Courts is charged with prescribing and certifying the qualifications of interpreters for persons who speak only or primarily a language other than English. This statute reaches all judicial proceedings instituted by the United States. Volume 5 of the Guide to Judiciary Policy sets forth various provisions to assist in the implementation of the Court Interpreters Act and the provision of interpreters in general. For example, Section 210.10(a) provides that “a judge must appoint interpreters . . . if the judge determines that a party or a witness speaks only or primarily a language other than English . . . so as to inhibit that person’s comprehension or communication in the proceeding.” Subsection (b) makes clear that this includes “the assignment of an interpreter to assist in facilitating communication between counsel and the party” and subsection (d) provides for the appointment of interpreters for defense witnesses.

---

540 Id.
542 Trenchel and Summers, supra n. 26 at 339.
543 See Elizabeth Imbarlina, “The Right to an Interpreter for Criminal Defendants with Limited English.” Jurist.org. 15 April 2012 (“The rights of a criminal defendant to due process, equal protection and a fair trial would be substantially hampered, if not completely denied, if a defendant were not able to understand the nature of the charges against him and the meaning of the criminal proceedings. The right of a criminal defendant to have effective counsel as assistance, to confront witnesses against him and to protect himself against self-incrimination will have very little or no meaning at all if he is unable to speak English.”
544 Section 9481(b) of the Military Commissions Act of 2009 provides, “Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter may detail to or employ for the military commission interpreters who shall interpret for the military commission, and, as necessary, for trial counsel and defense counsel for the military commission, and for the accused.”
545 Rule 604 of the Military Commission Rules of Evidence provides, “An interpreter is subject to the provisions of these rules relating to qualifications as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.”
546 Interpreters are discussed in Sections 2-3, 7-3, 7-7, 11-6, 16-6, and 18-2 of the Regulations for Trial by Military Commissions. Notably, Section 2-3 maintains that interpreters should be qualified, Section 7-3 describes the specific types of interpretation interpreters are to be capable of performing, and Section 16-6 provides that translators or interpreters shall be provided not only to the accused, but also to victims and witnesses.
547 Article 28 of the Uniform Code of Military Justice provides, “The convening authority of a court-martial, military commission, or court of inquiry may detail or employ interpreters who shall interpret for the court or commission.”
549 Id.
Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal funds.\footnote{42 U.S.C. § 2000d et seq. (2015).} “The right of a criminal defendant to a court-appointed interpreter can be implied from the prohibition against discrimination based on national origin. . . . The language of the equal access requirement of the [Civil Rights Act] applies not only to the courtroom, but to all federally-sponsored programs over which the courts have oversight.”\footnote{Imbarlina, supra n. 66.} For example, in \textit{Ling v. State}, the Supreme Court of Georgia made clear to the lower courts that the state’s court system, as a recipient of federal funding, “is obligated to provide persons who are ‘limited English proficient’ with meaningful access to the courts in order to comply with Title VI of the Civil Rights Act of 1964 . . . and the Omnibus Crime Control and Safe Streets Act of 1968 . . . which prohibit national origin discrimination.”\footnote{Ling v. State, 702 S.E.2d 881, 884 (Ga. 2010).}

\textbf{i. Domestic jurisprudence}\

The United States Supreme Court has never held that criminal defendants have a constitutional right to an interpreter. However, U.S. courts have found the right to an interpreter / translator implicit in other constitutional guarantees. For example, in \textit{United States ex rel. Negron v. New York}, the Court of Appeals for the Second Circuit held that the lack of adequate translation rendered his trial constitutionally infirm.\footnote{434 F.2d 386, 387 (2d Cir. 1970).} Negron was a 23-year-old indigent Puerto Rican male with a sixth-grade education who neither spoke nor understood English. His court-appointed attorney spoke no Spanish.\footnote{Id. at 388.} Any translations were “spasmodic and irregular.”\footnote{Id.} Accordingly, “to Negron, most of the trial must have been a babble of voices.”\footnote{Id. at 389.} Thus the Court found that the trial “lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment.”\footnote{Id. at 390.} The Court went on to say that Negron was denied the right to be confronted with adverse witnesses, the right to cross-examine those witnesses, and the right to consult with his lawyer as a result of the interpretation and translation infirmities in this case.\footnote{Id.} The Court noted, “Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.”\footnote{Ling, supra n. 75 at Page 882.} The \textit{Negron} decision has been cited with approval by federal and state courts as recently as 2015.

Various decisions have found a number of rights held by criminal defendants to be violated as a result of deficiencies in interpretation / translation. For example, a recent decision by the Supreme Court of Georgia held that defendants “who cannot communicate effectively in English may be effectively incompetent to proceed in a criminal matter and rendered effectively absent at trial if no interpreter is provided.”\footnote{Ling, supra n. 75 at Page 882.} In \textit{State v. Ramirez}, the Court of Appeals of Ohio found that the State’s attempt to inform Ramirez of his \textit{Miranda} rights was unsuccessful due to poor interpretation and so his motion to suppress the statements he made to the police should have been granted.\footnote{135 Ohio App.3d 89 (Ohio Ct. App. 1999).} In \textit{State v. Rodriguez}, the Superior Court of New Jersey held that indigent, non-English-speaking defendants have the right to an interpreter to be paid for at the public expense and that “there can be no waiver of the right to an interpreter without a knowing, voluntary, and intelligent declaration on the record by the defendant, after having had the opportunity to consult with his attorney and after having had this action fully explained to him by the trial judge.”\footnote{682 A.2d 764, 770-771 (N.J. Super. 1996).} In \textit{State v. Tamez}, the Louisiana Court of Appeals held that “it is axiomatic that an interpreter should be a neutral and detached individual whose abilities are first screened by the court and who is sworn to make a true, literal and complete bilateral translation. The use of an unqualified, unsworn
interpreter who was the co-defendant with the accused and also has a substantial interest in the outcome of the proceedings, renders the plea itself questionable.” 563 The Court thus found that Defendant Sanchez’s guilty plea, interpreted by Defendant Tamez, should not have been accepted and reversed Sanchez’s conviction. 564 Finally, in People v. Resendes, the California Court of Appeals held that each defendant unable to understand English is to be provided with his own separate interpreter and therefore it constituted reversible error to force two co-defendants to share one interpreter because this procedure “inhibited effective communication with counsel.” 565

j. Bias on the part of the interpreter / translator

The interpreter / translator should be independent and impartial. Pursuant to Rule 807(b)(2)(E) of the Rules for Military Commissions, he or she must take an oath that they will interpret / translate truly. 566 Though the interpreter / translator may be employed by the court or the Office of Military Commissions, they should not take instructions from the court or the Office of the Military Commission regarding the substance of what is interpreted / translated. The U.S. government should not pressure or otherwise seek to unduly influence an interpreter / translator. Furthermore, an interpreter or translator specifically assigned to a defendant or a defense team should not report back to the prosecution, the court, the Office of Military Commission or any other individual or entity any matter or information learned through the attorney client, work product, or other privileges. At Guantanamo Bay, “upon request, the defense team may be provided an interpreter who is a confidential member of the defense team. This interpreter facilitates communication between the defense team and the accused during attorney-client meetings and in courtroom consultations.” 567

In regard to bias against the accused on the part of an interpreter, opinions differ as to whether such bias implicates a defendant’s right to a fair trial. While an accused’s counsel acts unilaterally for the defendant and therefore ought to be biased in favor of his or her client, “the interpreter acts as a neutral intermediary who may not in any way appear as a person with his or her own opinions. There is no particular relationship of confidence between the interpreter and his or her client.” 568

However, what if the interpreter had participated in the torture of the accused at a CIA black site? This was precisely the situation of one Ramzi bin al-Shibh, a defendant being held as an enemy combatant at Guantanamo Bay. At a hearing on February 9, 2015, the defendant stated, “I cannot trust him [the interpreter] because he was working at the black site with the CIA.” 569 While the defendant’s counsel speculated that this “coincidence” was actually “part of the pattern of infiltration by government agencies into the defense teams,” 570 the Government insisted that there had been “no attempt to have someone be put into the defense teams in any sort of untoward way.” 571

[Issues – Is there a conflict if the interpreter interprets for a private lawyer / defendant meeting in one case, and then interprets for a confidential lawyer / defendant meeting in another case, when the two different defendants may have conflicting interests? Can an interpreter interpret for both co-defendants if the co-defendants have different interests? Can an interpreter who once interpreted for the defense in private meetings then work as an interpreter for the prosecution? What sorts of conflicts arise with interpreters? How are those conflicts resolved?

[This Right to an Interpreter / Translator is being developed further. More is forthcoming.]
### 37. Right to Interpreter (ICCPR, art 14(3)(f))

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the defendant have access to an interpreter to help facilitate communication with his counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is the interpreter competent in the defendant’s language / dialect?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge explain to the interpreter the interpreter’s rights?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge warn the interpreter that it was a crime to knowingly interpret falsely?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge explain the right to challenge interpreters?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were there any challenges to the interpreter?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were there any challenges to any interpretation?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In your view, was the interpretation of good quality?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the interpreter made available to the accused at all stages of the proceedings?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the interpreter provided free of charge to the accused?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If no interpreter was provided, did the accused have a sufficient understanding of the language used by the Commission?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If no interpreter was provided, did the Commission make an inquiry into the level of the accused’s understanding of the</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was there any indication of bias on the part of the interpreter?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 38. Right to Translation (Translation of Documents) (ICCPR, art 14(3)(f))

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

DRAFT
<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Unknown</th>
</tr>
</thead>
<tbody>
<tr>
<td>Was the defendant provided with translations of judicial documents needed for his defense?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are defendant’s requests for translated documents timely honored?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the defendant have access to a translator to help facilitate communication with his counsel?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is the translator competent in the written language of the defendant?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge explain to the translator the translator’s rights?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge warn the translator that it was a crime to knowingly</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge explain the right to challenge translators?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were there any challenges to the translator or to any translation?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In your view, was any translation of good quality?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were translation services provided free of charge to the accused?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Which documents were translated for the accused?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Which documents were not translated for the accused?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
P. Right to Public Proceedings

The right to public proceedings requires that pre-trial, trial, and post-trial hearings be open to the public. This right is not absolute, but the government has the burden of demonstrating that the hearings should be closed. The right to a public trial is incorporated into the right to a fair trial for the defendant—mainly for defendants in a criminal trial. However, other U.S. Military Commission stakeholders also share the right to public proceedings. Such stakeholders include: the prosecution, the victims and victims’ families, the press/media, and the public. The right to public proceedings in the context of Guantanamo Bay has a challenging meaning, given the remote location of the U.S. Military Commissions – on a military base on a Caribbean Island with very limited, controlled access and very narrow opportunities for the proceedings to be viewed on the U.S. mainland.

a. General

International and domestic laws provide that defendants, and all other stakeholders, are entitled to public pre-trial hearings, trials, and post-trial hearings. Other stakeholders with the right to public proceedings include the victims and the victims’ families, family members of the defendants, the press – who may also be considered members of “the public”.

All criminal proceedings must be open to the public, except that the government may exclude the public from some proceedings if the government demonstrates that the hearings should be closed.

What does the right to public proceedings mean in the context of the U.S. Military Commissions at Guantanamo Bay, Cuba? The courtroom is on a U.S. military base on a Caribbean island, with very limited access, fully under the control of the U.S. government. A maximum of only 13 or 14 public “observers” are permitted to be in the Guantanamo Bay courtroom during any proceeding, with a very small number of seats also reserved for victims and victims’ family members. The public is also permitted to view Guantanamo Bay hearings and trials via a live video-link into the Post Theater at Ft. Meade, Maryland. That base has limited access, and knowledge about the public’s ability to attend hearings at Ft. Meade is not widespread.

[This section of the Manual will be fleshed out further, as additional research is conducted on what constitutions the “right to public proceedings”, when is it determined that the right to public proceedings is being afforded to stakeholders and when is that right being denied, particularly in the context of U.S. Military Commissions at Guantanamo Bay. Researcher affiliated with Indiana University McKinney School of Law are working on these issues.]

b. International law requires public hearings

Binding international instruments require that U.S. Military Commission conduct public hearings, as do the customary international law norms contained in non-binding international instruments.

572 The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is also provided for in the following international instruments: UDHR, Article 10; Principles on the Independence of the Judiciary, Principle 2 (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”); American Convention, Article 8(1); and European Convention, Article 6(1). See Karttunen v. Finland, (387/1989), 23 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 120; Fey v. Austria, 24 February 1993, 255 Ser. A 13, para. 34; Collins v. Jamaica, (240/1987), 1 November 1991, Report of the HRC, (A/47/40), 1992, at 236 para. 8.4; See also American Convention, article 27(2) (the right to a competent, independent, impartial judiciary, may not be suspended even in states of emergency); Inter-American Court, Advisory Opinion OC-8/87, 30 January 1987, Habeas Corpus in Emergency Situations; Inter-American Court, Advisory Opinion OC-9/87, 6 October 1987, Judicial Guarantees in States of Emergency, OAS/Ser.L/V/III.19 doc.13, 1988; Article 67(1) of the ICC Statute (guaranteeing a fair hearing conducted impartially).
i. International law that binds the United States

The common law and Constitutional ideals associated with public hearing have been incorporated into international laws or treaties. One of the prominent or core treaties which binds the United States is the International Covenant on Civil and Political Rights (ICCPR).

Within Article 14(1) of the ICCPR the international community laid out the explicit rights for a fair and public hearing. Article 14(1) of the ICCPR states:

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, **everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal** established by law. The press and the public may be excluded from all or part of a trial for reasons of **morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court** in special circumstances where publicity would prejudice the interests of justice…”

In addition to the ICCPR, the United States is also bound as a Party to the Geneva Conventions. Both the Third and Forth Geneva Conventions state that representatives of the protecting power have a right to attend a trial. Only narrow circumstances can prohibit this right and allow a trial to be held in camera (a legal term that essentially means “private”). Specifically, Geneva Convention IV, Article 74 states: “Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held “in camera” in the interests of the security of the Occupying Power, which shall then notify the Protecting Power.” The applicable section of the Third Geneva Convention (Prisoners of War), Article 105 states: “The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held in camera in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.” Additionally, The Protocol Additional to the Geneva Conventions of 12 August 1949—Article 75 No. 4(i) states: “anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly.” Note that the public element of these war trials under the Geneva Conventions are reserved as a right to the Protecting Power—that is the members of the state belonging to the accused. And, there added Protocol makes the judgement a required element of the “public trial”—necessitating its publication.

ii. Non-binding international instruments that provide for the right to public hearings:

Non-binding International Law

International instruments that do not bind the U.S. but that incorporate binding customary international law norms that do bind the U.S. include:

The Universal Declaration of Human Rights, states in Article 10: “Everyone is entitled in full equality to a fair and **public hearing** by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him” (emphasis added). Article 11 (1) adds that: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a **public trial** at which he has had all the guarantees necessary for his defense” (emphasis added).

Thus, the ideal of a public hearing or trial is incorporated into the human rights considerations on the international plane. This legal idea is reiterated in several other treaties and declarations that do not bind the United States, but the norms of a fair and public trial within these documents have risen to the level of customary international law the norms thus bind the U.S.

The American Declaration of the Right and Duties of Man (which pre-dates the UDHR) in Article
XXVI provides:

“Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment” (emphasis added). As a declaration, like the UDHR, it is a document that is non-binding, but does contain norms within it that are binding.

The European Convention on Human Rights, Article 6(1) states:

In the determination of his civil rights and obligation or any criminal charge against him, everyone is entitled to a fair and public hearing.”

The American Convention on Human Rights more narrowly stipulates the right in Article 8(5):

“Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.”

The Rome Statute of the International Criminal Court, Article 64(7) states: “The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence” (emphasis added). Therefore, a tension exists within these international criminal trial between the defendant’s right to a public hearing or trial and the rights and interests of other stakeholders to have confidential or sensitive information remain intact. Article 67(1) of the Rome statute reiterates the accused’s right to a public hearing, stating: “In the determination of any charge, the accused shall be entitled to a public hearing. . .” (emphasis added). However, the ICC statute again recognizes an exception to the principle of public hearing in article 68 (2). It states: “As an exception to the principle of fair hearing provided for in Article 67, the chambers of the court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means.”

Domestic (U.S.) Law

U.S. Constitution

The primary source for the right to public proceedings within fair trial rights for the United States is found in the Constitution’s Sixth Amendment, which states: “In all criminal proceedings, the accused shall enjoy the right to a . . . public trial.” Additionally, the First Amendment speaks to the freedom of the press. The press are often the eyes and ears of the public in judicial proceedings. Thus, the freedoms the press encounters during a trial can directly correlate to the ideals of a public trial.

U.S. Federal Case Law

In 1980, the Supreme Court directly addressed a challenge to the closure of a murder trial in Richmond Newspapers v. Virginia.573 In the case, the defendant moved to have the public excluded. The prosecution did not object, and, the trial judge allowed for the requested closure. This case focused on the question: can a criminal trial be “closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant’s superior right to a fair trial, or that some other overriding consideration requires closure.”574 Although this case focused more on the right of the press and public in the “public trial” guarantee, Chief Justice Burger, who delivered the opinion of the Supreme Court, walked through the origins of the modern criminal trial and where the right to a public trial came from.

Public trials have always been part of Anglo-American justice—dating back before the days of


574 Id. at 564.
the Norman Conquest in England—when the public that attended the trial functioned also as a sort of jury.575 Eventually, the jury evolved into a selection from the public – as representatives of the public. Nevertheless, “the public character of the trial at which guilt or innocence was decided” remained vital and constant throughout the evolution of criminal court trials.576 The ideal of an open and public trial was also established in the ideals of the colonies and then the formation of the United States. In fact, drafters within the Continental Congress wrote: “[O]ne great right is that of a trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, in open Court, before as many of the people as [choose] to attend, shall pass their sentence upon oath against him . . ..”577 Thus, long before the right to a public trial was codified within the Constitution, the concept of a public trial was already linked to the right of a fair trial. “[W]e gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.”578

Despite the strong historical considerations for a public trial, the Court in Richmond Newspapers had address: does “the Constitution afford[] protection against exclusion of the public from criminal trials.”579 The Court determined that although the right of the public to attend trials is not explicit within the First Amendment, the Court did hold that “the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated.’”580

With this Constitutional right in place, the Court then determined if under the accused’s Sixth Amendment right to a public trial, there is also an implicit right of the accused to a private trial. The issue with the trial judge’s decision in Richmond Newspapers was that the motion of closure was granted without any findings to support the closure. There was no inquiry made to see if alternative solutions could be applied to meet the needs of the accused without completely closing the trial to the press and public.581 Thus, the Court concluded that “[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”582

Six years later, in Press-Enterprise Co. v. Superior Court [II],583 the Supreme Court established a test for determining if a constitutional presumption of access applies to a proceeding or to records of the proceeding). The Court gave lower courts a way to know if closure of proceedings may take place.

In Press-Enterprise Co. [II], the Court also expanded the scope of the test for the Constitutional right to a public trial beyond just the criminal trial. In the case the defendant had requested the closure of the pre-trial hearings, which was uncontested by the prosecution and granted by the judge. The defendant went on to request the transcripts from the pre-trial hearings to be sealed as well—this motion was also granted. Thus, this case gives insight into how closures can be adjudicated for pre-

575 Id. at 565.
576 Id. at 566.
577 Id. at 568-69 (quoting 1 Journals of the Continental Congress, 1774-1789, pp. 101, 107 (1904)).
578 Id. at 569.
579 Id. at 575.
580 Id. at 580 (quoting Brandenburg v. Hayes, 408 U.S. 665, 681 (1972)).
581 Id. at 580.
582 Id. at 581.
583 478 U.S. 1 (1986).
trial hearings and court documents as well. The opinion of the Court was once again given by Chief Justice Burger. In the opinion, he states: “The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness.”584 And this case addresses the right of the public within the right of the “public trial,” not that of the defendant – “the right asserted here is that of the public under the First Amendment.”585 The Court determined that in dealing with the First Amendment right to access criminal proceedings two considerations must be made: (1) “whether the place and process have historically been open to the press and general public,”586 and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.”587

Within the Press-Enterprise Co. [II] opinion, Chief Justice Burger reiterated the test developed from the earlier Press-Enterprise Co. v. Superior Court [I]588 that courts must use to determine if the presumption of the public’s right of access to a hearing or trial can be overcome. Closure of proceedings are permissible only if on-the-record findings are made: (1) that closure is necessary to further a compelling government interest, (2) the closure order is narrowly tailored to serve that interest, and (3) that no less restrictive means are available to adequately protect that interest.589

In this case, there was a further consideration of what rights attach to pre-trial hearings (and transcripts related to it). The Court determined that because pre-trial hearings occur without a jury, it “makes the importance of public access to a preliminary hearing even more significant.”590 Therefore, the Court held that “the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings.”591 Thus, the same test established in Press-Enterprise Co. [I] applies to determining closures of preliminary hearings. The Court added that if the accused is the one requesting closure in the interest of the right to a fair trial “the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.”592

**U.S. Military Law**

In ABC, Inc. v. Powell,593 the United States Court of Appeals for the Armed Forces stated that the Sixth Amendment right of public trial for the accused extends to trials by court-martial and then expanded this right of the accused to Article 32 investigative hearings. In its reasoning, the court noted that the applicable procedural rule is found at RCM 405(h)(3), Manual for Courts-Martial, United States (1995 ed.), which states: “Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer.”594 And the additional discussion of this rule states: “Closure may encourage

---

584 Id. at 7.
585 Id.
586 Id. at 8.
587 Id.
589 Id. at 9.
590 Id. at 13.
591 Id.
592 Id. at 14.
594 Id.
complete testimony by an embarrassed or timid witness. *Ordinarily the proceedings of a pretrial investigation should be open to spectators.*” (emphasis added). Nevertheless, the court here makes clear that closure can still occur when the elements of the Supreme Court’s Press-Enterprise test is applied. Such a test must be applied on a case-by-case basis. Thus, the right of the accused to a public trial can be overcome if cause is “shown that outweighs the value of openness.”

Currently, the Military Commissions Act of 2009 (MCA) provides that a military commission judge may close parts of a trial to protect information that might be injurious to national security, or to ensure physical safety of individuals (10 U.S.C. 949d[c]).

Sessions: (c) Closure of Proceedings—

(1) The military judge may close to the public all or part of the proceeding of a military commissions under this chapter.

(2) The military judge may close to the public all or a portion of the proceedings under paragraph (2) only upon making a specific finding that such closure is necessary to:

   a. Protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities; or

   b. Ensure the physical safety of individuals.

10 U.S.C. 949d(c)

Section 949d of the MCA also provides that materials not classified or protected, such as transcripts, pleadings, filings, ruling, orders and other materials used at the military commission hearings, be accessible to the public.

Section 949d is coupled with the Rules of Military Commissions (part of the Manual for Military Commissions United States) Section 806. These rules, which were amended in June of 2013, state in section 806:

(a) [M]ilitary commissions shall be publicly held. For purposes of this rule, “public” includes representatives of the press, representatives of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities. Access to military commissions may be constrained by location, the size of the facility, physical security requirements, and national security concerns.

(b) Control of spectators and closure

(1) Control of spectators.

   (A) In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, and exclude specific persons from the courtroom.

   (B) Any limitations imposed by the military judge under paragraph (b)(1)(A) shall be supported by essential findings of fact appended to the record of trial.

(2) Closure.

   (A) The military judge may close to the public all or part of the proceedings of a military commission under chapter 47A of title 10, United States Code.

   (B) The military judge may close to the public all or a portion

---

595 Id.

of the proceedings under paragraph (A) only upon making a specific finding that such closure is necessary to—

   i. Protect information the disclosure of which could reasonably be expected to damage national security, including intelligence or law enforcement sources, methods, or activities; or
   
   ii. Ensure the physical safety of individuals.

(C) A finding under paragraph (B) may be based upon a presentation, including a presentation ex parte or in camera, by either trial or defense counsel.

(c) Photography and broadcasting prohibited. Except as otherwise expressly authorized by the Secretary of Defense, video and audio recording and the taking of photographs—except for the purpose of preparing the record of trial—in the court room during the proceedings and radio or television broadcasting of proceedings from the courtroom shall not be permitted. However, the military judge may, as a matter of discretion permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under R.M.C. 804 or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

(d) Protective orders. The military judge may, upon request of any part of sua sponte, issue an appropriate protective order, in writing, to prevent parties and witnesses from making extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members.597

Thus, the rules for military commissions lay out a narrower scope for the public to see the military proceedings in Guantanamo Bay. But, this narrow scope has not gone unchallenged.

The Guantanamo Bay Hearings

The remote location of the Guantanamo Bay hearings makes it difficult for a member of the public to exercise the Constitutional right to attend. Although a contemporaneous closed-circuit television feed is sent to Ft. Meade, Maryland for the public’s viewing, it can be cumbersome to accessing the location.598

To increase the accessibility of the hearings to the public, in 2012, the defense counsel in the case U.S. v. Al-Nashiri submitted a motion requesting that proceedings of the military commission be available to media outlets as well as CCTV locations. In the motion, defense counsel requested that the Commission make the video feed (which already was sent to Ft. Meade, Maryland) be made available to the media without discrimination. Defense counsel pointed out that since “the video feed now exists, broadcast stations throughout the country could ‘hook into’ the same feed that goes to the restricted locations or rebroadcast the signal transmitted to Ft. Meade.”599

In its argument, defense quoted Judge Robertson of the District Court for the District of Columbia, who wrote that the “eyes of the world are on Guantanamo Bay. Justice must be done there,

597 Rules for Military Commissions, Section 806(a)-(d), http://www.mc.mil/Portals/0/pdfs/2012ManualForMilitaryCommissions.pdf


599 Defense Motion Requesting that Proceeding of this Military Commission be Available to Media Outlets as well as CCT Locations, AE081, (8 June 2012).
and must be seen to be done there, fairly and impartially.” \(^{600}\) The defense points out that the broadcast of the proceedings to remote locations that are difficult for the public to access does not “foster greater openness.” \(^{601}\) Taking the Constitutional and statutory provisions as noted above, the defense points out that the defense’s right to a public trial is coextensive with the public’s right to access. The defense further argued that 10 U.S.C, § 949d(d)(2) does not forbid open broadcast of the proceedings and that R.M.C. 806(c) – which authorizes the Secretary of Defense as the sole authority to broadcast the proceedings – is not fully binding on the military. \(^{602}\) The defense also points out that the government has not provided a compelling reason to keep the broadcast of the live feed from reaching a broader audience. In fact, the broadcast is already in place – thus, the issue is why the broadcast feed is so restricted in its access (when it is not forbidden).

The government’s argument that the feed that the access to transcripts on website fulfilled the met “the law’s requirement competing public interests defense argued that Rules was not binding, the government claimed that the rules were mandatory for the military court. Thus, granting the motion would be a violation of the court’s own judiciary rules. The government also points out that both court-martial and federal courts forbid the broadcasting of criminal trials. Therefore, this limitation is not an outlier rule, but one made with the support of precedent and support. The government also points out that the Constitutional rights provided in the First and Sixth Amendments does not guarantee televised trials. The government also argues from the Supreme Court’s opinion and holdings in United States v. Moussaoui, \(^{604}\) where the Court found that an audio-visual feed and online availability of transcripts “fully satisfied[ed] the constitutional requirements for openness and accessibility.” \(^{605}\)

The government also argues that broadcasting the proceedings could impact witness testimony or the willingness of individuals (both for the prosecution and the defense) to testify. And, broadcasting the pre-trial proceedings could impact the judgment of the jury. Furthermore, the government points out that there could be a negative impact for the defendant himself, if the proceedings are widely broadcasted. Thus, broadcasting the proceedings could end up

---


\(^{601}\) Id.

\(^{602}\) Id.

\(^{603}\) Government Response to Defense Motion Requesting that Proceedings of this Military Commission be Available to Media Outlets as well as CCTV Locations, AE081, (22 June 2012).

\(^{604}\) 205 F.R.D. 183 (E.D.Va 2002).

compromising a fair trial, not promoting it.\textsuperscript{606}

The military court ruling denied the defense’s motion—mainly relying on the precedent that the government used in its argument and, also, the statement within R.M.C. 806(c): “[e]xcept as otherwise expressly authorized by the Secretary of Defense, video and audio recording and the taking of photographs . . . in the court room during the proceedings and radio or television broadcasting of proceedings from the courtroom shall not be permitted.”\textsuperscript{607} Based on this rule the Commission stated it did not have the discretion or authority to allow what the Defense requested.\textsuperscript{608}

[The First Amendment right of public access extends to trials by court-martial.\textsuperscript{609}]

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|}
\hline
\hline
Can the general public access the Guantanamo Bay proceedings via closed circuit television \textit{at Ft. Meade, Maryland}? & & & & \\
\hline
Are there any hurdles in place that might prevent the general public from gaining access to the Guantanamo Bay proceedings \textit{at Ft. Meade} (e.g., lack of information about the access of proceedings, ID and screening procedures to gain access to \textit{Ft. Meade}, etc)? & & & & \\
\hline
If there are hurdles that prevent the level of public hearing required by law, are those hurdles “unreasonable”? & & & & \\
\hline
Does the public have access to pre-trial proceedings? & & & & \\
\hline
Is the public access reasonable under the circumstances? & & & & \\
\hline
Were any members of the public present at any of the pre-trial proceedings? & & & & \\
\hline
Are improper hurdles currently in place that prevent the level of public hearing required by law? & & & & \\
\hline
Was any member of the public denied access to the viewing theater? If so, please explain. & & & & \\
\hline
\end{tabular}
\caption{Rights to Public Proceedings (Military Commission Act of 2009, 10 U.S.C. 949d; ICCPR Article 14(1))}
\end{table}

\begin{footnotesize}
\begin{enumerate}
\item[606] See generally, supra note 32.
\item[607] Ruling: Motion Requesting that Proceedings of the Military Commission be Available to Media Outlets as well as CCTV Locations, AE 0812C, (10 Sept 2012).
\item[608] Id.
\item[609] \textit{ABC Inc. V. Powell}, 47 M.S. 363, 365 (1997).
\end{enumerate}
\end{footnotesize}
Can the general public access the Guantanamo Bay proceedings via closed circuit television at Ft. Devins, Massachusetts, or is that location reserved for victims and their families (VFs) with no access to the general public?

Can the general public access the Guantanamo Bay proceedings via closed circuit television at Norfolk, Virginia, or is that location reserved for victims and their families (VFMs) with no access to the general public?

Can the public access the Guantanamo Bay proceedings via closed circuit television at Ft. Meade, Maryland?

Can the general public access the Guantanamo Bay proceedings via closed circuit television at Camp Bulkeley (at Guantanamo Bay, Cuba) or anywhere else at Guantanamo Bay?

Can the general public access the Guantanamo Bay proceedings via closed circuit television at any other location?

If the general public is not present at the proceedings in Guantanamo Bay in person, can that proceeding still count as a “public proceeding”?

NGO Observers, along with the public, media and victims and family members, may view GTMO Military Commission proceedings from the Post Theater at Ft. Meade, Maryland. Ft. Meade is where military proceedings were held for Army Pfc. Chelsea Manning (formerly Army Pfc. Bradley Manning) who was convicted of leading sensitive data, and is also the home of the National Security Agency (NSA).

Q. Freedom from Self-Incrimination; Right Not to Be Compelled to Testify Against Oneself; Right Not to Be Compelled to Confess Guilt

a. General

International and domestic U.S. law provide that all Military Commission defendants have the right to freedom from self-incrimination, the right not to be compelled to testify against himself, and the right not to be pressured to confess guilt.610 These rights are all related to each other in that they acknowledge the obligation of the prosecution to bear the full burden of proving all elements of all crimes against the defendant, that the defendant who is presumed innocent has the right to remain silent, and that the defendant should not be placed in a position where he is mandated to provide the evidence that will result in his conviction.

b. U.S. Constitution & U.S. Supreme Court cases

The Fifth Amendment to the U.S. Constitution provides that no “No person . . . shall be compelled in any criminal case to be a witness against himself”. The U.S. Supreme Court has ruled that the Fifth Amendment Clause contains three elements: (1) compulsion, (2) incrimination, and (3) testimony.611 In *Miranda v. Arizona*,612 the U.S. Supreme Court articulated the rule that continues to protect defendants from compelled self-incrimination, compelled testimony against oneself, and compelled confession of guilt. *Miranda* ruled that “In order to properly safeguard the protection the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored…The privilege against self-incrimination secured by the constitution applies to all individuals.”613 If a defendant is compelled to reveal information that is self-incriminating, that information may not be admitted against the defendant in court.614

Questions arise as to what constitutes “compulsion”, that is, when self-incrimination will be deemed “compelled” for purposes of the prohibition against compelled self-incrimination.615 Determining whether compelled self-incrimination exists, courts may look to the nature and degree of the compulsion,


611 *Fisher v. United States*, xyz U.S. abc, zyx (19xx). A Maryland court noted that for the privilege to be available, each of its six constituent elements must be established: (1) no person (2) shall be compelled [the compulsion element] (3) in any criminal case (4) to be a witness [the testimonial element] (5) against (6) himself.” *Smith v. State*, 186 Md. App. 498, 508-09 (Md. Ct. Spec. App. 2009)

612 384 U.S. 436 (1966)

613 Id. at xyz; See also *Dickerson v. United States*, 530 U.S. 428 (2000) (upholding *Miranda v. Arizona*, ruling that xyz.)

614 The defendant has the right to be free from self-incrimination, and to being free from being compelled to testify against himself or confess guilt. If a confession is extracted using torture or cruel, inhuman or degrading treatment or punishment, the government may not use that confession against the defendant in court. See also Godsey, Mark A., *Miranda’s Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 DUKE L. J. 1703, 1722 – 1726 (2002) (violation of privilege against self-incrimination for involuntary confessions extracted using torture to be used as evidence against a defendant)

615 *Francis v. United Kingdom*, European Court of Human Rights (Application no. 15809/02 and 25624/02) Judgment of 29 June 2007, para 53-56. (The right against self-incrimination is not absolute, but depends on whether the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained had destroyed the essence of the right.)
to whether any relevant safeguards exist in the procedure.616

The right against self-incrimination can be claimed by a defendant in any case, including the Guantanamo Bay Military Commission.617 In court, no comments are permitted concerning a defendant’s refusal to testify.618 A violation of the right against compelled self-incrimination would occur not when the testimony is compelled, but would occur only when (and if) the evidence is sought to be used against the defendant at trial.619

c. Military Commission Instruments; UCMJ

The Military Commission Act of 2009 § 948r(b) provides “No person shall be required to testify against himself or herself at a proceeding of a military commission under this chapter”620 Similarly, Rule 301 of the Military Commission Rules of Evidence provides “No person shall be required to testify against himself at a proceeding of a military commission under these rules.” However, exceptions are carved out to that permit some coerced statements to be admitted at trial.621

The Manual for Military Commissions, §831 Article 31, provides that “No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer which may tend to incriminate him.”622

Uniform Code of Military Justice, §831 Article 31 provides “No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer which may tend to incriminate him”.

d. International law sources

These rights related to compelled self-incrimination and confessed guilt are among those “judicial guarantees which are recognized as indispensable by civilized peoples” provided for in Common Article 3 of the Geneva Conventions, and thus the U.S. is obligated under international law to afford these rights

---

616 Francis v. United Kingdom, European Court of Human Rights (Application no. 15809/02 and 25624/02) Judgment of 29 June 2007, para 53-56

617 See Kastigar v. United States (The Supreme Court ruled that the right “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” 406 U.S. 441, 444-45 (1972). In Carter v. Kentucky, 450 U.S. 288 (1981), the Supreme Court gave its imprimatur to judges instructing the jury that they should attach no significance to a defendant’s refusal to testify.)

618 California v. Griffin, 380 U.S. 609 (1965)

619 In United States v. Gecas, a distinction was drawn between the time that testimony was compelled and the time it was sought to be used against the defendant. 120 F. 3d 1419, 1484 (11th Cir. Fla. 1997) The court noted that the self-incrimination clause of the Constitution “only protects against the actual ‘infliction of criminal penalties on the witness’--a criminal conviction--based on self-incriminating testimony.”

620 These rights are also addressed in MCA of 2009, §§ 831(c), 948b(d), 949a(b)(2)(C), 949l. See also MCM, Rule 919 (“Trial Counsel may not comment on the accused’s exercise of the right of self-incrimination”); and MCRE Rule 301 (“No person shall be required to testify against himself at a proceeding of a military commission under these rules”).

621 For example, Military Commission Rules of Evidence, Rule 104(f) provides: “A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of Mil. Comm. R. Evid. 301 and 304”.

622 For more on self-incrimination, see Rule 704 (discussing testimonial or use immunity in regards to the right against self-incrimination). Note that Preamble section (1)(b) notes that “10 U.S.C. § 831(a), (b), and (d), relating to compulsory self-incrimination…do not apply to these military commissions.”
to defendants at the Guantanamo Bay Military Commissions.

Furthermore, the rights related to compelled self-incrimination and confessed guilt are found in various treaties that bind the U.S., including ICCPR article art 14(3)(g)). General Comment No. 32, para. 41, promulgated by the United Nations Human Rights Committee, prohibits “any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.”

The Third Geneva Convention, article 99, prohibits compelled self-information and confessed guilt as follows:

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

These rights are also contained in various international instruments that do not bind the U.S. but contain parallel customary international law that do bind the U.S., such as Protocol I to the Geneva Conventions (Article 75(4)(f)), the Protocol II to the Geneva Conventions (Article 6(2)(f)), and the European Convention on Human Rights, and other instruments.

625 The Human Rights Committee oversees implementation of the ICCPR, which the U.S. has signed and ratified. See footnote xyz. See also See also Human Rights Committee, General Comment 13.

624 General Comment 32 provides:

Finally, article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will. (footnotes omitted)

626 Professor Doswald-Beck discusses the European Courts approach to self-incrimination generally noting that the European Court has stated that ‘the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6’.

Human Rights in Times of Conflict and Terrorism, Oxford University Press (2011), section 13.5.2. Furthermore, she notes that “The right not to incriminate oneself, in particular, presuposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression…the right is closely linked with the presumption of innocence.” ID.


627 These rights, as principles of customary international law, are also contained in the following international instruments that do not as instruments bind the U.S.: American Convention, Article 8(2) (g) (“During the proceedings, every person is entitled, with full equality, to the following minimum guarantees…the right not to be compelled to be a witness against himself or to plead guilty.”) and article 8(3); European Convention on Human Rights, article 6; ICC Statute, Articles 55(1)(a) (pre-trial) and 67(1) (g); Arab Charter in Human Rights, Article 16(6); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, F 21; Declaration of Minimum Humanitarian Standards, article 9 (“No one shall be compelled to testify against himself or herself or to confess guilt.”); and Turku Declaration on Judicial Guarantees, Article 9. See also International Committee
e. International and foreign cases

International cases concur with U.S. cases in providing that a defendant’s of the right against self-incrimination, once invoked, must be made voluntary, knowingly, and intelligently.628 And, the prosecution may not use against the defendant evidence obtained through coercion or oppression in defiance of the defendant’s will.629 Furthermore, comments about an accused’s failure to testify are not permitted.630 Finally, like in Miranda,631 a defendant must be informed of his right against self-incrimination before he is questioned by government authorities.632

---

40. Freedom from Self-Incrimination, (Military Commission Act of 2009 § 948r(b); ICCPR, art 14(3)(g))

<table>
<thead>
<tr>
<th>Out of Court Statements</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is the prosecution seeking to offer into evidence any out-of-court statement(s) made by the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the prosecution is seeking to offer into evidence any out-of-court statement(s) made by the defendant, were those statements made during interrogation of the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the prosecution is seeking to offer into evidence any out-of-court statement(s) made by the defendant, were those statements made after the defendant was interrogated?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the prosecution is seeking to offer into evidence any out-of-court statement(s) made by the defendant, were those statements by the defendant “against” the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In Court Statements?

Did the defendant make any in-court statements?

---

of the Red Cross Customary International Humanitarian Law, Rule 100. In Funke v. France, the European Court of Human Rights found that per article 6 of the European Convention on Human Rights, a defendant has the right “to remain silent and not to contribute to incriminating himself”. (Application no. 10828/84), Judgment of 25 February 1993, paras 38-45)


630 E.g., R. v. Noble, 1 SCR 874 (1977)

631 Supra, n. xyz.

See discussion in the next chart regarding right not to be compelled to testify against oneself.

### Informed About Right Against Self-Incrimination

Was the defendant informed of his right against self-incrimination?

If so, when was the defendant informed of his right against self-incrimination?

Was the defendant informed of the rights against self-incrimination before any questioning took place?

### Waiver of Right to Not Incriminate Himself

Did the defendant waive his right to not incriminate himself?

If so, was his waiver of the right not to incriminate himself made knowingly, intelligently, and voluntarily?

### Enhanced Interrogation / Torture / Compelled / Pressure

Were any arguments made that torture was used to compel the defendant to incriminate himself?

Were any arguments made that cruel, inhuman or degrading treatment was used to compel the defendant to incriminate himself?

Were any arguments made that enhanced interrogation was used to compel the defendant to incriminate himself?

Were any arguments made that the defendant was in any way compelled to incriminate himself?

Were any arguments made that the prosecution, the court or any other individual or entity put pressure on the defendant to incriminate himself, either at a pre-trial hearing or at trial?

To the best of your knowledge, did the prosecution or the court put pressure on the defendant to incriminate himself?

### Mention of Choice to Remain Silent

Was there any mention during the proceedings of the defendant’s choice to remain silent?

Was there any mention during the pre-trial hearing or at trial of the defendant’s failure to testify or provide other evidence on his behalf?

Did the judge instruct the jury that no significance should be given to the defendant’s choice not to testify?
41. Right not to be Compelled to Testify Against Oneself, (Military Commission Act of 2009 § 948r(b); ICCPR, art 14(3)(g))

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pre-Trial or Trial Testimony</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant testify at a pre-trial hearing?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant testified at a pre-trial hearing, was that testimony against himself?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant testify at trial?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant testified at trial, was that testimony against himself?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant testified at trial, was that testimony self-incriminating?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Informed of Rights; Waiver of Rights</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant informed of his right not to testify against himself?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If so, when was the defendant informed of his right not to testify against himself?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was any non-testimonial evidence, generated by the defendant, sought to be introduced against the defendant’s?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant waive his right to not testify against himself?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If so, was the defendant’s waiver of the right not to testify against himself made knowingly, intelligently, and voluntarily?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Torture; Enhanced Interrogation; Compulsion</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were any arguments made that torture was used to compel the defendant to testify against himself?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were any arguments made that cruel, inhuman or degrading treatment was used to compel the defendant to testify against himself?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were any arguments made that enhanced interrogation was used to compel the defendant to testify against himself?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were any arguments made that the defendant was in any way compelled to testify against himself?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Were any arguments made that the prosecution, the court or any other individual or entity put pressure on the defendant to testify against himself, either at a pre-trial hearing or at trial?

<table>
<thead>
<tr>
<th>Voluntary, Willing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the defendant affirmatively state or otherwise indicate that he was exercising his right to remain silent?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Mention of Choice to Remain Silent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Was there any mention during the proceedings of the defendant’s choice to remain silent?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Was the defendant granted immunity for making a statement testifying?</td>
</tr>
</tbody>
</table>

### 42. Right not to be Compelled to Confess Guilt (ICCPR, art 14(3)(g))

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant confess guilt?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant “plead guilty”, resulting in a conviction?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the court accept the defendant’s guilty plea?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant confesses guilt, did he confess guilt before the trial commenced?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant confesses guilt, did he confess guilt during the trial?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant informed of his right to not be compelled to confess guilt?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If so, when was the defendant informed of his right to not be compelled to confess guilt?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant informed of the right not to be compelled to confess guilt before any questioning took place?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant waive his right not to be compelled to confess guilt?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
If so, was his waiver of the right not to be compelled to confess guilt made knowingly, intelligently, and voluntarily?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

Were any arguments made that torture was used to compel the defendant to confess guilt?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

Were any arguments made that cruel, inhuman or degrading treatment was used to compel the defendant to confess guilt?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

Were any arguments made that enhanced interrogation was used to compel the defendant to confess guilt?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

Were any arguments made that the defendant was in any way compelled to testify against himself?

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

### 43. Exceptions exemptions, or additional facts to consider when analyzing freedom from self-incrimination, right not to be compelled to testify against oneself, and the right not to be compelled to confess guilt

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Was the defendant granted immunity in exchange for his making an out-of-court statement?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant granted immunity in exchange for his making an in-court statement?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant’s statement “testimonial” or “non-testimonial”?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the statement concern only the defendant’s identification?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant enter into a plea agreement?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the Military Commission accept that plea agreement?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant did not testify at trial, did the prosecution make a statement concerning the defendant’s choice to not testify or his failure to testify?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defense counsel request that the Military Judge instruct the jury to attach no significance to the defendant’s refusal to testify?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the Military Judge give that instruction to the jury?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
R. Right to Equality of Arms; Equality Before the Courts; Equal Protection

The right to equality of arms and the right to equality before the courts are based in notions of fairness. Both parties to a criminal proceeding – the prosecution and the defense – should have fair, equitable opportunities in the criminal proceedings. Equality of arms and equality before the courts do not require that parties be treated identically, or that they receive precisely identical opportunities. But any distinctions between the parties must not discriminate unlawfully or otherwise be equitable or unfair.

a. General

The prosecution and defense have the right to equality before the court, equality of arms, and equal protection of the law and procedure. It is in fact the “hallmark of due process” to be afforded procedural equality.633 Both sides should essentially be in procedurally equal positions during all criminal proceeding phases. The principle of “equality of arms” applied means that the defense and the prosecution must be allotted an equal opportunity to prepare their arguments. Each side should have equal access to the courts and all other resources needed for their case.

However, these principles do not demand identical treatment of the parties. Any distinction made between the prosecution and defense merely must not be based on unlawful discrimination, must not violate the rights of either side, and otherwise must not be inequitable or unfair. “The principle of equality of arms means that the procedural conditions at trial and sentencing must provide a ‘fair balance’ for all parties.”634

This part of the Guantanamo Bay Fair Trial Manual discusses the rights and principles of equality of arms, equality before the courts, and equal protection of the law which are provided for in international law instruments (section b); in customary law international norms incorporated into instruments not binding on the U.S. (section c); in international law jurisprudence (section d); in U.S. Military and U.S. Military Commission law (section e); and in U.S. Constitutional and domestic case law (section f).

b. Treaties Binding on the U.S.

The International Covenant on Civil and Political Rights, art. 14(1)635 provides for equality of arms and all other rights relating to equality of the prosecution and the defense. It does so in relevant part:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law….”636

Further explanation by the UN Human Rights Committee provides interpretation on the rights of equality of arms, equality before the court, and equal protection. The Committee notes that ICCPR art. 14 relates to the right of equality before courts and tribunals, granting rights of equal access to the court and equality of arms with the goal of ensuring that neither side is treated with any discrimination.637 By

633 Martha F. Davis, Participation, Equality and the Civil Right to Counsel: Lessons from Domestic and International Law, 122 Yale L.J. 2260, 2268 (2013). (though it primarily examines the right to counsel)


635 See also Universal Declaration of Human Rights, art. 10 (Everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.)

636 ICCPR, art. 14(1)

637 General Comment 32 on Article of the ICCPR, UN Doc CCPR/C/GC/32, Human Rights Committee (2007). (hereinafter “GC 32”).
ensuring equality of the parties before courts and tribunals, the right to equality of arms is also ensured. In order to make sure that all of those rights are protected, no distinction between the parties should be made unless those distinctions are both based in law and can be “justified on objective and reasonable grounds”. There may be no “actual disadvantage or other unfairness” to the defendant.

General Comment 32 asserts that the fulfillment of the rights of equality of arms and equality before the court are essential to guaranteeing the right to fair trial, and that the rights equality before the court and of arms require the following:

**Adequate Time and Facilities.** That the defendant must have adequate time and preparation of his defence and to communicate with counsel of his own choosing (per ICCPR Article 14(3)(b)).

**Examination and Cross-Examine Witnesses.** That the defendant has the right to examine, or have examined, all witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses used against him (per ICCPR Article 14(3)(e)). This promotes a defendant’s and his counsel’s effective defense, and “thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”

**Interpreter/Translator Assistance.** That the defendant have the free assistance of an interpreter if the accused cannot understand or speak the language used in court, available at all stages of the Military Commission proceedings (per ICCPR Article 14(3)(f)).

In addition to the text of ICCPR art. 14 and the Human Rights Committee’s comments regarding equality before the court, there are also the International Criminal Tribunal of the Former Yugoslavia Statute, article 21(4), and the International Criminal Tribunal of Rwanda Statute, article 20(4), which guarantee “full equality” in any proceeding.

c. **Customary International Law**

There are a few treaties which the U.S. is not a party to but which have risen to the level of customary law that have relevant principles regarding equality of arms, equality before the court, and equal protection. These treaties include the *American Convention*, the *African Charter*, and the *ICC*

---

638 Id.

639 Id.

640 The Committee gives the example of only the prosecutor, and not the defendant, being able to appeal a decision. Id.

641 Id.

642 GC 32, supra note 83; See also section H of this Checklist.

643 GC 32, supra note 83; See also section U of this Checklist.

644 GC 32, supra note 83; See also section O of this Checklist

645 See ICTY Statute, art. 21(4) (“In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality”) (emphasis added)

646 ICTR Statute, art. 20(4) (“ In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality”) (emphasis added)

647 American Convention on Human Rights, article 8(2) (“...During the proceedings, every person is entitled, with full equality, to the following minimum guarantees”)

648 African Charter, art. 3 (“Every individual shall be equal before the law”; “Every individual shall be entitled to equal protection of the law”); African Charter, art. 19 (“All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.”)
Statute. Additionally, there is the principle enumerated in the article 10 of the Universal Declaration on Human Rights, which states: “Everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

d. International Jurisprudence

In 1981, the European Commission on Human Rights noted that it most nations have legislation either entrusting criminal investigations to a member of the judiciary or to a prosecutor’s office on the condition that all exculpatory evidence be discovered to the defense in order to establish equality between the prosecution and defense. 650 It is the “rights of the defence” which establish said equality, which is why such rights have been instituted.651 The European Commission went further in Kaufman v. Belgium, stating that the right to quality of arms “entails a party shall have a reasonable opportunity of presenting [its] case to the court under conditions which do not place [it] at a substantial disadvantage” compared to its opponent.652 This case established that, in order for a petitioner to be granted relief on a claim based on equality of arms, the petitioner must have suffered a substantial prejudice.653

In determining what other rights a defendant must be afforded in order to ensure equality before the court or equal protection, various courts have ruled on cases where petitioners claimed that had been deprived of certain procedural and other rights. For example, in Wright v. Jamaica, the Committee on Civil and Political Rights noted that a person must have adequate time and facilities to prepare a defense in order for the right to equality of arms to be satisfied.654 Additionally, the U.N. Human Rights Committee officially recognized the right to “equality of arms” in 1994, almost a decade before publishing General Comment 32.655 Also in 1994 was the case of Barbera, Messengué and Jabardo v. Spain, in which the European Court found that a defendant must be able “to examine or have witnesses against him and to obtain the attendance of witness on his behalf under the same conditions as witness against him” in order for the right to a fair trial to have been satisfied.656

However, there are limits to guaranteeing such rights. Equality does not mean identical in the sense of these rights.657 In general, “the principle of equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”658

e. US Military and Military Commission Law

There has been some case law regarding equality between the defense and the prosecution in relation to US Military Commissions. In the al Bahlul case, the defendant was tried under the 2006 Military Commission Act. He was convicted of performing media relations for Osama bin Laden, and he was sentenced to life imprisonment. However, in 2014, his conviction was overturned by the D.C. Court of

649 86 ICC Statute, art. 67 (“In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality”)

651 Id.
653 Id.
654 Wright v. Jamaica, Communication No. 349/1989, U.N. Doc. CCPR/C/45/D/349/1989 (1992) (“The right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms.”)
655 Grant v. Jamaica, 353/1988, U.N. Doc. CCPR/C/50/D/353/1988 (1994). “The right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case.”)
656 Barbera, Messegue and Jabardo v. Spain, 11 EHRR 360 (1994).
657 Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of Appeals Chamber (Int’l Crim. Trib. or the Former Yugoslavia July 15, 1999) (The tribunal rejected the defendant’s claim that he was denied equality of arms because he was unable to secure the attendance of witnesses for his defense at trial.)
658 Id.
Appeals since the charges he was convicted of are not recognized as war crimes when he was convicted.\textsuperscript{659} Though, the court did not render any discussion or holding regarding the equal protection issues contained within the 2006 Act.\textsuperscript{660} In order to get that conviction, though, there was an element of the Military Commission judicial process which had to be changed: Access to the normal appellate process had to be accessible to defendant’s convicted by the Military Commission. Under the Military Commission Act of 2006, the only appellate review option for defendants was a trio of Pentagon appointees, which has the potential to be extremely prejudicial to the petitioner’s right of equality before the court and equal protection of the law.\textsuperscript{661}

The US Military Commission Act of 2009 provides for a more balanced appellate process, having all final verdicts automatically sent to the US Court of Military Commission Review.\textsuperscript{662} The 2009 act also provides for the right to be informed of the charges promptly (in detail and in a language understood by the defendant), the right to be present at the trial, and the right to counsel; right to at least one free defense counsel and a second learned civilian counsel in capital cases; and, technically, right to communication confidentially with their legal counsel.\textsuperscript{663} Additionally, the Act affords the defense “the opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the constitution.”

All of these listed procedural rights afforded give near equality of arms.\textsuperscript{664} However, there are areas of concern. Defendants are not allowed to choose their own counsel; they are currently appointed military lawyers.\textsuperscript{665} Also, in the realm of obtaining witnesses and evidence, there has been dispute since the 2009 Act only provides that “reasonable” opportunity should be afforded to the defense to obtain witnesses, etc. when, usually, criminal rules provide for “equal” opportunity.\textsuperscript{666} It is of particular concern that trial prosecutors may refuse to produce a witness, very much unlike US federal criminal procedure.\textsuperscript{667} There has also been discussion on detainees rights to a trial without “undue delay.”\textsuperscript{668} Concerning equal protection specifically, arguments have additionally been made that both the 2006 and 2009 Military Commission Acts are per se discriminatory.\textsuperscript{669}

Additionally consider in the Uniform Code of Military Justice, which provides in part: “The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.”\textsuperscript{670}

f. The US Constitution and Domestic Case Law

The US Constitution has a few relevant Amendments regarding equality of arms, equal protection and

\textsuperscript{660} Id.
\textsuperscript{661} 10 U.S.C. § 949j
\textsuperscript{662} 10 U.S.C. § 950c.
\textsuperscript{663} 10 U.S.C. § 948a, § 948s, § 949a(2)(B)-(C), § 949a(C), and § 949c(b)(7).
\textsuperscript{664} Frakt, supra note 80.
\textsuperscript{665} Id at 581.
\textsuperscript{666} Id. at 582-3.
\textsuperscript{667} Id. at 583 (However, as Frankt points out, such a refusal may be made in military court martial proceedings.)
\textsuperscript{668} Id. at 583.
\textsuperscript{669} See Jordan J. Paust, Still Unlawful: The Obama Military Commissions, Supreme Court, and Deviant Dicta in the D.C. Circuit, 45 Cornell Int’l L.J. 367, 378 (2012). (“Under the 2006 and 2009 MCA, only an ‘alien unprivileged enemy belligerent is subject to trial by military commission.’ This provision necessarily violates several relevant treaty-based and customary international laws requiring the United States to give detainees equal protection under the law”)
\textsuperscript{670} 846 Article 46 (“The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court- martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the Unites States having jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions”).
equality before the court. However, there are no Supreme Court cases on the specific matter of equality of arms. The only US case law referring to equality of arms and equal protection other than the Al Bahlul case is *US v. Tucker*, which effectively dismissed the concept and right of equality of arms as non-applicable in US domestic law. All that matters in the US is that the defense and the prosecution be “adequately matched”, nothing more.

[Due Process under the 5th and 14th Amendments may also be relevant.]

[This Rights to Equality of Arms introductory section is being developed further. An Indiana University McKinney School of Law student is assigned to research this topic.]

### 44. Equality of Arms – Pre-Trial Hearing Stage

<table>
<thead>
<tr>
<th>Prosecution Staff &amp; Resources</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>How many prosecutors are officially assigned to the case?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>How many prosecutors were present in the courtroom?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were any changes made to the prosecutor’s staff during the proceeding?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did all prosecutors act professionally throughout the proceeding?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the Chief Prosecutor in the courtroom?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are prosecution resources substantially greater than, equal to, or less than those of the defense?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>How many paralegals are assigned to the prosecution?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>How many analysts are assigned to the prosecution?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>How many interpreters are assigned to the prosecution?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

671 See Due Process clauses under the 5th and 14th Amendments to the US Constitution.

672 *U.S. v. Tucker*, 249 F.R.D. 58 (S.D.N.Y. 2008) (“The principle of equality of arms may apply in certain international criminal law contexts, but it has no place in our constitutional jurisprudence. For better or worse, due process demands only that a criminal defendant receives a constitutionally “adequate” defense, not that the parties to a criminal prosecution be equally matched.”)

673 *Id.*
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>How may translators are assigned to the prosecution?</td>
<td></td>
</tr>
<tr>
<td>How many investigators are assigned to the prosecution?</td>
<td></td>
</tr>
<tr>
<td><strong>Defense Counsel &amp; Defense Resources</strong></td>
<td></td>
</tr>
<tr>
<td>How many military defense lawyers are officially assigned to the case?</td>
<td></td>
</tr>
<tr>
<td>How many civilian defense lawyers are officially assigned to the case?</td>
<td></td>
</tr>
<tr>
<td>How many defense lawyers were present in the courtroom?</td>
<td></td>
</tr>
<tr>
<td>Were any changes made to the defense staff during the proceeding?</td>
<td></td>
</tr>
<tr>
<td>Did all defense counsel act professionally throughout the proceeding?</td>
<td></td>
</tr>
<tr>
<td>Was the Chief Defense Counsel in the courtroom?</td>
<td></td>
</tr>
<tr>
<td>Are defense counsel resources substantially greater than, equal to, or less than those of the prosecution?</td>
<td></td>
</tr>
<tr>
<td>How many paralegals are assigned to the defense?</td>
<td></td>
</tr>
<tr>
<td>How many analysts are assigned to the defense?</td>
<td></td>
</tr>
<tr>
<td>How many interpreters are assigned to the defense?</td>
<td></td>
</tr>
<tr>
<td>How may translators are assigned to the defense?</td>
<td></td>
</tr>
<tr>
<td>How many investigators are assigned to the defense?</td>
<td></td>
</tr>
<tr>
<td>How many mitigation specialists are assigned to the defense?</td>
<td></td>
</tr>
<tr>
<td><strong>Equal Before the Courts -- Prosecution &amp; Defense</strong></td>
<td></td>
</tr>
<tr>
<td>Has the prosecution complained that it has been impermissibly discriminated against and not treated equal to the defense before the courts?</td>
<td></td>
</tr>
<tr>
<td>Has the defense complained that it has been impermissibly discriminated against and not treated equal to the prosecution before the courts?</td>
<td></td>
</tr>
</tbody>
</table>
S. Right to be Present at or Absent from Pre-Trial Hearings

The right to be present at pre-trial hearings requires…
The right to be absent from pre-trial hearings requires…

[This Rights to be present at trial and at pre-trial hearings is being researched further This section is not yet complete.]

a. General

International and domestic law provide that a defendant is entitled to be present at trial or at pre-trial hearings, and has the right to be absent from trial or pre-trial hearings. The defendant has the right to be present at any stage of the proceeding if his presence is critical to the fairness of the procedure. The defendant has the right to waive his right to be present, and to exercise his right to be absent. Any waiver of his right to be present, and invocation of his right to be absent, must be voluntary on his part.

Treaties that bind the U.S. that provide for the right to be present at or absent from trial or pre-trial proceedings

The U.S. is bound by the following international instruments that address the right to be present or absent from trial or pre-trial hearings:

(i) ICCPR article 14(3) (d) provides that:
The Defendant has right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

(ii) Geneva Convention I, II, III, IV of 1949:

Common Article 3 of the 4 Geneva conventions provide that:

Anyone charged with an offence shall have the right to be tried in his presence.

(iii) ICTY Statute

Article 15 of the ICTY Statute provides that:

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

ICTY Statute article 21(4)(d) provides that:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
(d) to be tried in his presence.

ICTY Rule 65 ter provides that

(I) In order to perform his or her functions, the pre-trial Judge may proprio motu, where appropriate, hear the parties without the accused being present. The pre-trial Judge may hear the parties in his or her private room, in which case minutes of the meeting shall be taken by a representative of the Registry.
Article 20(4)(d) of the ICTR Statute provides that:

In determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

d) **To be tried in his or her presence**, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

Article 14 provides that:

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.

**Non-Binding Treaties**

(i) Rome Statue of the International Criminal Court

Rome Statute, article 58(1)(b) provides that:

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
   (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
   (b) The arrest of the person appears necessary:
      (i) To ensure the person's appearance at trial,
      (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(ii) Statue of the Special Tribunal for Lebanon

Article 22 Trials of the Lebanon Statute provides:

Trials in Absentia
1. The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she: (a) Has expressly and in writing waived his or her right to be present; (b) Has not been handed over to the Tribunal by the State authorities concerned; (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.
2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that: (a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality; (b) The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal; (c) Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.

(iii) ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Article 63 of the Rome Statute provides:

**Trial in the presence of the accused**
1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

(iv) Arab Charter

Article 16 (3) of the Arab Charter provides that:
Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgment rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees:

The right to be tried in his presence before an ordinary court and to defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially.

Other International Instruments

(i) UDHR

Article 10 of the UDHR provides that:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

(ii) Body of Principals on Detention or Imprisonment

Principle 30 (2) of the Body of Principals on Detention or Imprisonment provides that:

A detained or imprisoned person shall have the right to be heard before disciplinary action is taken.

International cases

(ix) Maleki v. Italy, the U.N. Human Rights Committee clarified that a court hearing a trial in absentia must “verify that the [accused] had been informed of the pending case before proceeding,” thereby affirming that actual notice is required.

(x) Belziuk v. Poland, the European Court on Human Rights found that the accused be present at trial as a general rule to a fair hearing.

U.S. constitution

The sixth amendment to the U.S. Constitution provides:

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state.

Military Commissions Act of 2009

(xi) Provisions of the Military Commission Act of 2009 that addresses the right include:

Military Commissions Act of 2009, article 10 U.S.C. §949a(b)(2)(B) provides:

“To be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.”

(xii) Military Commissions Act of 2009, article 10 U.S.C. §949d(d) provides:

“EXCLUSION OF ACCUSED FROM CERTAIN PROCEEDINGS. — The military judge may exclude the accused from any portion of a proceeding upon a determination that, after being warned by the military judge, the accused persists in conduct that justifies exclusion from the courtroom—

(1) to ensure the physical safety of individuals; or

(2) to prevent disruption of the proceedings by the accused.

Uniform Code of Military Justice

(xiii) Uniform Code of Military Justice (UCMJ provisions) Article 39 provides that

The accused at a court-martial has the right to be present at all proceedings other than the deliberation of the members.

U.S. Cases – Non-Supreme Court

• State v. Buchanan, 330 N.C. 202, 223–24 (1991) if the subject matter of the hearing “implicates the defendant’s confrontation rights, or is such that the defendant’s presence would have a reasonably substantial relation to his opportunity to defend,” then he or she has the right to be present
U.S. supreme court case

  
  In that case, Taylor voluntarily absented himself following the morning session of the first day of his trial. Notwithstanding his absence, the trial continued through verdict and Taylor was found guilty. The court held that the defendant had attended the opening session of his trial, and had a duty to be present at the trial, when a defendant voluntarily absents himself from his trial as specified in is found guilty, and does not return by the time sentence is to be imposed, sentencing may proceed in his absence.

  
  A defendant may forfeit his right to be present during his trial and may accordingly be removed from the courtroom when he acts so disruptively as to make it impossible for the trial to be conducted in an orderly fashion. However, the Court also held that, “once lost, the right to be present can be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.”

  
  The Supreme Court, Appellate Division, held that defendant validly waived right to be present during suppression hearing.

- **Hopt v. Utah**
  
  A part of the proceedings in the trial court were conducted in the absence of the defendant. Court held that: the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him.

Military commission case

**U.S.A. v. Khalid Shaikh Mohammad et al**

- The Commission advised each accused of the right to be present at all sessions and of the option to voluntarily waive the right to be present at certain sessions. Each accused, with advice of counsel, understands their right to be present and their option, under certain circumstances, to voluntarily waive the right.

The court ordered that:

a. That, for pretrial proceedings before this Commission, the accused have a right, provided by statute, to be voluntarily absent from the Commission;

b. That before the accused are to be permitted to be voluntarily absent, each accused must participate in an on-the-record inquiry to ensure he understands his individual rights

**U.S.A. v. ABD al Rahim Hussayn Muhammad al Nashiri**

The procedural rules concerning an accused's presence at a session of the Commission make it clear an accused may waive the right to be present, and a Commission proceeding may continue in the absence of the accused following a military judge's determination the accused knowingly, intelligently, and voluntarily has waived the right to be present.

The government issue its reply:

- The accused has a right to present at every session of the proceedings.

- The accused has a right to waive voluntarily this right to be present at certain sessions of proceedings. Before the accused is to be permitted to be absent voluntarily, he must participate in an on-the-record inquiry.

Summary

- Right to be present or absent at pre-trial hearing under international jurisprudence

There are several international cases address the defendant is entitled to present at pre-trial hearing. In *Belziuk v. Poland*, the European Court emphasized that the right to be present at trial as a general rule ensured in a fair hearing. A fair hearing requires the accused be present at a trial. However, at the appellate level the court will not entail right to be
present in person, the court must consider the special feature of the proceedings involved and the manner in which the defendant’s interests are presented and protected before the appellate court. In **Maleki v. Italy**, the U.N. Human Rights Committee clarified that the accused is entitled to the actual notice when the trial in absentia.

- **Right to be present or absent at pre-trial hearing under domestic U.S. law**

The defendant is entitled to a right to be present or absent at pre-trial hearing under the U.S. law. The **Sixth Amendment** to the **United States Constitution** guarantees the speedy and public trial, and it extends to the right to be present at pretrial hearing. Besides the **U.S. Constitution**, the **Military Commission Act of 2009** and **Uniform Code of Military Justice** can be construed so as to provide for defendant the right to be present at all proceedings. Additionally, the exclusion is also implied in the **Military Commission Act of 2009** that the accused will be excluded for the reason to ensure the physical safety of individuals and prevent disruption of the proceedings by the accused.

- **Right to be present or absent at pre-trial hearing under domestic jurisprudence**

The U.S. supreme court ensure the accused has the right to be present at trial proceedings. In **Hopt v. Utah**, the court held the accused shall be personally present at every stage of the trial when the legislature is essential to the protection of his substantial rights. However, it also stated several exceptional situations that provided the defendant will forfeit his right to be present at trial hearing. In **Illinois v. Allen**, a defendant is removed from the courtroom when he acts so disruptively as provided in the Military Commission Act of 2009. However, the right can be reclaimed as soon as the defendant’s act consistent with the decorum and respect inherent in the concept of courts and judicial proceedings. In another case, the trial may proceed even if the defendant is absent to the court. The court held that the defendant has duty to be present at the trial if the defendant had attended the opening session of his trial. In **People v. Underwood**, the defendant can waive right to be present voluntarily.

- **Right to be present or absent at pre-trial hearing under military commission jurisprudence**

The military court held the accused has a right to be present at all sessions and has option to voluntarily waive to be present at certain sessions. Before the permission of the voluntarily absent, each accused shall participate in an on-the-record inquiry. The defendant is also required to sign a statement of understanding right to be present at commission proceedings. In **U.S.A. v. Khalid Shaikh Mohammad et al.**, the court applies the Federal Rule of Criminal Procedure 43 and R.M.C. 804(c), it requires that the defendant present at the initial appearance, the initial arrangement, and the plea; every trial stage; the return of the verdict and, sentencing. When the trial begins, the defendant has right to absent voluntarily as long as receiving the permission of the military judge for a good cause.

> [The defendant has the right to be present at pre-trial hearings. (Military Commission Act of 2009, § xx; ICCPR, art 14(3) (d))]^{674}

- Robert J. Dieter West's Colorado Practice Series TM Criminal Practice and Procedure

| 45. Right to be Present (Military Commission Act of 2009, § xx; ICCPR, art 14(3)(d)) |
|-----------------------------------------------|-----|-----|-----|-----|
| Is the defendant afforded the right to be present for all proceedings? | Yes | No | Don’t Know | Comment |
| Has the defendant been improperly prohibited from being present from any proceedings? | | | | |

---

674 The defendant’s right to be present at pre-trial hearings is provided for in many international instruments, including:
Has the defendant been present for every court appearance that he wished to be present for? 

Has the defendant exercised his prerogative to be absent from any proceedings? 

Was the defendant present? 

Was the defendant explained his rights? 

Did the defendant testify? 

Was the defendant removed from the courtroom during the proceeding while it was ongoing? 

If the defendant was removed, what was the court’s reason? 

Did the court remove the defendant because classified information was going to be discussed? 

Did the court remove the defendant because of behavior of the defendant? 

If the defendant was removed, did the court give the defendant warning that his behavior might lead to exclusion? 

If the defendant was removed, did the defendant return to the courtroom? 

If the defendant was removed, during his absence, was testimony given by any witnesses? 

If the defendant was removed and testimony was given in his absence, was the defendant given an opportunity to be read a transcript of the testimony or to watch a video-recording of the testimony? 

If the defendant was removed and testimony was given in his absence, was the defendant given an opportunity to examine the witness or have the witness examined?

### 46. Right to be Absent from Pre-Trial Hearings

| Has the defendant been present for every court appearance that he wished to be present for? | Yes | No | Don’t Know | Comment |
| Has the defendant exercised his prerogative to be absent from any proceedings? | | | |
| Was the defendant present? | | | |
| Was the defendant explained his rights? | | | |
| Did the defendant testify? | | | |
| Was the defendant removed from the courtroom during the proceeding while it was ongoing? | | | |
| If the defendant was removed, what was the court’s reason? | | | |
| Did the court remove the defendant because classified information was going to be discussed? | | | |
| Did the court remove the defendant because of behavior of the defendant? | | | |
| If the defendant was removed, did the court give the defendant warning that his behavior might lead to exclusion? | | | |
| If the defendant was removed, did the defendant return to the courtroom? | | | |
| If the defendant was removed, during his absence, was testimony given by any witnesses? | | | |
| If the defendant was removed and testimony was given in his absence, was the defendant given an opportunity to be read a transcript of the testimony or to watch a video-recording of the testimony? | | | |
| If the defendant was removed and testimony was given in his absence, was the defendant given an opportunity to examine the witness or have the witness examined? | | | |
| Was the defendant given the opportunity to defend himself in person? |   |   |
T. Right to Defend Oneself in Person or Through Counsel of His Own Choosing

The right to defend oneself in person or through counsel of his own choosing requires that defendants have the opportunity to either represent themselves or to be represented by lawyers that the defendants themselves choose. Fairness in the criminal justice system offers defendants the opportunity to play a large role in shaping his defense, which is critically important to the interests of the defendants themselves, but also critically important to the interests of other stakeholders. Defendants want a fair trial, and they may feel that they will only have a chance at a fair trial if they represent themselves or choose their own representatives. Furthermore, the proceedings must appear to be fair, not only to the defendants but to others, and permitting defendants to control their representation furthers the appearance of fairness.

a. General

International and domestic law provide that the defendant has the right to defend himself in person or through counsel of his own choosing.

The 6th Amendment to the U.S. Constitution provides for these rights, and the U.S. Supreme Court has confirmed this in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The 6th Amendment has been interpreted to include the right to self-representation in *Faretta v. California*, 422 U.S. 806 (1977). The Military Commissions Act provides for these rights in Section 949.

These rights are provided for in Article 14(3) of the ICCPR, which binds the U.S. They are provided for in other instruments binding on the U.S., such as in Article 21 of the ICTY Statute. These rights are also provided for in Article 75 of Protocol Additional I of the Geneva Conventions, which the U.S. has recognized as reflecting binding customary international law.

Furthermore, these rights have risen to the level of customary international law, given the adequacy of state practice and opinion juris, and are provided for in the numerous instruments that do not bind the U.S., including American Human Rights Convention, Article 8 & 18(3) and the European Convention on Human Rights, Article 6(3).

The European Court of Human recognizes these rights in its jurisprudence, for example, in *Pakelli v. Germany*, 6 EHRR 1 (1983) and the case against *Slobodan Milosevic* which was reaffirmed in *Seselj* and *Krajisnik*.

b. International Law and the Right to Defend Oneself in Person or Through Counsel of His Own Choosing

International instruments that bind the U.S. that provide the right to defend oneself or through counsel of his own choosing include statutes of the ad hoc tribunals created by UN Security Council Resolutions that bind the U.S including the *ICTY Statute*. An additional treaty that is binding on the U.S. is the ICCPR. Both the ICTY and the ICCPR use identical language when describing this right.

The ICTY, Article 21(4)(d). Rights of the accused provides:

675

676

677

678 See Art. 21. Rights of the Accused

679 See Art. 14(3)(d)
In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

The key provisions of these binding instruments for observers to keep in mind is that the accused has the right:
- to be tried in his presence,
- to defend himself or through legal assistance of his own choosing, and
- to have legal assistance assigned to him/her without payment.

The U.S. is bound by international law such as Additional Protocol I to the Geneva Conventions\(^{680}\) that has risen to the level of customary international law. Additional Protocol I extends the rights to include that anyone charged shall have the right to examine, or have examined, the witnesses against him.

The right to defend oneself or through counsel of his own choosing is reiterated in many treaties that are not binding on the U.S. These include The American Convention on Human Rights,\(^{681}\) The European Convention of Human Rights,\(^{682}\) and The African Charter on Human and Peoples’ Rights.\(^{683}\) These treaties include many of the rights that are stated in the treaties that bind the U.S. including the right of the accused to defend oneself or through assistance of counsel and that the accused shall be appointed counsel if he/she does not have the means to pay. Both the binding and non-binding treaties include these rights in the interests of justice. The non-binding treaties include an additional right that the accused has the right to free and private communication with counsel.

International courts have upheld this right to self-representation or through counsel of his own choosing. The Appeals Chamber of the ICTY in the case against Slobodan Milosevic granted forceful right to self-representation after the Trial Chamber imposed Counsel on Milosevic. The Appeals Chamber in its opinion stated that the concept was an indispensable cornerstone of justice.\(^{684}\) The Appeals Chamber has stated that this right can be limited\(^{685}\) if the self-represented accused is intentionally or unintentionally, and substantially or persistently obstructing or hindering the proper and expeditious conduct of the trial.\(^{687}\) However, this has just been a statement on general principle, which are not allowed in its rulings.

---

\(^{680}\) See Art. 75(4)(g) (“No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: (g) anyone charged with an offence shall have the right to examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;”)

\(^{681}\) See Art. 8(2)(d) (“Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings ever person is entitled, with full equality, to the following minimum guarantees: (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel.”)

\(^{682}\) See Art. 6(3)(c) Right to a fair trial (“Everyone charged with a criminal offence has the following minimum rights: (c) to defend himself in person or through legal counsel of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;”)

\(^{683}\) See Art. 7(1)(c) (“Every individual shall have the right to have his cause heard. This comprises: (c) the right to defense, including the right to be defended by counsel of his choice”)

\(^{684}\) Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel Milosevic (IT-02-54-AR73.7), Appeals Chamber. 1 November 2004, p. 11.

\(^{685}\) Milosevic Appeal Decision on Representation, supra note 6, p. 12-13.

\(^{686}\) Milosevic Appeal Decision on Representation, supra note 6, p. 11.

\(^{687}\) Milosevic Appeal Decision on Representation, supra note 6, p. 13.
concerning particular cases. The Appeals Chamber has always overruled the Trial Chambers even though they are in a better position to determine whether or not the accused has intentionally or unintentionally, and substantially or persistently obstructed or hindered the conduct of the trial. This has been reaffirmed in the cases against Seselj and Krajinšnik.688

Another international case that has upheld this right was Pakelli v. Germany. Pakelli was charged with importing cannabis into Germany from Turkey. The counsel he requested for the appeal of the case was denied. The Court refused to grant counsel on the basis that such an appointment for hearings in an appeals on a point of law; there was no legal requirement at that stage for him to appear in person or be represented by a lawyer. Pakelli claimed a violation of Article 6 paragraph 1 and 3(c) of the Convention that since he lacked the means to pay for defense counsel of his own choosing that in the interests of justice he should have one appointed to represent him at the hearing before the federal court. The Government argued that Pakelli did have the means to provide himself with counsel and therefore he did not need court appointment of counsel. The Court ruled, that in the interests of justice, Pakelli should be appointed counsel and refusing this request violated, Article 6 of the Convention.689

c. Right to Defend Oneself or Through Counsel of His Own Choosing – U.S. Constitution and Common Law

The Sixth Amendment of the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.690

The Supreme Court has held that the framers of the Constitution placed a high value on the right of the accused to have the means to put up a proper defense and that the states must respect that by providing counsel to defendants. In Gideon v. Wainwright the defendant requested that the trial court appoint an attorney for him when he appeared at court without one. However, Florida state law only allowed for appointment of counsel to indigent defendants in capital cases. The request was denied and Gideon was forced to defend himself. The Supreme Court unanimously held that Gideon’s right to counsel had been denied and therefore it must be rectified.691

The Sixth Amendment has been interpreted by the U.S. Supreme Court to include the right to self-representation. In Faretta v. California the Supreme Court held that the state could not constitutionally force a lawyer upon petitioner because he was literate, competent, and understanding, and voluntarily exercised his informed free will in waiving his right to assistance of counsel.692 Guantamano Bay detainees when requesting materials for pro se representation often cite this case in their motions. The Supreme Court has stated that the rights encompassed within the right to self-representation include the right to make motions, argue points of law, and question witnesses.693

d. Right to Defend Oneself in Person or Through Counsel of His Own Choosing – Military

688 Reasons for Decision (No.2) on Assignment of Counsel, Seselj (IT-03-67-PT), Trial Chamber, 27 November 2006; Decision on Assignment of Counsel, Seselj (IT-03-67-PT), Trial Chamber, 21 August 2006; Reasons for Oral Decision Denying Mr. Krajinšnik’s Request to Proceed Unrepresented by Counsel, Krajinšnik (IT-00-39-T), Trial Chamber, 18 August 2005.

689 Pakelli v. Germany, 6 EHRR 1 (1983)

690 U.S. Const. amend. VI

691 Gideon v. Wainwright, 372 U.S. 335 (1963)

692 Faretta v. California, 422 U.S. 806 (1975)

Commissions Act of 2009

The Military Commissions Act of 2009 includes in the rights of the accused the right to self-representation. Section 949a. Rules(b)(2) states:

Notwithstanding any exceptions authorized by paragraph (1), the procedures and rules of evidence in trials by military commission under this chapter shall include, at a minimum, the following rights of the accused: To self-representation, if the accused knowingly and completely waives the assistance of counsel, subject to the provisions of paragraph (4).

The Act goes on to limit this right in section (4) stating:

(A) The accused in a military commission under this chapter who exercises the right to self-representation under paragraph (2)(D) shall conform the accused’s deportment and the conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission. (B) Failure of the accused to conform to the rules described in subparagraph (A) may result in a partial or total revocation by the military judge of the right of self-representation under paragraph (2)(D). In such case, the military counsel of the accused or an appropriately authorized civilian counsel shall perform the functions necessary for the defense.

The key provisions from these rules for observers to keep in mind when attending these proceedings is that the detainee must waive his assistance of counsel in order to represent himself. If the detainee does use the right to self-represent he/she must conform to the conduct of the defense to the rules of evidence, procedure, and decorum. If the accused is representing himself/herself and fails to conform to this conduct, this right may be revoked. Revocation will result in the appointment of appropriately authorized civilian counsel.

e. The Right to Defend Oneself in Person or Through Counsel of His Own Choosing – Military Commissions Cases

This rights are discussed more in-depth above, in Chapter XYZ.

f. Right to Defend Oneself in Death Penalty Cases

In death penalty cases, the detainees are appointed Learned Counsel who have expert knowledge on the subject. In these cases the detainees still request to represent themselves for the aforementioned reasons of providing themselves with the best opportunity for a proper defense. The Commission has been reluctant to allow the accused to represent themselves for two reasons: (1) They lack the knowledge of the Learned Counsel to put up a proper defense and therefore are less likely to have a fair trial, and (2) much of the evidence they would need to put up a proper defense is highly classified and the Commission does not like to turn it over to the accused. In this way, by not granting the right to represent themselves, the Commission is still serving the best interests of the detainees and the judicial process.

[This Right to Defend Oneself in Person or Through Counsel of His Own Choosing introductory section is being developed further. An Indiana University McKinney School of Law student is assigned to research this topic.]

694 Q & A session with Rick Kammen
### 47. Right to Defend Oneself in Person – Pre-Trial Hearing Stage

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Was the defendant given the opportunity to defend himself in person?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant expressed a desire to fire or replace any counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant sought to represent himself?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 48. Right to Defend Oneself Through Counsel of His Own Choosing (ICCPR, art 14(3)(b) & (d))

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does defendant have military defense counsel? How many?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the defendant have civilian defense counsel? How many?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did you observe any obstacles that prejudiced the defendant’s opportunity to fully present his defense?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the suspect represented by defense counsel throughout entire pre-trial stage and all investigative proceedings?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was defense counsel present? Was s/he appointed or contracted?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In the case of contracted counsel, was the defendant able to choose her/him independently?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defense counsel replaced during the proceeding?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant and the defense counsel appear to have an amicable working relationship?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge prohibit the defendant from communicating with his counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did it appear that the arrangement of the seats at the defense table, the presence of security guards, or anything else interfere with the ability of the defendant and his counsel to communicate?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td>Answer 1</td>
<td>Answer 2</td>
<td>Answer 3</td>
<td></td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>----------</td>
<td>----------</td>
<td>----------</td>
<td></td>
</tr>
<tr>
<td>Did the defendant have the opportunity to meet with his counsel, in an appropriate environment, to be able to confer in private, without interference or monitoring?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the court limit the amount of time or the number of meetings that could be had between the defendant and his client?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the detention facility staff limit the amount of time or the number of meetings that could be had between the defendant and his client?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defense/defendant given adequate advance notification of the witnesses or experts that the prosecution intended to call at trial?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was counsel provided with appropriate information and resources to be used to mitigate any sentence if convicted?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defense have the opportunity to obtain and comment on the observations filed or evidence adduced by the other party?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were there any obstacles that limited the defendant’s right to access to competent and effective defense through counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
U. Right to Examine and Cross-Examine Witnesses, including Questioning a Co-Defendant

The right to examine and cross-examine witnesses guarantees both the defense and the prosecution to call witnesses in support of their respective positions, and to cross-examine witnesses called by the opposite party. Both parties must be equally afforded the administrative, logistical and subpoena and other enforcement mechanisms needed to facilitate access to witnesses. The defendant has the right to examine or cross-examine any co-defendant whose testimony or out-of-court statements are sought to be used against the defendant, despite the co-defendant’s right to freedom from self-incrimination.

a. General rights regarding calling, examining and cross-examining witnesses

Regarding attendance and examination of witnesses, under international and domestic U.S. law, each Guantanamo Bay defendant has:

(a) the right to examine, or have examined, the witnesses against him\(^{695}\) and

(b) the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.\(^{696}\)

Similarly, the prosecution has the right to call witnesses on behalf of the prosecution, and to cross-examine any defense witnesses.

The right to examine and cross-examine witnesses applies at pre-trial hearings, during the trial, and during any proceedings that may be held after the trial ends and a verdict is rendered.

b. Calling and Examining Witnesses

The prosecution is charged with proving the case against the defendant beyond a reasonable doubt. The prosecution typically seeks to introduce evidence against the defendant through the testimony of live witnesses at trial. The prosecution has the right to call “fact witnesses” to testify about what they heard or saw related to facts that the prosecution must prove to achieve a conviction, and may call “expert witnesses” to testify about their informed opinions.

Similarly, the defendant has the right to call fact witnesses or expert witnesses, and he has the right to call these witnesses under the same conditions that apply when the prosecution calls witnesses for the

---

\(^{695}\) U.S. Constitution, Sixth Amendment; Military Commission Act of 2009, § xx; ICCPR, art 14(3) (e). The right to examine, or have examined, the witnesses against him was guaranteed in various international instruments, including the IMT Charter (Nuremberg) which provided (in article 16(e)) that “A Defendant shall have the right . . . to cross-examine any witness called by the Prosecution”. This right is also guaranteed in many other international instruments, including the following: European Convention, article 6(3)(d) (right “to examine or have examined witnesses against him”); American Convention, art 8(2)(f) (accused guaranteed “the right of the defense to examine witnesses present in the court”); Additional Protocol I of the Geneva Conventions, art 75(4)(g) (“Anyone charged with an offence shall have the right, or have examined, the witnesses against him”); ICC Statute, art 67(1)(e) (accused is entitled “to examine, or have examined, the witnesses against him or her”); Statute of the Special Court for Sierra Leone, article 17(4)(e) (accused has the right “in full equality . . . to examine, or have examined, the witnesses against him or her”); ICTY Statute, article 21(4)(e) (right “to examine, or have examined, the witnesses against him”); ICTR Statute, article 20(4)(e) (accused shall have the right “to examine, or have examined, the witnesses against him or her”). See also 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind, Article 11(1)(f); IMT Charter of Tokyo, article 9(d); Convention on the Rights of the Child, article 40(2)(b)(iv); and African Commission Resolution, Paragraph 2(e)(iii).

Relevant international cases included: Al-Khawaja and Tahery v. U.K., Idalov v. Russia, Engel and Others v. The Netherlands, Perna v. Italy.

\(^{696}\) Military Commission Act of 2009, § xx; ICCPR, art 14(3) (e). The right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him is also provided for in the following international instruments: ICTY Statute, Article 21(4) (e); ICTR Statute, Article 20(4) (e).
prosecution. This right is incorporated into the Sixth Amendment of the U.S. Constitution, which provides that defendants shall the right “to have compulsory process for obtaining witnesses in his favor”.

A defendant has the right to choose which witnesses he would like to call on his behalf, and the right to have the government facilitate access to those witnesses, and to have the court issue a subpoena or other compulsory process in order to secure the witness for testimony. Again, the prosecution has similar rights to secure the appearance and testimony of prosecution witnesses.

c. Cross-Examination of Witnesses.

The Sixth Amendment to the U.S. Constitution provides that defendants have the right "to be confronted by the witnesses against him", and this same principle arises in international law. A defendant has the right to cross-examine witnesses that the prosecution offers against the defendant. The defendant has the right, directly or through counsel, to challenge the accuracy of the witnesses’ testimony, and challenge the credibility, integrity, and motivations of the witnesses who testify against the defendant. The prosecution has reciprocal rights, that is, to cross-examine or have cross-examined any witnesses the defense calls.

Generally, the prosecution would be prohibited from introducing against the defendant “hearsay statements” (out-of-court statements admitted for the truth contained therein) unless the defendant has the opportunity to cross-examine the person who made the original statement. Defense would also generally not be permitted to offer witnesses to provide hearsay testimony if the prosecution would have no opportunity to cross-examine the person making the out-of-court statement.

d. Military Commission Act of 2009 rules on Witness Examination and Cross-Examination

Section 949j of the Military Commissions Act of 2009 contains provisions related to both the defense and the prosecution to obtain witnesses. Rule 703 of the Rules for Military Commission provide further rules for witness production, as does Regulation 13-2 of the Regulations for Military Commissions.

Section 949j provides that defense counsel “shall have a reasonable opportunity to obtain witnesses” and that “the opportunity to obtain witnesses…shall be comparable to the opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution”. Rule 703(C) of the Rules for Military Commission provides that if the defense wishes to obtain the testimony of a witness, the “defense shall submit to the [prosecution] a written list of witnesses whose production by the Government the defense requests”. Essentially, the defense asks the prosecution for permission to obtain defense witnesses.

If the defense requests a witness, the prosecution “shall arrange for the presence of witnesses listed by the defense unless the [prosecution] contends that the witness’ production is not required” or if the prosecution deems it to be protected. Thus, the prosecution can veto a defense witness by not “arranging” for the witness’ presence.

Furthermore, when the defense requests to obtain testimony of a defense witness, the defense must reveal to the prosecution not only the name, address and telephone number of the proposed witness, but also the defense must provide “a synopsis of the expected testimony sufficient to show its relevance and necessity”.

Pursuant to the Military Commission Act of 2009 and its Rules and Regulations, the prosecution may seek to call any witness of it choice, without being required to seek approval from the defense or from any authority, and need the prosecution need not disclose to the defense the name, address, telephone number or “a synopsis of the expected testimony sufficient to show its relevance and necessity”.

If the prosecution denies a defense request to obtain a witness, the defense may appeal to the military judge if the case has already been referred for trial, or to the Convening Authority if pre-referral.

Article 949j of the Military Commission Act of 2009 governs the obtaining of witnesses by the defense and prosecution at Guantanamo Bay. Article 949j provides:

697 Id. The prosecution may refuse to produce a witness requested by the defense if the prosecution “contends” that the witness is not required under the rule, is classified, or is “government information”. Id.
(1) Defense counsel in a military commission . . . shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.

(2) Process issued in military commissions . . . to compel witnesses to appear and testify and to compel the production of other evidence—

(A) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

(B) shall run to any place where the United States shall have jurisdiction thereof.

Rule 703 of the Rules of the Military Commissions provides:

(a) In general. The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules.

(b) Right to witnesses.

(1) On the merits or on interlocutory questions. Each party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.

(2) On sentencing. Each party is entitled to the production of a witness whose testimony on sentencing is required under R.M.C. 1001(e).

(c) Determining which witnesses will be produced.

(1) Witnesses for the prosecution. The trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution.

(2) Witnesses for the defense.

(A) Request. The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests.

(B) Contents of request.

(i) Witnesses on merits or interlocutory questions. A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

(C) Time of request. A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness’ presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

(D) Determination. The trial counsel shall arrange for the presence of witnesses listed by the defense unless the trial counsel contends that the witness’ production is not
required under this rule, classified under 10 U.S.C. § 949j(c), or government information under rule 701(k) and (l). If the trial counsel contends that the witness’ production is not required or protected, the matter may be submitted to the military judge, or if prior to referral, the convening authority. If, after consideration of the matter and an *in camera* review of any trial counsel submissions asserting that the material is subject to such provisions, the trial judge grants a motion for a witness, the trial counsel shall produce the witness, or the military judge shall issue such order as the interests of justice may require.

The Regulation 13-2 of the Regulations for Military Commissions provides in relevant part:

R.M.C. 703(c) governs the initial determination of whether to produce a witness. Once the trial counsel decides to produce a witness, including a witness submitted by defense counsel, the trial counsel requests travel funds by letter sent by electronic transmission to the Office of the Convening Authority, who determines whether to approve funding.

[This Right to Examine and Cross-Examine Witnesses introductory section is being developed further.]

### 49. Right to Obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (Military Commission Act of 2009, § xx; ICCPR, art 14(3)(e))

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the defendant seek to call witnesses on his behalf?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant seek to call co-defendant as witnesses on his behalf?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant seek to call other Guantanamo Bay detainees as witnesses on his behalf</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge impose improper constraints on the defendant’s ability to examine witnesses against him?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant seek to call as witnesses on his behalf individuals who the U.S. government would not permit to be called?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### 50. Right to Examine Witnesses Against Him (U.S. Constitution, Sixth Amendment; Military Commission Act of 2009, § xx; ICCPR, art 14(3)(e))

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has the defendant sought to examine any witnesses against him?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the court permit the defendant to examine any witnesses against him?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were these examinations by the defendant himself? Were these examinations through counsel for the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge impose improper constraints on the defendant’s ability to examine witnesses against him?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant were conducting his own defense, did the defendant have an opportunity to interview or depose the witness against him before the testimony in court?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant’s lawyers have an opportunity to interview or depose the witness against the defendant before the testimony?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant / counsel informed of the identity of any witness against the defendant in sufficient time to permit defense counsel to investigate the witness before the testimony?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the court admit into evidence any hearsay evidence, that is, where a witness testifies in court about what another person said or wrote outside of the courtroom?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any party object to the admission of any hearsay?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the court admit the hearsay or exclude the hearsay that was objected to?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
V. Right of Exclusion of Illegally Obtained Evidence

The right to exclude illegally obtained evidence requires…

a. General

International and domestic law provide that the defendant has the right to have right to have illegally obtained evidence excluded from consideration. This does not mean that U.S. officials needed to have search warrants before gathering all evidence against all defendants before, during or after their capture and transfer to Guantanamo Bay. But, it does mean that when the U.S. government obtains evidence illegally, that illegally obtained evidence and the fruits of that illegally obtained evidence is excludable against a defendant in a U.S. Military Commission.

The Fourth Amendment to the Constitution provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Universal Declaration of Human Rights provides: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence."

The ICCPR provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence."

Furthermore, customary international law provides for the search and seizure right.

[This Right to Exclude Illegally Obtained Evidence is being developed further.]

<table>
<thead>
<tr>
<th>51. Right to Exclusion of Illegally Obtained Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the defendant seek to have excluded from evidence information he alleged to be illegally obtained?</td>
</tr>
<tr>
<td>If the defendant sought to have evidence excluded he alleged to be illegally obtained, did the judge exclude this evidence?</td>
</tr>
<tr>
<td>If the judge did not exclude evidence that the defendant alleged to have been obtained illegally, what was the judge’s rationale in admitting this evidence?</td>
</tr>
<tr>
<td>Did the prosecutor seek to introduce evidence obtained through torture of the defendant?</td>
</tr>
</tbody>
</table>


W. Right to Exclusion of Hearsay

The U.S. Constitution’s 6th Amendment Confrontation Clause provides that defendants have the right to confront accusers and those presenting evidence against them. Thus, out-of-court statements may not be admitted against a defendant if the defendant does not have the opportunity to confront the person who made the statement. The defendant must have an opportunity to test the witness’s and the statement’s credibility, reliability, and trustworthiness. A limited number of exceptions to the hearsay rule would permit courts to admit into evidence certain hearsay statements in U.S. federal courts, at courts-martial, and at U.S. Military Commissions at Guantanamo Bay.

a. General

International and domestic law provide that a defendant has the right to exclusion of hearsay, and provide that other evidentiary rules are critical to the defendant’s receipt of a fair trial.

Hearsay is a person’s out-of-court written or oral statement that is sought to be introduced in court to show that what was asserted is true. With hearsay, the person who made the original statement is not present in court, and the defendant (or prosecution) cannot examine or cross-examine that person about the truth of the original statement. Under the U.S. Constitution, hearsay evidence is prohibited based on the Confrontation Clause of the 6th Amendment to the U.S. Constitution, that provides that criminal defendants have the right to “confronted with the witnesses against him” 701. Defendants cannot cross-examine an absent witness, and should be protected from evidence that cannot be effectively challenged in the courtroom.

Rules limiting hearsay admissibility are incorporated into the fabric of U.S. federal courts, 702 courts martial, 703 and the Military Commission 704 each have rules limit the admissibility of hearsay. 705 The federal court and courts-martial rules are “impose largely similar restrictions on the usage of hearsay evidence.” 706 Generally, under the Federal Rules of Evidence (for the federal courts) and the Military Rules of Evidence (for courts-martial), hearsay is not admissible in proceedings unless a hearsay exception permits the hearsay to be admitted. These exceptions would render admissible an out-of-court statement even though the person who originally made the statement is not present in court, subject to examination or cross-examination, or subject to scrutiny for reliability or credibility. Hearsay subject to an exception may be admitted when its trustworthiness, reliability and credibility are not compromised.

The leading U.S. Supreme Court case dealing with prohibiting hearsay under the 6th Amendment Confrontation Clause is Crawford v. Washington, 541 U.S. 26 (2004), which ruled that the Confrontation Clause prohibits hearsay if: (a) the hearsay is sought to be admitted against a criminal defendant; 707 (b) 708

---

701


703 The Military Rules of Evidence, Rule 802 limits the admissibility of hearsay in U.S. courts martial.


705


707 For example, the Fourth Circuit in the Moussaoui 9-11 case applied Crawford and refused to admit against the defendant out-of-court statements as substitutes for in-court statements. 382 F.3rd at 481-82.

Of course, the prosecution would be shielded from a defendant’s proffer of hearsay, for example, if the defendant sought to offer out-of-court statements containing information that might tend to exculpate the defendant. Under Crawford, this exculpatory hearsay
the hearsay is “testimonial”\footnote{In seeking to determine whether an out-of-court statement is “testimonial”, federal courts inquire “whether a reasonable person in the declarant’s position would have expected his statements to be used at trial”. \textit{United States v. Udeozor}, 515 F. 3d 260 (4th Cir. 2008)}; and (c) the defendant did not have an opportunity to cross-examine original person who made the statement (the “affiant” or “declarant”).

b. Types of hearsay likely to arise at Guantanamo Bay Military Commissions

It is conceivable that the prosecution and defense might seek to introduce at the Guantanamo Bay Military Commissions a wide range of “types” of hearsay. These out-of-court statements introduced to prove the truth of the statements could be made:

i. Notes of active U.S. Military personnel interrogators. Handwritten notes or other records made by U.S. active military personnel who interrogated the defendant immediately after his capture, who may or may not be available to testify in person about the interrogation;

ii. Notes of retired U.S. Military personnel interrogators.

iii. Statements by CIA interrogators.

iv. Co-defendants. Co-defendants of the defendant who may have made out-of-court statements implicating the defendant, but the co-defendant is not willing to testify as to what he said;

v. Current Guantanamo Bay defendants. Other prisoners currently incarcerated at Guantanamo Bay who are not co-defendants; and

vi. Former Guantanamo Bay defendants. Former prisoners, released from Guantanamo Bay, with or without trial or conviction.

In some of the above instances, the declarant may be willing or able to testify at the Military Commissions at Guantanamo Bay. In other instances, the declarant may not be willing or able to testify at the Military Commissions, or the prosecution may not be willing to produce the witness to testify at the Military Commissions.

c. Hearsay rule under the Military Commission Act of 2009

The Military Commission Act of 2009 provides that if hearsay evidence is not admissible under the rules of general courts-martial, that hearsay evidence may still be admissible at the U.S. Military Commissions at Guantanamo Bay. Section 948a(b)(D)(3) provides:

(D) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission only if—

i) the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent’s intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and

ii) the military judge, after taking into account all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne, determines that—

(I) the statement is offered as evidence of a material fact;

(II) the statement is probative on the point for which it is offered;

(III) direct testimony from the witness is not available as a practical matter, taking
into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness; and

(IV) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

Thus, evidence that would be excluded as inadmissible in federal courts or in courts-martial may be admissible at Guantanamo Bay.

[The topic of exclusion of hearsay to be explored further.]
X. Right of Detainees Who Were Juveniles When Captured or When They Were Taken to Guantanamo Bay

Detainees who were juveniles when taken to Guantanamo Bay have the following rights…

a. General

Approximately 15 detainees were juveniles when they were captured or arrested and / or when taken to Guantanamo Bay.709 International law and domestic U.S. law require the U.S., when undertaking criminal justice procedures, to consider a juvenile alleged offender’s age and the desirability of promoting his rehabilitation.710 In addition to enjoying all the rights to be afforded to adults, juveniles are entitled to procedures and processes that take into account the best interests of the child, including being treated in a manner commensurate with their age and their level of maturity. Non-judicial criminal proceedings should be considered. Education and rehabilitation should be considered rather than punishment, particularly for child soldiers caught up in conflicts before reaching an age at which they can make informed, intelligent, and knowingly willful decisions on their own.

[The youngest detainee currently at Guantanamo Bay – Mr. Hassan bin Attash -- is currently about 30 years of age, and was taken to Guantanamo Bay when he was about 15.]

[The Section on the Right of Detainees Who Were Juveniles When Taken to Guantanamo Bay is being developed further.]
Y. Right to Appeal

Both the defense and the prosecution have certain rights to appeal adverse rulings or decisions at different stages of the trial process. Each party may lodge an interlocutory appeal of a judge’s adverse pre-trial or trial decision. The defense has the right to appeal the final verdict of the Military Commission and to appeal any sentence.

a. General

The U.S. Military Commissions provide for three distinct categories of appeals: (a) interlocutory appeal; (b) appeal of a verdict; and (c) appeal of a sentence. Both parties to a Military Commission – the defense and the prosecution – have rights to appeal certain decisions or rulings adverse to them.

Both parties have the right to interlocutory appeals of certain decisions rendered by the judge as early as the commencement of the criminal proceedings, pre-trial. For example, the judge may rule on a motion for discovery, dismissal of charges pre-trial, or on jurisdictional questions. In some circumstances, either the defense or prosecution may appeal an adverse ruling in these or other areas.

To help ensure that there has been no miscarriage of justice by an erroneous conviction, the defendant has the right to appeal a verdict adverse to him, and if convicted the defendant has the right to appeal any sentence. For a defendant to enjoy the right to appeal, he must also be afforded the right to time and facilities to prepare the appeal, the right to effective assistance in the preparation of his appeal, the right to a hearing before an independent, impartial and competent appellate tribunal, and the right to a reasoned judgment, and the right to the hearing and judgment in a reasonable time.\footnote{See Christopher “Kip” Hale & James P. Bair (eds), INTERNATIONAL DUE PROCESS AND FAIR TRIAL MANUAL, 26 – 27 (ABA Center for Human Rights) (2014)}

In addition to rights specifically focused on the appeal, at the appeal stage (interlocutory appeal, appeal of conviction or appeal of sentence), all general fair trial rights also apply.

Binding Treaties on right to appeal

- ICCPR: Art. 14(5)
  - “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

- Third Geneva Convention Art. 106:
  - “convicted persons shall have a right to appeal in the same manner as members of the armed forces of the detaining power”

- Fourth Geneva Convention Art. 73:
  - “a convicted person shall have the right to appeal provided for by the law applied by the court.”

- UN Charter
  - ICTY Statute- Art. 25.1. The appeals chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice. 2. The appeals chamber may affirm, reverse or revise the decisions taken by the Trial Chambers

- ICTR Statute- Art. 24(1)(2): Same language/procedure as ICTY.

- The Appeals Chambers of the ICTY and ICTR decide (1) judgment (conviction or acquittal) appeals; (2) sentence appeals; (3) interlocutory appeals on jurisdictional matters and (in the ICTY only) procedural matters; and (4) some special appeals.

Non-binding treaties on right to appeal

- Geneva Conventions Additional Protocol 1, Art. 75(j) and Additional Protocol 2, Art. 6(3): “A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.”

\footnote{See Christopher “Kip” Hale & James P. Bair (eds), INTERNATIONAL DUE PROCESS AND FAIR TRIAL MANUAL, 26 – 27 (ABA Center for Human Rights) (2014)}
Rome Statute Art. 81: Appeal may be made by either prosecutor or convicted party for procedural error, error of fact, or error of law. Appeal may also be made by the convicted person on any other ground that affects the fairness or reliability of the proceedings. Art. 82: provides that either party may appeal other decisions including: jurisdiction, a decision granting or denying release of person being prosecuted, decision of pre-trial chamber to act on its own initiative, and decisions that involve issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

European Convention on Human Rights Article 6(1): Does not explicitly give right to appeal, but provides a right to a fair and public hearing when determining issues criminal charges. Court has found violation of this provision when rights of appeal are foreclosed.

American Convention Art. 8(2)(h): “the right to appeal the judgment to a higher court”

Uniform Code of Military Justice sections on right to appeal
- Article 66: Those convicted by court-martial have an automatic appeal to their respective service courts of appeal
- Article 67: Decisions by service appellate courts are reviewable on a discretionary basis by the Court of Appeals for the Armed Forces, a civilian court composed of five civilian judges appointed by the president.
- Decisions by the Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari.
- Habeas corpus provides a means by which those sentenced by military court, having exhausted military appeals, can challenge a conviction or sentence in a civilian court

U.S. Supreme Court cases on right to appeal
- Coppedge v. U.S. “Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right. That is, a defendant has a right to have his conviction reviewed by a Court of Appeals. and need not petition that court for an exercise.” 369 U.S. 441 (1962).

U.S. cases non Supreme Court on right to appeal
- Nance v. U.S. “Rule 32(a)(2) of the F.R.Crim.P. requires the district judge advise all defendants of their right to appeal and of the right of those financially unable to appeal, of their right to proceed in forma pauperis.” 422 F.2d 550 (7th Cir. 1970).
- In re City of Memphis, 293 F.3d 345, 350 (6th Cir. 2002), on interlocutory appeals.
- Kraus v. Bd. of County Rd. Comm'rs, 364 F.2d 919, 922 (6th Cir. 1966).

Law Review Articles & Other Resources

International cases that deal with the right to appeal include:
- Prosecutor v. Jelisic: On prosecutorial appeal, the Appeals Chamber held that the correct test for determining whether prosecution evidence is insufficient to sustain a conviction “is whether there is evidence (if accepted) upon which a reasonable [trier] of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.” Prosecutor v. Jelisic, IT-95-10-A, Appeals Judgement ¶ 37 (ICTY App. Chamber July 5, 2001).
- Prosecutor v. Tadic (Vujin) and Prosecutor v. Aleksovski (Nobilio): Defense counsels seeking to appeal convictions for contempt of court. The Appeals Chamber recognized that the right to

- Inter-American Commission on Human Rights, *Case 11.137* (Argentina), applying American Convention on Human Rights Article 8(2)(h), the IACHR found that “the right of appeal can never be dispensed with and must be provided in situations of non-international armed conflict”
- *Mendel v. Sweden:* Court found violation of ECHR Art. 6(1) when an administrative board told an applicant that they could not appeal its decision revoking her membership in an employment service program. ECHR found that the applicant did not have practical, effective right of access to court.

**[The Section on the Right to Appeal is being developed further.]**

<table>
<thead>
<tr>
<th>53. Right of Appeal</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General Appeals Inquiry</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are all the rights afforded to stakeholders at the pre-trial and trial stages also afforded to stakeholders at the appeal stage?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has any stakeholder complained about not any aspect of the appeal process, including complaints about appeals not being available or complaints about not having effective assistance of counsel with an appeal?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Interlocutory Appeals</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has either the prosecution or defense sought an interlocutory appeal of an adverse ruling before or during the trial?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If either the prosecution or defense sought an interlocutory appeal of an adverse ruling before or during the trial, has the interlocutory appeal gone forward?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If there have been interlocutory appeals, what has been their nature?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If there have been interlocutory appeals, what has been their outcome?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Appeal of Verdict</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td>Answer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>--------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If a verdict was reached against a defendant, to the best of your knowledge, was he informed of his right to appeal the verdict?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If a verdict was reached against a defendant, to the best of your knowledge, was he afforded effective assistance of counsel to lodge his appeal of the verdict?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If a verdict was reached against a defendant, to the best of your knowledge, was he presumed innocent during the time of his appeal (even though the verdict was of guilt)?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If a verdict was reached against a defendant, to the best of your knowledge, was he provided adequate time and facilities in which to prepare his appeal of the verdict?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If a verdict was reached against a defendant, did the appellate tribunal publish a reasoned judgment in response to the appeal of the verdict?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the prosecutor seek to appeal any aspect of the verdict?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Appeal of Sentence**

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>If a verdict was reached against a defendant and he was sentenced, to the best of your knowledge, was he informed of his right to appeal his sentence?</td>
<td></td>
</tr>
<tr>
<td>If a verdict was reached against a defendant, to the best of your knowledge, was he afforded effective assistance of counsel to lodge his appeal of his sentence?</td>
<td></td>
</tr>
<tr>
<td>If a verdict was reached against a defendant, to the best of your knowledge, was he presumed innocent during the time of his appeal of his sentence (even though the verdict was of guilt and sentenced)?</td>
<td></td>
</tr>
<tr>
<td>If a verdict was reached against a defendant, to the best of your knowledge, was he provided adequate time and facilities in which to prepare his appeal of his sentence?</td>
<td></td>
</tr>
<tr>
<td>If a verdict was reached against a defendant, did the appellate tribunal publish a reasoned judgment in response to the appeal of his sentence?</td>
<td></td>
</tr>
<tr>
<td>Did the prosecution seek to appeal any aspect of the sentence?</td>
<td></td>
</tr>
</tbody>
</table>
Z. Right to a Remedy (Victims, Detainees, Defendants)

Right to a remedy

a. General

The right to a remedy requires….

Article 3(3) of the ICCPR provides:

3. Each State Party to the present Covenant undertakes:
   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
   (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 9(4) of the ICCPR provides:

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provides:

Article 3:
   (d) Provide effective remedies to victims, including reparation, as described below.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10

The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation (emphasis added).

Article 11.

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:
   • (a) Equal and effective access to justice;
   • (b) Adequate, effective and prompt reparation for harm suffered;
   • (c) Access to relevant information concerning violations and reparation mechanisms.

Article 12

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
(c) Provide proper assistance to victims seeking access to justice;
(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

Article 15:

712 Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx These Basic Principles and Guidelines on Victims’ Rights are not a treaty, and do not bind the U.S. However, important rules contained within the instruments have risen to the level of customary international law and thus bind all states, including the U.S.
... Reparation should be proportional to the gravity of the violations and the harm suffered...

Article 19:
Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

Article 20:
Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

Article 21: Rehabilitation should include medical and psychological care as well as legal and social services.

Article 22: Satisfaction should include, where applicable, any or all of the following:
(a) Effective measures aimed at the cessation of continuing violations;
(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
(f) Judicial and administrative sanctions against persons liable for the violations;
(g) Commemorations and tributes to the victims;
(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

Article 23: Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:
(a) Ensuring effective civilian control of military and security forces;
(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
(c) Strengthening the independence of the judiciary;
(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

Article 27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights and interests of others, in particular the right of an accused person to benefit from applicable standards of due process.

[The Section on the Right to Appeal is being developed further.]

54. Right to a remedy

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Don't Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Was an appropriate remedy made available for …..</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was an appropriate remedy made available for …..</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
II. Rights of Victims & Victims’ Families

The right of victims & victims’ families requires the government to honor the burdens upon the shoulders of those most directly harmed by perpetrators of serious crimes. The Military Commission, other U.S. Federal statutes, as well as international law norms govern the rights to be afforded to victims and victims’ families. Victims and victims’ families have a range of rights, including the right to receive information about the accused and the proceedings, the right to access to the proceedings, the right to participate in the proceedings, the right to protection from retaliation or further harms, and the right to restitution or reparations.

The Section on the Rights of Victims and Victims’ Families is being developed further.

a. General

Under international and domestic U.S. law, victims’ and victims’ families have special rights in criminal proceedings. These rights are provided for in many international treaties and other international instruments, and in U.S. and other domestic law sources. Some of these sources of law are more advanced than others, in recognizing harms done to victims and victims’ families, and in recognizing that victims and victims’ families are entitled to access to the criminal proceedings, are entitled to information, and are entitled to be heard in an official capacity at different stages of the proceedings.

International and domestic law recognizes that harms cannot be undone. But, that is not the end of the story. Victims and victims’ families have rights, and are, for example, entitled to a fair hearing, and entitled to other rights associated with the criminal proceedings.

Remedies could include civil law suits against the defendants, against individual and state alleged sponsors of the defendants’ behavior, the U.S., and other individual and entities. Some compensation has been made available for some victims and victims’ families, for example, through the September 11th Victim Compensation Fund.

b. International instrument addressing rights of victims

Victims and their families might seek recourse under rules incorporated into the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Rules in this instrument have risen [or may have risen] to the level of customary international law, and would thus bind the U.S.

b. Right to a remedy

Article 3(3) of the ICCPR provides:

713 See http://www.vcf.gov/. Soon after the 9/11 attacks, Congress enacted the Air Transportation Safety and System Stabilization Act (Public Law 107-42), pursuant to which the September 11th Victim Compensation Fund of 2001 was created. (See Federal Register, Vol. 76, No. 169, p. 54112, 31 August 2011) (http://www.gpo.gov/fdsys/pkg/FR-2011-08-31/pdf/2011-22295.pdf) the Fund, which was opened for victims and victims’ families to submit claims from 22 December 2001 through 22 December 2003, compensated persons who were physically during the 9/11 attacks and personal representatives of those who died. A Special Master distributed over $7 billion to survivors of 2,880 persons who died and to 2,680 persons injured in the attacks or in the post-attack rescue operations. Id. (referencing the Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, available at http://www.justice.gov/final_report.pdf.) On 2 January 2011 President Obama signed into law the Zadroga Act, which, inter alia, reopened the Fund, added new categories of beneficiaries, established new deadlines for filing claims, imposed a cap on total awards, and restricted attorney fees collectable through the fund. See Federal Register, supra. To be a victim for compensation purposes under the Fund, a person must have been “present at one of the sites at the time of the crashes or in the immediate aftermath of the crashes. The immediate aftermath of the crashes means any time during the period beginning with the crashes and ending on May 30, 2002.” (http://www.vcf.gov/faq.html#eli1)

714
3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

d. Two Military Commission entities / programs designed for victims

Two entities / programs related to the U.S. Military Commissions at Guantanamo Bay that address issues of victims and victims’ families include the Office of Military Commissions Victims / Witness Assistance Program, and the Defense Initiated Victims’ Outreach Program.

International instruments that expressly provide for rights of victims and victims’ families include the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (see Appendix), and the ICCPR. Some of these instruments are excerpted in the Appendix to this Guantanamo Bay Fair Trial Manual. Those some of these instruments do not bind the U.S., principles victim-oriented principles contained in these instruments have risen to the level of customary international law, rendering those principles binding on the U.S. irrespective of whether the underlying instrument binds the U.S.

e. Victim/Witness Assistance Program (VWAP) of the Office of Military Commissions

The Office of Military Commissions (OMC) houses the Victim/Witness Assistance Program (VWAP), which was created to help make the U.S. Military Commissions at Guantanamo Bay more accessible to victims and victims’ families, those who are most directly affected by crimes falling within the Military Commission jurisdiction. The VWAP, which also provides logistical support for witnesses who may appear before the commissions, has goals regarding victims and their families. These goals include that victims and victims’ families should be:

1. treated with fairness and respect for the victim’s privacy and dignity.
2. reasonably protected from the accused offender.
3. permitted to confer with the VWAP Director;
4. permitted allowed to speak with the prosecutors assigned to the case;
5. notified of court proceedings;
6. provided information about the conviction, sentencing, imprisonment and transfer of any convicted offender.


A federal statute -- 18 U.S.C. § 3771 -- outlines rights of victims of crimes in the United States. This statute may offer guidance concerning rights of victims and victims’ families in the Military Commissions. Section 3771 provides the following rights for victims:

1. the right to be reasonably protected from the accused;
2. the right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused;

3. the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that the testimony of the victim would be materially altered if the victim heard other testimony at the proceeding;
4. the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding;
5. the reasonable right to confer with the attorney for the government in the case;
6. the right to full and timely restitution as provided in law;
7. the right to proceedings free from unreasonable delay; and
8. the right to be treated with fairness and with respect for the victim’s dignity and privacy.

g. Federal Rule of Criminal Procedure, Rule. 60

Federal Rule of Criminal Procedure 60 may also serve as a guide regarding rights for victims and victim’s families in the Military Commissions. It gives victims the following rights:
1. To receive reasonable, accurate, and timely notice of any public court proceeding involving the crime.
2. To attend the proceeding unless the court determines by clear and convincing evidence that a victim’s testimony would be materially altered if the victim heard other testimony at the proceeding. The court is bound to make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.
3. To be heard on release, plea, or sentencing involving the crime.
4. A victim’s rights may be asserted by the victim, the victim’s lawful representative, the attorney for the government, or any other person authorized by 18 U.S.C. § 3771.
5. Multiple victims: If the court finds that the number of victims makes it impracticable to accord all of them their rights, the court must create a reasonable procedure that gives effect to the rights without unduly complicating or prolonging the proceedings.

h. Private Charities

Immediately after the 9/11 attacks, individuals and groups began donating money to assist victims. One of those groups is listed as the September 11th Fund, which according to its website was created by the New York Community Trust and United Way of New York City. It collected $534 from over 2 million donors, and distributed it via grants. This fund dissolved in 2004.718

[A group called “Families of September 11th” was a nonprofit formed in October 2001 by family members of persons who died during the 9/11 attacks. Objectives of the group include to “raise awareness about the effects of terrorism and public trauma and to champion domestic and international policies that prevent, protect against, and respond to terrorist acts.” (http://www.familiesofseptember11.org/whoweare.aspx) The Families of September 11 is now operating as the For Action Initiative (See http://www.familiesofseptember11.org/whoweare.aspx; http://www.foractioninitiative.org/)]

717 Id.
718 Id.
### 55. Rights of the Victims

<table>
<thead>
<tr>
<th>Victim’ Right to Information</th>
<th>Y</th>
<th>N</th>
<th>D</th>
<th>C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has the government provided to the victims information about the arrest or capture of alleged perpetrators, the filing of charges, the commencement of proceedings, and the status of the case?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the government provide the victims with information in a timely manner arrest or capture of alleged perpetrators, the filing of charges, the commencement of proceedings, and the status of the case?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the government created an easy, convenient and effective avenue for the sharing of information between the victims of the crime and the government?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the government created an easy, convenient and effective avenue for the sharing of information between and among the victims of the crimes?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the government facilitated communication between and among victims of the crimes in question?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the government facilitated communication between and among victims of the crimes in question and victims of other crimes, particularly if those other crimes are similar to the crimes in question?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the government provided the victims with information about the identity of the accused and his location, and assured the victims that the victims will be secure and safe from any retaliation?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the government provided the victims with information about the identity of the defendant’s his counsel or other representatives, in case the victims wish to communicate with them?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Victims’ Right to Be Present</th>
<th>Y</th>
<th>N</th>
<th>D</th>
<th>C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Were any victims present at the viewing site during your observation mission?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If any victims were present at the viewing site during your observation mission, how many attended the proceeding?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did you learn the identities of the any victims who were present at the viewing site during your observation mission?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Can victims access the proceedings via closed circuit television at Camp Bulkeley at Guantanamo Bay, Cuba?

Can victims access the proceedings via closed circuit television at Ft. Devins, Massachusetts?

Can victims access the proceedings via closed circuit television at Ft. Meade, Maryland?

If there was a conviction, did the victims exercise a right to present a victim’s impact statement?

Were victims’ families excluded from any of the proceedings while you were present?

Have there been undue delays in proceedings that have affected the victims’ ability to attend hearings?

### Victims’ Right to Participate; Right to be Heard

Were victims allowed to speak at any time during the proceeding, in person?

Were victims allowed to speak at any time during the proceeding through counsel?

Were victims allowed to speak at any time during the proceeding through another representative?

Were you aware of any victims participating in the proceeding via documents, presented in person, through counsel, or through another representative?

Have there been undue delays in proceedings that have affected the victims’ ability to participate?

### Treatment of Victims

Did it appear as though the victims were treated with fairness, and respect for their dignity and privacy?

Are you aware of whether at this stage of the proceeding, any victims have received any sort of restitution or reparations through the Military Commissions?

Are you aware of whether at this stage of the proceeding, any victims have received any sort of restitution or reparations through a source other than the Military Commissions?

If there was a conviction, did the victims receive restitution?
**Right to Fair Trial for Victims**

Does it appear as though the victims have had the right to a fair proceeding (hearing or trial) afforded to them?

Does it appear to you that the prosecution has effectively helped ensure that the rights of the victims have been or are being protected?

**Defense Initiated Victims’ Outreach Liaisons**

Were there any Defense Initiated Victims’ Outreach liaisons present at the proceedings you observed?

Are you aware of any contact between any Defense Initiated Victims’ Outreach liaisons and any victims in the case you observed?

If you became aware of any contacts between any Defense Initiated Victims’ Outreach liaisons and any victims in the case you observed, what were those contacts?

Are you aware of any contact between the Office of Military Commissions Victims / Witness Assistance Program and any victims in the case you observed?

If you became aware of any contacts between the Office of Military Commissions Victims / Witness Assistance Program and any victims in the case you observed, what were those contacts?

---

**56. Rights of the Victims’ Families – Pre-Trial Hearing Stage**

<table>
<thead>
<tr>
<th>Victim’ Families’ Right to Information</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has the government provided to the victims’ families information about the arrest or capture of alleged perpetrators, the filing of charges, the commencement of proceedings, and the status of the case?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the government provide the victims’ families with information in a timely manner arrest or capture of alleged perpetrators, the filing of charges, the commencement of proceedings, and the status of the case?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Has the government created an easy, convenient and effective avenue for the sharing of information between the families of victims of the crime and the government?

Has the government created an easy, convenient and effective avenue for the sharing of information between and among the families of victims of the crimes?

Has the government facilitated communication between and among families of victims of the crimes in question?

Has the government facilitated communication between and among families of victims of the crimes in question and families of victims of other crimes, particularly if those other crimes are similar to the crimes in question?

Has the government provided the victims’ families with information about the identity of the accused and his location, and assured the victims’ families that the victims’ families will be secure and safe from any retaliation?

Has the government provided the victims’ families with information about the identity of the defendant’s his counsel or other representatives, in case the victims’ families wish to communicate with them?

<table>
<thead>
<tr>
<th>Victims’ Families Right to Be Present</th>
</tr>
</thead>
<tbody>
<tr>
<td>Were any victims’ families present at the viewing site during your observation mission?</td>
</tr>
<tr>
<td>If any victims’ families were present at the viewing site during your observation mission, how many attended the proceeding?</td>
</tr>
<tr>
<td>Did you learn the identities of the any victims’ families who were present at the viewing site during your observation mission?</td>
</tr>
<tr>
<td>Can victims’ families access the proceedings via closed circuit television at Camp Bulkeley at Guantanamo Bay, Cuba?</td>
</tr>
<tr>
<td>Can victims’ families access the proceedings via closed circuit television at Ft. Devins, Massachusetts?</td>
</tr>
<tr>
<td>Can victims’ families access the proceedings via closed circuit television at Ft. Meade, Maryland?</td>
</tr>
<tr>
<td>If there was a conviction, did the victims’ families exercise a right to present a victim’s impact statement?</td>
</tr>
<tr>
<td>Were victims’ families excluded from any of the proceedings while you were present?</td>
</tr>
<tr>
<td><strong>Have there been undue delays in proceedings that have affected the victims’ families’ ability to attend hearings?</strong></td>
</tr>
<tr>
<td><strong>Victims’ Families Right to Participate: Right to be Heard</strong></td>
</tr>
<tr>
<td>Were victims’ families allowed to speak at any time during the proceeding, in person?</td>
</tr>
<tr>
<td>Were victims’ families allowed to speak at any time during the proceeding through counsel?</td>
</tr>
<tr>
<td>Were victims’ families allowed to speak at any time during the proceeding through another representative?</td>
</tr>
<tr>
<td>Were you aware of any victims’ families participating in the proceeding via documents, presented in person, through counsel, or through another representative?</td>
</tr>
<tr>
<td>Have there been undue delays in proceedings that have affected the victims’ families’ ability to participate?</td>
</tr>
<tr>
<td><strong>Treatment of Victims’ Families</strong></td>
</tr>
<tr>
<td>Did it appear as though the victims’ families were treated with fairness, and respect for their dignity and privacy?</td>
</tr>
<tr>
<td>Are you aware of whether at this stage of the proceeding, any victims’ families have received any sort of restitution or reparations through the Military Commissions?</td>
</tr>
<tr>
<td>Are you aware of whether at this stage of the proceeding, any victims’ families have received any sort of restitution or reparations through a source other than the Military Commissions?</td>
</tr>
<tr>
<td>If there was a conviction, did the victims’ families receive restitution?</td>
</tr>
<tr>
<td><strong>Right to Fair Trial for Victims’</strong></td>
</tr>
<tr>
<td>Does it appear as though the victims’ families have had the right to a fair proceeding (hearing or trial) afforded to them?</td>
</tr>
<tr>
<td>Does it appear to you that the prosecution has effectively helped ensure that the rights of the victims’ families have been or are being protected?</td>
</tr>
<tr>
<td><strong>Defense Initiated Victims Outreach Liaisons</strong></td>
</tr>
<tr>
<td>Were there any Defense Initiated Victims Outreach liaisons present at the proceedings you observed?</td>
</tr>
</tbody>
</table>
Are you aware of any contact between any **Defense Initiated Victims’ Outreach** liaisons and any victims’ families in the case you observed?

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

If you became aware of any contacts between any **Defense Initiated Victims’ Outreach** liaisons and any victims’ families in the case you observed, what were those contacts?

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

Are you aware of any contact between the **Office of Military Commissions Victims / Witness Assistance Program** and any victims’ families in the case you observed?

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>

If you became aware of any contacts between the **Office of Military Commissions Victims / Witness Assistance Program** and any victims’ families in the case you observed, what were those contacts?

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>
III. Rights / Interests of the Prosecution

The prosecution is a party to the Military Commission proceedings, and is entitled to a range of rights. Rights of the prosecution include the right to equality of arms, the right to access to the court equal to that afforded to the defense, and the right to interlocutory appeals. The prosecutor, like all other stakeholders, is entitled to a fair trial.

A. General

This section of the Guantanamo Bay Fair Trial Rights Manual focuses on the prosecution’s rights, interests, and responsibilities under international law and domestic U.S. law. These rights, interests and responsibilities are overlapping in substance and in application, and reach relations between the prosecution and other stakeholders, such as the defendants, the victims and victims’ families, the press, and the court itself.

This section of the Manual will be fleshed out further. Research is being conducted on what distinguishes a “right” of the prosecution from an “interest” of the prosecution. We are researching the sources of international and domestic law that provide for prosecutorial rights and interests, and that distinguish between the two. To date, we have found no clear-cut typology that outlines what falls into which category, and this version of the Manuals groupings is subject to change after further research, consultation with the U.S. Military Commission Office of the Prosecutor, and consultation with other NGOs involved in the Military Commission process.

For now, we mention that the prosecution has rights and interests in a fair trial, as do other stakeholders. The prosecution also has specific responsibilities.

B. Rights of the Prosecution (with this list of “rights” subject to change after further research is conducted)

a. Right to a Fair and Objective Trial

Like the defense, the prosecution has a right to a fair and objective trial. The International Association of Prosecutors notes that all prosecutors should be empowered to carry out the function of their position. This includes protection from the arbitrary actions of governments. This includes being entitled to a fair and objective trial. The prosecution has an interest in protecting the record and avoiding any reason for appeal or mistrial. Therefore, upholding the 4th and 5th Amendments is critical in obtaining a fair trial.

b. Right to Equality of Arms

Parties to criminal proceedings – the government and the defendant – have the right to equality of

---

719 Research is currently being conducted by affiliates of Indiana University McKinney School of Law. We invite anyone with knowledge or experience with prosecutions to share insights that will aid as we conduct our research. Please feel free to send comments, cases, articles, other sources, suggested language that may be useful as we complete this section. We would welcome your contribution at GitmoObserver@yahoo.com.

720 International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors.

721 Id. In general they should be entitled: 1) to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards; to objective evaluation and decisions in disciplinary hearings;

722 Id.

723 See U.S. Constitution, 4th Amendment, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause…”; U.S. Constitution, 5th Amendment, “…nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…”; Mapp v. Ohio, 27 U.S. 643; Miranda v. Arizona, 384 U.S. 436.
arms. Procedural and other rules that apply to one party should apply to the other. Each party should have the same access to witnesses, documents, motion dockets, and courtroom procedures, with favor or discrimination. Neither the prosecution nor the defense should have unfair access to the judge or other court personnel, or access to court documents that are not available to the other party. The prosecution has the right to be treated fairly by the court, and the court has an obligation to treat the prosecution with the same level of respect and consideration as it treats the defense.

c. Right to Access to and Use of Evidence

The prosecution should have the ability to introduce evidence at trial, just as the defense has the ability. If the prosecution seeks to introduce evidence and the defendants claim that the evidence is inadmissible because it was illegally obtained, the prosecution has the right to have the court render a fair ruling on the admissibility of the evidence. The prosecution does not have the right to have illegally obtained evidence (or any other evidence) admitted. However, the prosecution has the right to a judicial determination as to the admissibility of evidence. 724

d. Right to Freedom from Pressure (10 U.S.C. § 949(b)

e. Right to Freedom from Coercion, Unauthorized Influence

f. Right to Freedom of Expression

Prosecutors have a right to freedom of expression as long as they conduct themselves lawfully. 725 This right allows them to take part in public discussions concerning the administration of justice without retribution. 726 They also have the right to take part in professional organizations that help to represent their interests and increase their training. 727

i. International Sources of Law


- The Status and Role of Prosecutors, United Nations Office on Drugs and Crime.

ii. Domestic (United States) Sources of Law

- The 1st amendment of the U.S. Constitution provides this right as well, to not only prosecutors, but to all citizens. 728

iii. U.S. Military Commission Rules

iv. Military Law

---

724 International Criminal Court, Office of the Prosecutor.
725 Guidelines on the Role of Prosecutors, 8th United Nations Congress (1990), Freedom of Expression and Association (8) Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession. 726 Id.
727 The Status and Role of Prosecutors, United Nations Office on Drugs and Crime. (2) Right be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.
728 U.S. Constitution, 1st Amendment. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press...
C. Interests of the Prosecution (with this list of “interests” subject to change after further research is conducted)

a. Interest in Plea Bargaining/Sentencing Recommendation

The Military Commissions Act of 2009, 10 U.S.C. §949(i)(c) discusses the use of plea bargaining in military trials. The Guantanamo Bay prosecution, like other U.S. domestic prosecutorial units, has an interest in plea bargaining and making sentencing recommendations.

An issue is whether in the case of Guantanamo Bay accused, it is the prosecutor or other officials in the Executive Branch who decide whether to enter into plea negotiations or who decide what terms to offer or accept in plea bargains. The resolution of Guantanamo Bay cases by plea bargaining or otherwise is of great interest to the Pentagon, the White House, and others in the government. Does the prosecution have ultimate authority in negotiating plea bargains, or are the prosecution’s decisions subject to review or subject to being overruled by others?

Setting aside for the moment the peculiarities of the U.S. Military Commissions, generally, in criminal law, the use of plea bargaining may provide an efficient means to dispose of cases in which the defendant plans to plead guilty in return for the prosecution offering something, typically to drop a charge or ask for a lighter sentence. Although a prosecutor may make a plea bargain with a defendant, often that bargain is not binding on the court. If a plea bargain is not arranged, the prosecution may make its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or information unless authorized by the court. There must be a balance between protecting those who are accused of the crime and notifying the public of the difficulties involved in the administration of justice.

b. Interests in the Relations with the Press

The prosecution has an interest in maintaining relations with the press. Press coverage of prosecutorial activities can help to deter crime; however, the prosecution has a duty to protect its case and those involved. The prosecution should avoid the release of any confidential and/or prejudicial information unless authorized by the court. There must be a balance between protecting those who are accused of the crime and notifying the public of the difficulties involved in the administration of justice.

729 Military Commissions Act of 2009, 10 USC § 949(i) Pre-trial agreements. A plea of guilty made by the accused that is accepted by a military judge under subsection (b) and not withdrawn prior to announcement of the sentence may form the basis for an agreement reducing the maximum sentence approved by the convening authority, including the reduction of a sentence of death to a lesser punishment, or that the case will be referred to a military commission under this chapter [10 USCS §§ 948a et seq.] without seeking the penalty of death. Such an agreement may provide for terms and conditions in addition to a guilty plea by the accused in order to be effective.

730 Santobello v. New York, 404 US 257 (Plea bargains are an essential component to the administration of justice and should be encouraged by the courts.) The prosecution has the ability to use anything said by the defendant in plea bargaining discussions against him or her in a prosecution for false statement or perjury. Federal Rules of Criminal Procedure, Rule 11.

731 International Criminal Tribunal for Rwanda, Standards of Conduct of the Prosecutor. Prosecutor’s Regulation 001 (2005): If the prosecutor enters into discussions with defense counsel regarding any of the matters below, the trial chamber must be notified and all communications are confidential: (a) A potential plea of guilty to all or part of an indictment; (b) A possible agreement to or admission of alleged facts; (c) The possible co-operation of the accused with the Prosecutor in the discharge of his functions; and (d) The possible submissions of the Prosecutor on a reduced sentence in event of a guilty plea and co-operation by the accused.

732 International Criminal Tribunal for the Former Yugoslavia, Standards of Conduct. 2(a): While the release of information for the purpose of influencing a trial is, of course, always improper, there are valid reasons for making available to the public information about the administration of the law. The task of striking a fair balance between the protection of individuals accused of crime or involved in civil proceedings with the Government and public understandings of the problems of
c. Interest in Security

There is an interest in security that exists for the prosecution. This interest is not only for the security of themselves but the security for anyone who may be harmed as a result of their interaction with the prosecution.\(^738\) This includes maintaining confidentiality to protect the privacy and ensure the safety of witnesses and victims.\(^739\) In addition to protecting individuals, there is a duty to protect the nation. The prosecution has an interest in maintaining national security through the limited disclosure of information.\(^740\)

\[^738\] See, The Status and Role of Prosecutors, United Nations Office on Drugs and Crime. Prosecutors have a right to be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions; The Rome Statute, Article 68(5)

\[^739\] See, International Criminal Tribunal for the former Yugoslavia, Standards of Conduct. 2(g): to take any available measures, as required, to protect the privacy and ensure the safety of victims, witnesses and their families, to treat victims with compassion, and to make reasonable efforts to minimize inconvenience to witnesses; International Criminal Tribunal for the former Yugoslavia, Standards of Conduct. 2(i): to preserve professional confidentiality, including not disclosing information which may jeopardize ongoing investigations or prosecutions, or which might jeopardize the safety of victims and witnesses

\[^740\] Military Commissions Act of 2009, 10 USC § 949p-1: (a) Protection of classified information. Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.

\[^741\] United States Attorneys Manual, 9-2.030 (authorizing prosecution). The United States Attorney is authorized to initiate prosecution by filing a complaint, requesting an indictment from the grand jury, and when permitted by law, by filing an information in any case which, in his or her judgment, warrants such action, other than those instances enumerated in USAM 9-2.120; see also, United States Attorneys Manual, 9-2.020 (declining prosecution).


\[^743\] Guidelines on the Role of Prosecutors, 8th United Nations Congress. 17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

\[^744\] Rome Statute, Article 61(4): Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

\[^745\] Crime Victims’ Rights Act, 18 U.S.C. §3771: (a) Rights of crime victims. A crime victim has the following rights: (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused. (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding. (5) The reasonable right to confer with the attorney for the Government in the case. (6) The right to full and timely restitution as provided in law. (7) The right to proceedings free from unreasonable delay. (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

\[^746\] United States Attorneys Office, Crime Victims’ Rights Ombudsman. USAs and other DOJ staff shall make their best effort to ensure victims are aware of above rights

\[^747\] Office of Military Commissions (OMC), Victim/Witness Assistance Program (VWAP). Committed to ensuring victims/witnesses are 1) treated with fairness and respect; 2) reasonably protected from accused offender; 3) afforded an opportunity to speak with prosecutors on case; 4) notified of court proceedings; and 5) provided information about conviction, sentencing, imprisonment and transfer of offender.

\[^748\] Not to be Quoted or Reproduced Without Permission --- This is a Preliminary Draft.

\[^749\] © 2017

\[^750\] The Gitmo Observer (Indiana University McKinney School of Law)
D. Responsibilities of the Prosecution (with this list of “rights” subject to change after further research is conducted)

Prosecutors have a duty to seek justice. The prosecutor has a responsibility to be a “minister of justice and not simply that of an advocate.” Along with this responsibility is the important function of seeking reformation and improving the administration of the criminal justice system.

The International Criminal Tribunals for Rwanda and the former Yugoslavia note:

[T]he duties and responsibilities of the Prosecutor differ from, and are broader than, those of defence counsel… and many safeguards are built into the Statutes of the respective Tribunals, their Rules of Procedure and Evidence and the United Nations system to ensure high standards of conduct and ethics on the part of the Prosecutor and prosecution counsel.

The Universal Declaration of Human Rights notes that all are entitled to equal protection under the law, presumed to be innocent until proven guilty, and a fair and public hearing by an independent and impartial tribunal. The Guidelines on the Role of Prosecutors, adopted by the 8th United Nations Congress, states:

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime.

a. Responsibility to Seek Justice and Protect Public Interests

The prosecution has a responsibility to seek justice for the victims and protect public interests. This requires an objective view of the case at hand, reviewing all evidence equally, and making all inquiries necessary to ensure a fair trial. If justice is obtained unfairly, it “is unjust and dangerous to the whole community.”

---

748 Model Code of Professional Responsibility (MCPR) EC 7-13 (1979). The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice, the accused is to be given the benefit of all reasonable doubts.


750 American Bar Association, Standard 3-1.2. (a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction. (b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions. (c) The duty of the prosecutor is to seek justice, not merely to convict. (d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action. (e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.

751 Prosecutor’s Regulation No. 2 (1999).

752 Universal Declaration of Human Rights, art. 7, 10, and 11 (1948).


754 International Criminal Tribunal for the former Yugoslavia, Standards of Conduct of Prosecutor. (2): to serve and protect the public interest, including the interests of the international community, victims and witnesses, and to respect the fundamental rights of suspects and accused.

755 International Criminal Court, Code of Conduct for the Office of the Prosecutor, Chapter 3.1: Objective Truth Seeking- Conduct investigations with the goal of establishing the truth in the interests of justice; Consider all relevant circumstances when assessing evidence, regardless of whether they are to the advantage or disadvantage of the prosecution; Ensure all necessary and reasonable inquiries have been made and the results disclosed in accordance with the requirements of a fair trial.

756 Hurd v. People, 25 Mich. 404 (1872). “The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner’s guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community.”
b. Responsibility to Prosecute with Integrity, Impartiality, and Fairness

The prosecution has a responsibility to prosecute with integrity, impartiality, and fairness. The prosecutor should be a person with high moral character and high standards of integrity. This includes remaining free from bias, respecting the presumption of innocence, refrain from publicly expressing an opinion of guilt or innocence of the defendant, and conforming to the rules on disclosure of evidence. In addition, the prosecutor should be excused on any matter in which their ability to be impartial may be doubted.

c. Responsibility to Conduct Investigations

The prosecution has a responsibility to conduct investigations into whether a crime has been committed. When making the decision to proceed or not to proceed the prosecutor must make an impartial judgment based on the evidence, keeping in mind the interests of justice. During the investigation the prosecution should respect the rights of the individual(s) under investigation and refrain from prosecuting any person whom they believe are innocent of the charges. The investigation must extend to cover all facts and evidence.

d. Responsibility to Avoid Conflicts of Interest

A prosecutor has a responsibility to avoid conflicts of interest and abstain from any conduct that may conflict with the discharge of their duties. These conflicts may include personal interest in the case due to relationship with any of the involved parties or circumstances in which members of the prosecution appear to benefit financially or otherwise from any transaction with the Court. A prosecutor should not allow his or her professional judgment to be affected by any personal interests.

e. Responsibility to Disclose Exculpatory Evidence

A final responsibility the prosecution has is to disclose any evidence they have which suggests the defendant may be innocent of the crime being charged. There is a due process obligation under the U.S. Constitution to present the defendant with evidence not known to him which is material to disproving his guilt, reducing his punishment or impeaching witnesses. Exculpatory evidence is considered material when there is reasonable probability that effective use of the evidence will result in an
acquittal.\textsuperscript{769} The omission of the exculpatory evidence must be of sufficient significance to result in a denial of the defendant’s right to a fair trial.\textsuperscript{770}

\section*{B. Conclusion}

The Guantanamo Bay prosecution has a number of rights, interests, and responsibilities that are essential to a fair trial. These rights, interests, and responsibilities are also essential to victims receiving justice and the public’s interests being served.

\[\text{This Rights of the Prosecution introductory section is being developed further.}\]

\begin{tabular}{|l|c|c|c|}
\hline
57. Rights of the Prosecution & Yes & No & Don’t Know & Comment \tabularnewline
\hline
Did it appear as though the prosecution received a fair trial? & & & & \\
\hline
Did the judge treat the prosecution fairly? & & & & \\
\hline
Did the prosecution have the resources it needed to attempt to prove guilt beyond reasonable doubt? & & & & \\
\hline
Did the prosecution complain about any prejudice or unfairness to the prosecution by the judge? & & & & \\
\hline
Has the prosecution claimed that individuals or entities outside of the prosecution exerted or sought to exert undue influence on the prosecution? & & & & \\
\hline
Has the prosecution claimed that individuals or entities outside of the prosecution exerted or sought to exert influence on the prosecution to bring particular charges, to charge \textsuperscript{769} U.S. v. Bagley, 475 U.S. 667 \textsuperscript{770} U.S. v. Agurs, 427 U.S. 97 &&& \\
\hline
Were you aware of whether the prosecution claimed that the Department of Justice, the Convening Authority, or other individual or entity outside of the prosecution exerted influence on the prosecution on a decision whether to charge a particular offense, to charge an offense in a particular way, to drop a charge against a defendant, to appeal an adverse ruling, or regarding any other matter? & & & & \\
\hline
\end{tabular}
NGO Observers with Brigadier General Mark Martins, Chief Prosecutor of the U.S. Military Commissions at Guantanamo Bay (June 2014)
IV. Rights of the Press

For the press (or the media) to be fully afforded their rights, they must have access to the military commission proceedings absent an overriding government interest, access to non-confidential court documents, access to officials involved with the proceedings, access to tour the military commission facilities and other facilities associated with Guantanamo Bay including detention facilities, the ability to receive information and disseminate it to the public, and the ability to advocate on behalf of the public.

[This rights of the Press introductory section is being developed further. An Indiana University McKinney School of Law student is assigned to research this topic.]

a. General

Press, as a part of the general public and a symbol of democracy and civilization, has a significant interest in fair trial proceedings. Regarding the Guantanamo Bay Military Commissions, the press has the right to freedom of expression, which includes the right to be present at the proceedings, to gather information, and to disseminate that information.771 These rights are provided for by international law (treaties and customary international law) that binds the U.S., the U.S. Constitution (e.g., the First Amendment), and other U.S. statutory law and regulations (e.g., the Military Commission Act of 2009, and 28 CFR 50.9).

To be able to exercise these rights, the press requires reasonable access to the Guantanamo Bay court and its proceedings, access to documents associated with the proceedings, and access to personnel associated with the proceedings. Furthermore, the press must have a reasonable means of disseminating Military Commission-related information, particularly when dispatches are made from the remote military base at Guantanamo Bay, Cuba.

b. Freedom of the Press and International Human Rights Law

International human rights law provides protection for the right to freedom of expression of the press, as an important element of democracy and individual autonomy. Among various aspects of the press right to freedom of expression, the access to criminal proceedings is especially important, since it serves for both the press interest and the defendant’s right to fair trial. Although such right is not among the non-derogated fundamental human rights, states must balance the different interests at issue and justify the restriction by legitimacy, genuine necessity of public interest and justice.

(i) General Requirements

Freedom of the press is a fundamental human right recognized and protected by the law of most modern nations. Although the notion of “the press” is not explicitly mentioned in any of the international human rights conventions, the freedom of the press has

---

771 Members of the public and other Guantanamo Bay stakeholders who seek information also enjoy rights related to information gathered by and disseminated by the press. These other stakeholder rights and interests are discussed elsewhere in this Guantanamo Bay Fair Trial Manual, including at section xyz (rights of the U.S. public), section xxx (rights and interests of abc).
been recognized as an important aspect of the freedom of expression. As an effective tool of truth finding, free expression is generally considered as prerequisite of democracy. All major international human rights instruments include provisions protecting the freedom of expression, starting in 1948 with the Universal Declaration on Human Rights (UDHR). This idea was affirmed in the International Convention on Civil and Political Rights (ICCPR) twenty years later: “the right to freedom of expression includes the freedom to seek, receive, and impart information and ideas through any media.” Since the United States ratified the ICCPR, it is bound to respect, protect, and carry out all of the human rights stipulated by the Covenant. Specifically, the U.S. is expected to ensure that the public, especially the journalists, gain access to information and impart information in a fast, objective, and favorable manner.

Additionally, there are sources of international law that, although not binding the U.S., all acknowledge the right to freedom of expression: the American Convention on Human Rights, the European Convention on Human Rights (1950), and the African Charter on Human and Peoples Rights (1981).


773 Handyside v United Kingdom, Merits, App No 5493/72, A/24, IHRL 14, para. 49 (ECHR 1976).

774 Art. 19, UDHR.

775 Art. 19(2), ICCPR.

776 American Convention on Human Rights Article 13 (entitled “Freedom of Thought and Expression”) provides:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or  
b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of the information, or by any other means tending to impede the communication and circulation of ideas and opinions.

777 European Convention on Human Rights Article 10 (titled “Freedom of expression”) provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

778 African Charter on Human and Peoples Rights Article 9 provides:

1. Every individual shall have the right to receive information

2. Every individual shall have the right to express and disseminate his opinions within the law.
Noticeably, the European Court of Human Rights has identified the press as “public watchdogs” who provide information and opinions on public interest matters. Because the function of the press is of vital importance, the UN Educational, Scientific, and Cultural Organization (UNESCO) works to protect the interests of journalists and promote the freedom of the press. The UNESCO Constitution, which was ratified by the U.S., describes the objectives of the organization as encouraging the freedom to exchange opinions and information in order to enhance understanding and solidarity among nations.

(ii) Permissible Restrictions

The freedom of expression, as well as the freedom of press is not absolute in the context of an international criminal trial. If the interference is deemed justified, then the interference shall not constitute a violation of the right.

Article 19(3) of the ICCPR states that the freedom of expression may be subject to certain restrictions, “but these [restrictions] shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals.” Article 4 of the ICCPR addresses restrictions in context of armed conflict or emergency. States may restrict the right to such freedom “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed…provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.”

Article 14 of ICCPR defines the relationship between the press’ freedom of expression and the criminal defendant’s right to fair trial. Art. 14(1) states: “All persons shall be equal before the courts and tribunals.” The Article continues this thought in providing instances in which the press may be excluded from a trial, but only “for reasons of morals, public order (ordre public), or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; . . .” Thus, the press can be excluded from trial proceedings but the court must justify the exclusion within these narrow circumstances. This provision is intended to maintain the defendant’s right to a fair and public trial, while considering the rights and safety of other stakeholders as well.

Additionally, Art. 14(2) provides the defendant a right to be presumed innocent until proven guilty according to law. This implies a requirement that the press refrain from news coverage undermining the presumption of innocence.

Other instruments of international tribunals reiterate these same restrictions on limiting the access of the press and public from trial proceedings. Both the Rules of Procedure of the International Criminal Tribunal for the former Yugoslavia and the Rules of Procedure of the International Criminal Tribunal for Rwanda stipulate that all proceedings before the Trial Chamber should be held in public, unless otherwise provided. However, Rule 79 (in both documents) provides an exception in which the Trial Chamber may order the press be excluded from all or part of the proceedings for reasons of public order or morality; safety, security or non-disclosure of the identity of a victim or witness; or the protection of the interests of justice. Nevertheless, the

779 Observer and Guardian v United Kingdom, The Observer Limited and ors and ‘Article 19’ (The International Centre against Censorship) (intervening) v United Kingdom, Merits and just satisfaction, App No 13585/88, A/216, IHRL 2952, para. 31 (ECHR 1991).


781 Art. 19(3), ICCPR.

782 Art. 4(1), ICCPR.

783 Art. 14(1), ICCPR.

784 Id.
Trial Chamber must make public the reason for its order.

International human rights law provides protection for the right to freedom of expression of the press, as an important element of democracy and individual autonomy. Among various aspects of the press right to freedom of expression, the access to criminal proceedings is especially important, since it serves for both the press interest and the defendant’s right to fair trial. Although such right is not among the non-derogated fundamental human rights, state must balance the different interests at issue and justify the restriction by legitimacy, genuine necessity of public interest and justice.

c. Freedom of the Press and U.S. Law

Freedom of the press and the rights to fair trial in criminal proceedings raise controversial questions in domestic courts. The applicable constitutional provisions include the First Amendment, the Fourteenth Amendment, and the Sixth Amendment. Although the right of the public and press to attend criminal proceedings is not an explicit guarantee within these Constitutional amendments. Rather, it is a provision that can be read into them. In this context of the military commission trials at Guantanamo Bay, there are two main aspects of the implied rights of the press that should be examined—the right to be present at criminal trials and pretrial hearings and the right of access to judicial documents.

(a) The Right to be Present at Criminal Trial Proceedings and Pretrial Hearings

Historically, Anglo-American criminal courtrooms have been open to the public and the press to assure the proceedings were fair. There is also a therapeutic value to a public trial, in providing the community an outlet for their concern and emotion over the criminal activity being tried. Thus, an open criminal trial which allows observation of its process can “satisfy the appearance of justice.”

United States Case Law

Although long recognized as a common law right, the U.S. Supreme Court did not declare a constitutional right for the press to be present at trials until 1980. In Richmond Newspapers, Inc. v. Virginia, the Court held that the right to attend criminal trials was implicit in the First Amendment and that the First Amendment required that the trial be open to the public. The Court reasoned that open trials had a cathartic effect on the community, encouraged the perception that the trials were fair, and discouraged perjury and biased decision making. Additionally, the Court reasoned that although trials are open to the public, they

---

785 The First Amendment of the Constitution provides that “Congress shall make no law…abridging the freedom of speech, or of the press…”

786 The Fourteenth Amendment of the Constitution provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

787 The Sixth Amendment of the Constitution provides that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury….”


790 448 U.S. 555 (1980).

791 Id.

792 It should be noted that in Richmond Newspapers, Inc. v. Virginia the request for the press and public to be excluded came from the defense, as he felt the publicity of the trial negatively affected the ability of the jurists to remain unbiased. Thus, although the freedom of the press is a component of a fair trial, it is mainly a right of the press and the public as stakeholders, and is limited in relation to the rights and protections of the accused and other stakeholders. See generally, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
more likely to be attended by the press. 793 Thus, the press has taken on a role as “surrogates for the public.” 794 The Court recognized the work of the media as contributing “to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system . . . .”795 The Court also acknowledged that although the Constitution did not explicitly provide any guarantee the right to be present to the press, it did afford protection from exclusion via the First and Fourteenth Amendments. Together, these amendments “expressly guaranteed . . . freedom of communication on matters relating to the functioning of government.” 796 The Court explicitly held that “[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.” Therefore, the Court granted a Constitutional right of access to criminal proceedings, but left open the possibility of an “overriding interest” that could exclude the public and the press.797 The court left open the development of a strict scrutiny test for such instances in later cases.

The next year, in Globe Newspaper Co. v. Superior Court, the Court held that a state’s mandatory closure rule was unconstitutional. In this case, the Court struck down a Massachusetts statute which required the exclusion of the press and public from the courtroom during the testimony of a minor victim in a sex offense trial.798 The Massachusetts court had not only excluded the press for the testimony, but for the entire trial. The Boston Globe protested—and the Supreme Court granted certiorari. In reaching its decision, the Court applied a strict scrutiny approach to find exceptions to the presumed right of access for the press and general public in criminal trials: “[I]t must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest.”799 Although the Court agreed that closure might be necessary in a particular case to protect the welfare of the victim, automatic closure in every case could not be justified since the circumstances of the particular case could affect the significance of the interest. Thus, the Court concluded that trial courts should determine the necessity of closure on a “case-by-

793 Id. at 573.
794 Id.
796 Id. at 575.
797 Id.
799 Id. at 607.
In 1986, the Court further expanded the right of access to criminal proceedings to encompass preliminary hearings in Press Enterprise Co. v. Superior Court (“Press-Enterprise II”). The Court first applied a test to determine whether a particular hearing (in this case, a preliminary hearing) was protected the First Amendment: (1) whether the proceeding was one that had historically been open to the public; and (2) whether public access plays a significant positive role in the functioning of the particular process in question. If the hearing passes these two-step test, a qualified First Amendment right of access attaches, thus requiring heightened scrutiny to justify closure. Per the Court, to justify closure there must be a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.

It is clear from Richmond Newspapers and its progeny that the First Amendment protects access to criminal proceedings, and no discovered reported case since have upheld complete closure of a trial.

**Federal Statutory Law and Regulations**

In addition to case law, federal regulations provide for open judicial proceedings. The text of 28 CFR 50.9 (the U.S. Justice Department’s policy in regards to open judicial proceedings) refers to the “vital public interest in open judicial proceedings . . .” and states that Government attorneys shall not move for or consent to closure of federal trials, pre-trial evidentiary proceedings, or plea proceedings unless the following conditions are satisfied:

1. No reasonable alternative exits for protecting the interests at stake;
2. Closure is clearly likely to prevent the harm sought to be avoided;
3. The degree of closure is minimized to the greatest extent possible;
4. The public is given adequate notice of the proposed closure; and, in addition, the motion for closure is made on the record, except where the disclosure of the details of the motion papers would clearly defeat the reason for closure . . . ;
5. Transcripts of the closed proceedings will be unsealed as soon as the interest requiring closure no longer obtain; and
6. Failure to close the proceedings will produce;
   i. A substantial likelihood of denial of the right of any person to a fair trial; or
   ii. A substantial likelihood of imminent danger to the safety of parties, witnesses, or other persons, or
   iii. A substantial likelihood that ongoing investigations will be seriously jeopardized.

Meanwhile, Classified Information Procedures Act (CIPA) provides the limitation that if a hearing may result in disclosing “classified information” such hearing shall be held in camera. In practice, CIPA serves as a common ground for closing certain proceedings, as far as the relevant information is deemed as “classified.”

**Military Justice System**

---

800 Id. at 609.


802 Id.


804 18 U.S.C. Appx § 1(a) provides the definition of “classified information”:

“ Classified information as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).”

---

Not to be Quoted or Reproduced Without Permission — This is a Preliminary Draft.

© 2017

E-mail - GitmoObserver@yahoo.com  @GitmoObserver The Gitmo Observer (Indiana U McKinney School of Law)
In context of military justice, courts also acknowledge that the law favors a public proceeding. “We believe the accused, the press, and the public have a recognizable interest in being informed of the workings of our entire court-martial process, and that no public interest is served by a blanket rule closing pretrial hearings.”\textsuperscript{805} At the same time, national security may justify the closure of criminal proceedings to the press and the public.

In \textit{U.S. v. Lonetree}, a case concerning espionage allegations against a Marine Corp embassy guard, the information included the names and locations of covert U.S. intelligence agents. The Government sought under Military Rule of Evidence 505(j)(5) to exclude the public during some of the witness testimony.\textsuperscript{806} Without providing individual findings for each witness, the military judge granted the closure. On appeal, the Court of Military Appeals upheld the military judge’s order excluding public from part of the court-martial without separate judicial findings for each closed section, since 505 does not require such separate finding.\textsuperscript{807} In balancing the interests at issue, the military judge gave significant weight upon the sensitivity of national security, as well as judicial efficiency.

The Military Commission Act of 2009 provides that the military commission judge “may close portions of a trial only to protect information from disclosure where such disclosure could reasonably be expected to cause damage to the national security, such as information about intelligence or law enforcement sources, methods, or activities; or to ensure physical safety of individuals.”\textsuperscript{808} In this context, the information is not necessarily “classified”. Rather, the military judge may close the proceeding “only to protect information designated for such protection by a government agency or to secure the physical safety of individuals.”\textsuperscript{809} On the other hand, Rule 806 of the Manual for Military Commissions provides that alternatively, the military judge may “reasonably limit the number of spectators in, and the means of access to, the courtroom, and exclude specific persons from the courtroom.”\textsuperscript{810} In other words, under MCA and other applicable rules, generally press shall have the right of access to the judicial proceedings and public documents, unless the military judge orders a closed proceeding to protect certain crucial information.

In conclusion, stemming from the Constitution and federal law, the press generally has the right to be present at criminal trials and pretrial proceedings. Both the freedom of expression and the defendant’s right to public fair trial guarantee such right. To make determinations, the judge shall consider the alleged public interest. Particularly, classified information and issues related with national security often serve as justification for excluding the press as well as the general public from certain proceedings.

\subsection*{ii. The Right of Access to Judicial Documents}

To preserve the First and Sixth Amendment rights, courts must also determine to what extent they shall release the information not on the public record to the press.

\textit{United States Case Law}

Generally, there is little doubt that the press is not entitled to a right accessing to information unavailable to the public.\textsuperscript{811} In order to impose restrictions to access to certain information, the government has to show that there is a “serious and imminent threat of inference with the fair administration of justice”.\textsuperscript{812} In other words, with regard to the press’s First Amendment right to “gather news”, restrictions are permissible

\begin{itemize}
  \item \textsuperscript{806} \textit{United States v. Lonetree}, 31 M.J. 849 (N-M.C.M.R. 1990).
  \item \textsuperscript{807} \textit{United States v. Lonetree}, 1992 CMA LEXIS 1028 (C.M.A. 1992).
  \item \textsuperscript{808} 10 U.S.C. §949d(c).
  \item \textsuperscript{809} J.K. Elsea, the Military Commissions Act of 2009: Overview and Legal Issues, \textit{CRS Report}, (August 4 2014).
  \item \textsuperscript{810} Rule 806, Manual for Military Commissions (2007). \url{http://www.defense.gov/news/d20070118MCM.pdf}
  \item \textsuperscript{811} \textit{United States v. Mandel}, 408 F. Supp 673 (1975).
  \item \textsuperscript{812} \textit{Chicago Council of Lawyers v. Bauer}, 522 F.2d 242 (7th Cir. Ill. 1975).
\end{itemize}
only to “prevent substantial threat to administration to justice.”\textsuperscript{813} In practice, the interpretations and court’s rulings differ on case fact basis and provide far less than a clear and consistent clue.

The information at issue is not limited to trial documents and evidence, but also include pretrial documents. The criterion for restriction is in accordance with the rationale: to seal certain documents the judge “must make sufficiently specific findings on a document-by-document basis to show that the three substantive prerequisites to closure have been satisfied—that there is a substantial probability (1) that public proceedings would result in irreparable damage to defendant's right to a fair trial; (2) that no alternative to closure would adequately protect this right; and (3) that closure would effectively protect it.”\textsuperscript{814}

Laws passed after the terrorist attacks on September 11, 2001, such as the USA Patriot Act of 2001, make it more difficult for press to obtain records and information to some extent. The press has had some success in obtaining documents but only after getting courts to intervene.\textsuperscript{815} In 2003, media groups (including the major television networks and newspapers) filed a lawsuit to obtain access to court records in the criminal case of accused terrorist Zacarias Moussaoui. In \textit{U.S. v. Moussaoui}, the Fourth Circuit court held that the documents attached to the Moussaoui case’s appendices should be considered on a “document-by-document basis”, and ordered that all classified information under the CIPA would remain under seal.\textsuperscript{816} The court gave great concern of the secrecy and noted that “the government may determine what information is classified” and neither the defendant nor the court can question it. In the end, the press and general public were provided access to unclassified materials in the classified and unclassified appendices after the materials had been redacted. On the other hand, in a similar case, in 2003, the Center for National Security Studies filed a Freedom of Information Act (FOIA) complaint to obtain information of the names of the detainees and their lawyers. The D.C. Circuit court held that the disclosure of such names “could reasonably be expected to interfere with the ongoing terrorism investigation.”\textsuperscript{817} Thus the DoJ withholding information about the dates, locations of arrest, detention and release for each detainee was justified under Exemption 7(A) of the FOIA.\textsuperscript{818}

\textbf{Military Justice System}

In context of military justice, courts also recognize a “qualified, First-Amendment-based right of access to documents admitted in evidence at a pretrial open to the public.”\textsuperscript{819} Similarly, the military judge shall weigh the public interest and right to fair trial in determining whether the disclosure shall be granted. In determining the restriction to access of judicial documents, the judge has the discretion of granting disclosure or not on case-by-case basis, balancing the public interest, security concern, defendant’s right to fair trial and the existence of alternative means to obtain such documents. After 9/11, considering the “war on terror” and a series of legislations, the courts tend to give more weight on the government determination of classification and secrecy concern, which substantially makes the access to judicial documents for the press narrower.

\textbf{Military Statutory Law:}

\textit{RTMC, Reg. 19-4(e):}  

Except under exceptional circumstances, including equipment failure, the Convening Authority shall ensure the custodian of the OMC website posts a draft, unofficial, unauthenticated transcript of the public portions of the military commission proceedings to the OMC website as soon as practicable after the conclusion of a hearing each day the military commission is in session (whether

\begin{itemize}
\item \textsuperscript{813} \textit{United States v. Harrelson}, 713 F.2d 1114 (5th Cir. Tex. 1983).
\item \textsuperscript{814} \textit{Associated Press v. United States Dist. Court for Cent. Dist.}, 705 F.2d 1143 (9th Cir. Cal. 1983).
\item \textsuperscript{815} S. L. Alexander, \textit{Media and American Courts}, ABC-CLIO (2004).
\item \textsuperscript{816} \textit{United States v. Moussaoui}, 65 Fed. Appx. 881 (4th Cir. 2003).
\item \textsuperscript{817} \textit{Ctr. for Nat'l Sec. Studies v. United States DOJ}, 331 F.3d 918 (D.C. Cir. 2003).
\item \textsuperscript{818} Exemption 7(A) of FOIA provides a two-part test regarding releasing information: “(1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about it could reasonably be expected to cause some articulable harm.”
\item \textsuperscript{819} \textit{United States v. Scott}, 48 M.J. 663 (Army Crim. App. 1998).
\end{itemize}
the hearing is recessed, adjourned, or closed). This draft, unofficial, unauthenticated transcript shall be prepared by a court reporter seated in a room that receives an audio feed of the proceedings that is identical to the audio feed broadcast in the public gallery. This procedure will avoid inclusion in the draft, unofficial, unauthenticated transcript of any inadvertent utterances of classified or protected information inside the courtroom. Further, this draft, unofficial, unauthenticated transcript shall indicate that it is an unofficial, unauthentic draft that may be further revised, and that it is being released to facilitate the public’s access to military commission proceedings.

d. Guantanamo Bay Hearings

On January 6, 2016, several members of the press filed a motion with the Military Commissions in Guantanamo Bay concerning the redactions found within a released transcript. The case it concerned was the hearings for the 9/11 defendants (Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin ‘Attash, Ramzi Bin Al Shibh, Ali Abdul-Aziz All Mustafa Ahmed Adam Al Hawasawi). Basically, testimony concerning a motion Mr. bin ‘Attash had filed was taken. The testimony was taken in open court and several members of the press observed the full and open testimony and reported on it. However, when a transcript of the testimony was later posted on the military commission’s website for public and press access, several sections of the testimony were redacted. Much of the redacted testimony had already been reported on by the press who had observed it live. The government claimed that the Regulation for Trial by Military Commissions allows the government to make ex post redactions to public testimony (Regulation 19-4(e)). However, the regulation (stated above) does not mention the allowance of ex post redactions. The movants also pointed out that the redactions were in violation of their First Amendment right to public access and the government had not provided a compelling and overriding interest to overcome their presumptive right of access.820

After many months of motions and discussion, the military court ruled, on October 3, 2016, that the motion be denied. The court reasoned that the case entailed a significant amount of classified information, and the fact that an open testimony might lead to “spillage” (the inadvertent disclosure of classified information), did not “equal declassification.”821 And although R.T.M.C 19-4(e) does not explicitly grant ex post redactions, it does state that unofficial transcripts that are produced “may be further revised.”822 And, such a regulatory provision was granted to give the government a way of correcting “spillages after the fact without affecting the classified status of the information at issue.”823 Additionally, protected classified information is a compelling government interest and there is a statute in place that precludes a military or commission judge from ordering the “release of classified information to any person not authorized to receive such information.”824

e. JTF-GTMO Media Rules and Guantanamo Bay

JTF-GTMO has established rules and procedures regarding media coverage of the U.S. Military Commissions at Guantanamo Bay, and regarding press visits to the Naval Station Guantanamo Bay.825

---

820 Press Movants’ Motion to Unseal 30 October 2015 Transcript of Public Proceedings, AE400, (6 Jan 2016).


822 Id.

823 Id.

824 Id. quoting 10 U.S.C. § 949 p. 1(a); M.C.R.E. 505(a)(1).

825 Media Policy at Joint Task Force Guantanamo,
Department of Defense is charged with facilitating press access “to the maximum extent possible” “in an effort to encourage open reporting and promote transparency” consistent with the Military Commission Act and accompanying rules and regulations, and the need to protect operational and national security and comply with international treaty obligations.\textsuperscript{826}

The “ground rules” are intended “to protect operational security and to ensure the security of personnel, as well as the integrity of military commission proceedings.”\textsuperscript{827} Furthermore, JTF-GTMO states that the ground rules “are also designed to provide guidance to [press] concerning what information will be deemed to be “protected information” for purposes of these ground rules.”\textsuperscript{828} Media representatives must agree to abide by the ground rules as a condition of gaining access to GTMO and to military commission proceedings. If they do not comply, the individual press member could be permanently expelled and the press member’s parent organization can be denied further GTMO or military commission access. The Office of the Assistant Secretary of Defense for Public Affairs OASD (PA) is responsible for developing and implementing the GTMO ground rules. Noticeably, the ground rules have specific guidelines for a category of information known as “protected information”, which is also not the same as “classified information”. Pursuant to the Media Policy at Joint Task Force Guantanamo, “protected Information” is a broader definition than “classified information”. “Protected information necessarily includes classified information.” It also includes “(1) information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities, or jeopardize the physical safety of individuals, and (2) information subject to a properly-issued protective order by an official authorized to issue such orders by law or regulation.”\textsuperscript{829}

A distinctive aspect of the Guantanamo Bay trials is the physical location of the venue. The distant location and military environment make it less accessible to the press and general public. In practice, the number of press representatives and observers who can be physically present at the proceedings is extremely limited. Also, the isolated environment creates difficulties for disseminating the information. These situations raise the concern that the physical position \textit{per se} result in a de facto restriction upon the public access to the Guantanamo trials.\textsuperscript{830}

The press as part of general public has an interest in public fair trial proceedings under both international law and U.S. domestic law. Moreover, the special role of press as an observer and source of information to the society makes the press right to be present at criminal proceedings and access to judicial documents more important. Meanwhile, it does not grant the press “special access to information not shared by members of the public generally.”\textsuperscript{831} As discussed in former parts, in determining closure, the court usually consider following aspects: the prejudiced interest, the public policy and security, whether the closure is narrowly tailored and the alternative measures of access. In context of Guantanamo trials, the secrecy and security justifications, the JTF-GTMO security management rules as well as the physical location \textit{per se} are the most controversial concerns of restriction with regard to the right of the press.

\textsuperscript{826} Id.

\textsuperscript{827} Id.

\textsuperscript{828} Id.

\textsuperscript{829} Id.


58. **Right of the Press to Access to Information**

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the press’ access to the proceedings seem reasonable?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the press have reasonable access to stakeholders in the proceedings?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the press given appropriate access to Military Commission personnel (Office of the Military Commissions), prosecution team members, defense team members, Joint Task Force – Guantanamo personnel, other Department of Defense Personnel, the NGO Observers, Victims or Family Members of Victims, and other stakeholders?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has any of the press filed Freedom of Information Act (FOIA) requests for information related to any of the defendants?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the press go on a walking tour of Camp X-Ray or other detention facilities at which prisoners are no longer held?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the press go on a walking tour of detention facilities at GTMO at which prisoners are currently held?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the press go on a tour of the GTMO courtroom?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the press complained about inadequate access depriving them of the ability to carry out their press responsibilities?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were the press excluded from any other proceedings or hearings?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
If they were excluded, were the grounds for exclusion reasonable? In compliance with the MCA?

<table>
<thead>
<tr>
<th>59. Facilities for the Press</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Yes</strong></td>
</tr>
<tr>
<td>Did it appear as though the press had all the technical and logistical support they needed to do their jobs efficiently and effectively?</td>
</tr>
<tr>
<td>Did it appear as though the press had adequate access to the internet?</td>
</tr>
<tr>
<td>Did it appear as though the press Media Operations Center (MOC) adequately met the needs of the press?</td>
</tr>
<tr>
<td>Did anything (technically, environmentally) delay or inhibit the press’s ability to do their job?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>60. Rights of the Press</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Yes</strong></td>
</tr>
<tr>
<td>Did it appear as though rights of the press were afforded to them?</td>
</tr>
<tr>
<td>Was the press attending the proceedings national, local, or international?</td>
</tr>
<tr>
<td>Were there adequate facilities for the press inside the courtroom?</td>
</tr>
<tr>
<td>Were there adequate facilities for the press outside the courtroom?</td>
</tr>
<tr>
<td>Has the press complained about inadequate access depriving them of the ability to carry out their press responsibilities?</td>
</tr>
</tbody>
</table>
V. Rights Related to Witnesses (Fact Witnesses and Expert Witnesses)

a. General
Fact and expert witnesses at criminal proceedings have rights under international and domestic U.S. law.832

b. Fact witnesses
   i. Fact witnesses called by the prosecution
   ii. Fact witnesses called by the defense

c. Expert witnesses
   i. Expert witnesses called by the prosecution
   ii. Expert witnesses called by the defense

d. Military Commission entity / program designed for witnesses (and victims)
An entity / program related to the U.S. Military Commissions at Guantanamo Bay that addresses issues of witnesses is the Office of Military Commissions Victims / Witness Assistance Program.

[This Rights of Witnesses introductory section is being developed further.]

832 Furthermore, defendants have rights related to fact and expert witnesses. These rights of the defendants are discussed supra at pages xxx – yyy.

GTMO Receives First Expert Witnesses
Professor George Edwards (USA) (left), seated next to Professor Tim McCormick (Australia) on the C-17 plane traveling to Guantanamo Bay in March 2007. Professors Edwards and McCormack were the first two expert witnesses permitted to travel to Guantanamo Bay, Cuba for U.S. Military Commission cases.
### 61. Rights Related to Fact Witnesses

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Calling Fact Witnesses: Fact Witness Identities</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any party tender any fact witnesses?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were there any objections to any fact witnesses?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were any fact witnesses who were objected to denied the opportunity to testify? If so, why were they denied of the opportunity to testify?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any fact witnesses testify?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did these fact witnesses testify live, while in the courtroom?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did these fact witnesses testify live, but from a remote location outside of the courtroom?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>How many fact witnesses testified?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any fact witnesses testify by affidavit?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did either party seek to enter into evidence a deposition or other out-of-court statement in lieu of live testimony of a fact witness?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any individuals charged in the same case (co-defendants) testify as fact witnesses?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any current or former Guantanamo Bay detainee (or defendant) testify as a fact witness?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any fact witnesses seek to have their identities protected?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any fact witnesses testify anonymously (e.g., with voice or face obscured)?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Testimony of Fact Witnesses

| Were all fact witnesses subject to cross-examination? |  |
| Did the opposing side conduct a cross-examination on all fact witnesses? |  |
| Did the fact witnesses testify about any matter that the prosecution objected to on national security grounds or because the matters to be testified to were classified? |  |
| Did any fact witnesses testify in closed session with the NGO Observers excluded? |  |
| Did any fact witnesses testify in closed session with the defendant excluded? |  |

### Safety and Security of Fact Witnesses

| Did the court mention provisions to help prevent retaliation against fact witnesses? |  |
| What provisions or mechanisms did the court mention were in place to help prevent retaliation against fact witnesses? |  |

---

**62. Rights Related to Expert Witnesses**

<table>
<thead>
<tr>
<th>Calling Expert Witnesses; Expert Witnesses Identities</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did any party tender any expert witnesses?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the court permit those expert witnesses to travel to Guantanamo Bay to testify?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were there any objections to any expert witnesses?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any expert witnesses testify?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any expert witnesses testify by affidavit?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any expert witnesses testify from physical locations outside of the courtroom?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Did those expert witnesses testify on behalf of the prosecution or the defense?

**Testimony of Expert Witnesses; National Security and Classified Information**

Were all expert witnesses subject to cross-examination?

In your opinion, did the court grant adequate time for the expert witnesses to be cross-examined?

Did the fact witnesses testify about any matter that the prosecution objected to on national security grounds or because the matters to be testified to were classified?

Did any fact witnesses testify in closed session with the NGO Observers excluded?

Did any fact witnesses testify in closed session with the defendant excluded?

**Safety and Security of Expert Witnesses**

Did the court mention provisions to help prevent retaliation against expert witnesses?

What provisions or mechanisms did the court mention were in place to help prevent retaliation against expert witnesses?

---

Photo by Justin Merriman – 14 August 2016 – U Boat.
VI. Rights & Interests of Joint Task Force-Guantanamo Bay (JTF-GTMO)

a. General

A joint task force (JTF) is a military organization consisting of elements of different military branches that work together for a unitary mission. A JTF is established when “the scope, complexity, or other factors of the contingency or crisis require capabilities of Services from at least two Military Departments operating under a single joint force commander (JFC).”

Joint Task Force-Guantanamo Bay (JTF-GTMO) consists of representatives of multiple branches of the U.S. military and performs various prisoner detention functions and various U.S. Military Commission-related functions at Guantanamo Bay, Cuba. Currently, there are approximately two-thousand U.S. military and civilian personnel associated with JTF-GTMO. Approximately twelve-hundred JTF-GTMO personnel are assigned to the Joint Detention Group (JDG), which is JTF-GTMO’s detainee guard force.

JTF-GTMO members have a wide range of rights associated with performing their official duties, including right to security (e.g., reasonable protection of their identities to help curb retaliation from detainees); right not to be instructed to perform acts that might violate international or domestic law (e.g., protection from possible war crimes or other criminal charges associated with following illegal orders); and rights to non-discrimination in employment. They have rights while they are posted at Guantanamo Bay, Cuba. And they have rights after they depart Guantanamo Bay and return home.

The Mission Statement of JTF-GTMO follows:

JTF Guantanamo conducts safe, humane, legal and transparent care and custody of detainees, including those convicted by military commission. We conduct intelligence collection, analysis and dissemination for the safety and security of detainees and JTF Guantanamo personnel working in facilities as well as in support of ongoing overseas contingency operations. We also provide support to law enforcement, war crimes investigations and the Office of Military Commissions.

Upon entering the armed forces, while individuals do not lose their human rights, “states can limit their enjoyment of human rights due to requirements related to particular characteristics of military
The realities of military life that justify the restrictions on the exercise of human rights are usually related to the preservation of order and discipline, establishing political neutrality of the armed forces, maintaining operational effectiveness, protecting classified information, and maintaining the military hierarchical structure.

Servicemembers have the right to free speech and expression but these rights must be consistent with the good order and discipline of the military and national security. For example, a soldier may participate in a demonstration or protest, but may not do so in uniform. A servicemember may express their opinion on political subjects or candidates, but may not attend partisan political events in uniform or as a representative of the armed forces, even if they do not actively participate. Servicemembers may make financial contributions to a political campaign but are prohibited from actively managing a partisan political campaign.

Additionally, servicemembers, like civilians, have the Fourth Amendment right to be free unreasonable search and seizure. However, in order to access most military installations, servicemembers consent to be subject to search of their person or quarters at any time. The base commander can issue an order to search the servicemember or his/her quarters.

### i. Types of military personnel

Military personnel fall into multiple categories and types of personnel based on their status (full-time active duty v. part-time reservists or national guard, or full-time reservists or national guard), based on the different branches (Army, Air Force, Navy, Marines, and Coast Guard), based on the type of unit of which they are a member (e.g. combat arms, combat support, combat service support), or based on their ranks (within the enlisted v. commissioned officer ranks). Civilians also play important roles in the military. How these categories of military personnel fit and work within JTF-GTMO may depend the category to which they belong. For example, a specific branch of service with active duty personnel may handle their GTMO mission differently than other branches or reserve components. A reserve component, such as a state’s National Guard, has different employment/staffing issues at JTF-GTMO than active duty categories.

### ii. Conduct of military personnel at GTMO

JTF-GTMO, like all military personnel must adhere to operating procedures contained in documents entitled Standard Operating Procedures (SOPs). JTF-GTMO and other military members conducting special operations are subject to strict SOPs based on their mission. Commanders and other leadership are responsible for briefing their personnel on the operation procedures contained in the SOP, and “failure to comply with these prohibitions and mandatory requirements of this SOP by military personnel is a violation of Article 92, Uniform Code of Military Justice.”

These SOPs contain guidelines on how JTF-GTMO are to deal with prisoners (convicted and not convicted), with others within JTF-GTMO, with other GTMO base military personnel who are not part of JTF-GTMO, with participants in the U.S. Military Commissions, including civilians such as most Observers, media, and victims and victims’ family members.

### b. International instruments addressing rights/interests of JTF-GTMO Personnel

International humanitarian law (the law of war / the law of armed conflict) is relevant to JTF-GTMO,
as is U.S. military law generally.

The Army’s Operational Law Handbook, defines the law of war as follows:

“The law of war is defined as that part of international law that regulates the conduct of armed hostilities. It is often termed the law of armed conflict.”

The law of war is derived from several sources: treaties, the Geneva Conventions, The Hague Land War Conventions, judicial decisions, military regulations, military manuals and other sources. The basic principles of this area of law are simple: the wounded and sick, prisoners of war, and civilians must be protected; military targets must be attacked in such a manner as to minimize civilian casualties and damages; humanitarian and peacekeeping personnel must be respected and cannot be targeted; neutral states have certain rights and duties; and the use of certain weapons (including chemical weapons) and methods of warfare which cause unnecessary suffering are prohibited.

Under international law, JTF-GTMO personnel are members of an armed force and must be treated as combatants. Under the Third Geneva Convention of 1949, combatants are legally entitled to fight. Combatants may attack enemy forces, kill or injure them, and destroy property while conducting military operations. These activities, if not done not in wartime, would be criminal acts. If captured, combatants must be treated as prisoners of war, rather than as criminals, because of their combatant status.

JTF-GTMO personnel are required to treat the detainees / prisoners at GTMO humanely, in accordance with international and U.S. law that prohibits torture, cruel and inhumane treatment or punishment, and discrimination based on race, creed or color or other characteristics. JTF-GTMO must respect the internationally- and U.S.-recognized rights of detainees / prisoners, including the right to a fair trial. Conversely, the detainees / prisoners are obligated to respect rights of JTF-GTMO personnel.

**c. Right to Privacy**

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to privacy, and this right is to be afforded to JTF-GTMO personnel.

Article 17 provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” According to the ICCPR General Comment No. 16 for Article 17, “this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons.” The comment further provides, “the obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.” Additionally, “Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end.” Individuals must be effectively able to protect themselves against any unlawful attacks that occur and have an effective remedy against those responsible.

JTF-GTMO SOPs for many years have shielded most JTF-GTMO personnel identities from being known to detainees / prisoners, presumably in part to protect the privacy of JTF-GTMO personnel and in part for perceived security reasons (to protect the JTF-GTMO personnel and their family members from retaliation by detainees / prisoners, who without knowing the names of the JTF-GTMO personnel would not be able to track them or their families down or harm them back in the U.S.).

849 http://www.refworld.org/docid/453883f922.html
850 http://www.refworld.org/docid/453883f922.html
851 http://www.refworld.org/docid/453883f922.html
Before the advent of Velcro nametapes, anytime personnel were in the vicinity of detainees, the nametapes on their uniforms were meant to be covered with adhesive tape. Now JTF-GTMO personnel simply swap their velcroed nametapes for blank ones. The 2003 SOP for JTF-GTMO personnel states “personnel will only interact with detainees on official business that is essential for mission accomplishment. Personnel will not fraternize with detainees nor accept personal favors or services. This includes idle chatter and small talk conducted with the detainee.” It may help personnel comply with their obligation not to fraternize if personnel name plates are fictional or blank and the detainees do not know the names of personnel.

d. Right not to be instructed to perform acts that might violate international or domestic law (e.g., protection from war crimes or other criminal charges related to following illegal orders)

The United States military has a long history with many traditions upon which the current military is built. In multinational missions, the US military is often the leader and serves as a force many countries look up to. The main reason for this is the high level of discipline the US military maintains at all levels, which has a direct impact on its effectiveness as a force. Maintaining discipline throughout the organization is critically important to the success or failure of the organization’s mission. The aim is to control a body of human beings through training for a concerted action towards a common goal. US Navy Rear Admiral Arleigh Burke stated, “a well-disciplined organization is one whose members work with enthusiasm, willingness, and zest as individuals and as a group to fulfill the mission of the organization with expectation of success.”

Military discipline, order in the ranks and combat effectiveness depend on obedience to orders. Thus, servicemembers are trained from the very beginning of their training to obey orders from their superiors.

i. Obedience to Superior Orders

Servicemembers that fail to obey the lawful orders of their superiors risk serious consequences. Each member of the military swears an oath upon their induction to “obey the orders of the President of the United States and the orders of the officers appointed over me, according to the regulations and the Uniform Code of Military Justice.” Several provisions of the UCMJ outline the punitive articles that apply to disobeying orders. Willfully disobeying a lawful command of a superior commissioned officer is a crime pursuant to Article 90 of the UCMJ. In wartime, this may be punishable by death. It is a crime to disobey any lawful order from a superior officer or non-commissioned officer under Article 91 of the UCMJ. Under Article 92, it is a crime to violate or fail to obey any lawful general order or regulation, having knowledge of any lawful order issued by any superior member of the armed forces, which it has a duty to obey, fails to obey the order, or is derelict in the performance of his duties. Violations of the UCMJ can subject a servicemember to criminal charges and non-judicial punishment and can often end a career.

Though the UCMJ does not define what an unlawful order is, the UCMJ purposely qualifies those orders that the servicemember must follow as being “lawful.” This implies that an order which is unlawful or illegal does not need to be obeyed. This comports with customary international law in which “every combatant has a duty to disobey a manifestly unlawful order.” Obeying an unlawful order can result in criminal prosecution of the one who obeys it. Military courts have held that military members are accountable for their actions even while following orders - if the order was illegal. Servicemembers have a duty to ensure that they understand the orders given to them and understand the legality of those orders.

What would an unlawful order be in the context of GTMO? If, for example, a superior officer ordered...

---

855 http://www.army.mil/values/oath.html
856 http://www.ucmj.us/
857 https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule154
a serviceman to torture a detainee or to treat a detainee inhumanely. That would be an unlawful order, and the serviceman would be required under law to disobey that order. The superior officer would be in violation of the law for ordering torture or inhumane treatment, and a service who follows such an order would also be in violation of law.

Similarly, since it is unlawful to deny a detainee the right to a fair trial, it would be unlawful to issue an order that would deny a detainee the right to a fair trial, and it would be unlawful to follow an order that would deny a detainee the right to a fair trial.

ii. Defenses

The UCMJ affords the same defenses that are available to civilians in federal criminal and civil cases. A servicemember charged with a UCMJ violation may raise defenses of mistake, justification or consent. Likewise, they may raise appropriate affirmative defenses like self-defense, assumption of risk, mutual mistake, good faith or sole negligence of a co-defendant.

A servicemember will ordinarily not be able to benefit from the defense of “superior orders” (“I took the unlawful action only because I was following orders that I was obligated to follow”). For a discussion on “superior orders”, see above.

e. Domestic law

i. The United States Constitution

JTF-GTMO personnel are subject to the U.S. Constitution and the rules governing the military that flow from the Constitution.

The Second Amendment provides that “A well-regulated Militia, being necessary to the security of a free State...shall not be infringed.” Art. I Section 8 of the Constitution provides that Congress shall “make Rules for the Government and Regulation of the land and naval Forces“. Congress enacted the Uniform Code of Military Justice (“UCMJ”) in 1950. The UCMJ contains the substantive and procedural laws governing the military justice system. The UCMJ applies to all servicemembers. The UCMJ incorporates the Constitutional protections afforded to all US citizens, however military service and the government’s interest in maintaining order and discipline in the armed forces, allows some of these rights to be abridged.

ii. Federal civil rights law

Some aspects of federal civil rights law apply in the JTF-GTMO context.

Title VII of the Civil Rights Act of 1964 prohibits employers with 15 or more employees from discriminating against employees on the basis of sex, race, color, national origin, and religion. Federal courts have held Title VII inapplicable to persons in the military or who are seeking to enlist. Additionally in Chappell v. Wallace, the court held that military personnel are precluded from bringing lawsuits against superior officers to recover damages for injuries resulting from constitutional rights violations in the course of the military member’s service.

However, section 717 of Title VII provides that “all personnel actions affecting employees or applicants for employment...in military departments...shall be made free from any discrimination based on race, color, religion, sex, or national origin.” In Gonzalez v. Department of Army, the court concluded that “the term ‘military departments’ in section 717(a) of Title VII, when read in the context of the statutory definitions to which it refers, can be fairly understood to include only civilian employees of the Army, Navy, and Air Force and not both civilian employees and enlisted personnel...” Thus, a civilian member of JTF-GTMO could bring a claim under Title VII and a military member of JTF-GTMO...
could not. However, a military member could file a complaint with their Equal Opportunity representative or the Inspector General for further investigation into the matter.

f. Female Guards and JTF-GTMO Employment Rights

Multiple GTMO prisoners, all of whom are Muslim men, have claimed that their religion forbids for them to be touched by females who are not family members. They argue that female JTF-GTMO personnel touching the detainees violates the detainees’ religious rights. A future version of this Manual will discuss how this issue was raised and dealt with at GTMO. For now, the Manual will provide information about the female guard issue as it relates to one case—the case of Hadi al-Iraqi.

In October 2014 the defense counsel for Hadi al-Iraqi filed an emergency motion for appropriate relief for physical contact with female guards to cease. Hadi al-Iraqi had been in a meeting with his attorneys, and upon the conclusion of that meeting, a female guard came to unshackle and re-shackle him to effectuate the transfer back to his cell. At the time, Hadi requested that a male guard be called to complete the procedure. A member of JTF-GTMO interpreted this as non-compliance and proceeded to use force to return him to his cell, allegedly causing Hadi physical injuries. Hadi then indicated he would no longer attend attorney-client meetings or Commission hearings if he would be touched by female guards during shackling / transfer as these conditions significantly interfered with his religious beliefs.863

The presiding Judge, Captain J.K. Waits, issued an interim order granting the defense’s emergency motion to prevent female guards from escorting Hadi.864 The interim order remained in effect until the Commission could issue a final ruling on the defense’s motion.865 Following oral arguments in session, the Judge issued a final order denying the defense’s motion in February 2015. The Judge concluded that Hadi is not afforded the protections of the Religious Freedom Restoration Act. Hadi failed to show the detention facility’s policy was not rationally related to a legitimate government interest. The government’s evidence showed that the commander of the guard force for a previous rotation had a difficult time in filling the positions with qualified people. He argued that because a number of the qualified personnel were women, he had little choice in personnel available to assign to those positions, and removing the women from their assigned teams created cohesion issues among the teams, and this might have jeopardized the security of their assigned areas. Thus, the policy to allow female guards to do their jobs was “in furtherance of the legitimate governmental interests of running a well-functioning detention facility and eliminating gender discrimination.”866

As mentioned above, the 9/11 case also includes a similar issue relating to female guards touching detainees. In January 2015, the presiding judge issued an interim order also temporarily “limiting the use of female guards to physically touch the accused during movements to and from attorney-client meetings and Commission hearings, absent exigent circumstances” until the Commission makes a final ruling on the defense motion.867

[Again, more info / analysis on the female guard and other JTF-GTMO rights and interests will be included in a forthcoming revision of the Manual.]

864 According to Hadi’s defense counsel at the time, Major Thomas Jasper, this was the only time the Judge ruled in favor of the defense. http://gitmoobserver.com/2015/09/22/guantanamo-defendant-hadi-al-iraqi-fires-his-legal-counsel/.
### 63. Joint Task Force-GTMO

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Were you aware of any complaints by JTF-GTMO personnel about working conditions?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did you encounter any JTF-GTMO personnel whose name patches on their uniforms were covered up with Velcro or other material?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were you aware of any JTF-GTMO personnel who believed that they were ordered to conduct illegal acts?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were you aware of any JTF-GTMO personnel who objected to participate in enteral feeding (“force feeding”) of detainees?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If you were aware of any JTF-GTMO personnel who objected to participating in enteral feeding (“force feeding”), are you aware of whether the personnel was reprimanded or otherwise disciplined for this?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were you aware of any JTF-GTMO personnel who believed that they were ordered to conduct illegal acts?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
VII. Rights / Interests of the U.S. public

The U.S. public has a range of rights and interests associated with the U.S. Military Commissions. The U.S. public has the right to government disclosure of what is happening at Guantanamo Bay, an interest in the smooth, efficient and cost-effective operation of the Military Commissions, and an interest in U.S. compliance with binding international and domestic law.

The U.S. public has a range of rights tied to the U.S. Military Commissions. The U.S. public has an interest in learning about what is transpiring at the Military Commissions. The U.S. public has an interest in the Military Commissions being run efficiently, as inefficient operation results in wasted fiscal resources. The U.S. public has an interest in the U.S. complying with the rule of law, and with binding international human rights law, not only because this compliance upholds values of the U.S., but also because noncompliance may jeopardize the standing of the U.S. in the international community, and may threaten the security of U.S. physical assets, and may threaten U.S. lives.

[This introductory section on rights of the U.S. public is being developed further.]

<table>
<thead>
<tr>
<th>64. Rights of the U.S. Public</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>In your opinion, has the U.S. Military Commission process failed to provide information to the U.S. public that it should have?</td>
<td>Yes</td>
<td>No</td>
<td>Don’t Know</td>
</tr>
<tr>
<td>During your observations, did you encounter anything to suggest that the U.S. Military Commissions could be operated in a manner that would be more efficient, costing U.S. taxpayers less money, while preserving the interests of other stakeholders?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any members of the U.S. public who have sought to have the Military Commission broadcast more widely than the dispatches to the pre-designated secure locations in the U.S.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
VIII. Rights / Interests of the International Community

Nations other than the U.S. have rights and interests related to the U.S. Military Commissions at Guantanamo Bay. International community stakeholders include nations whose citizens are detained at Guantanamo Bay, nations whose citizens were harmed by the criminal behavior charged, nations that are party to treaties that are a source of international law that binds the U.S., and all nations that are bound by customary international law.

a. General

The international community has rights interests in what happens at Guantanamo Bay. Nations that have nationals who are detained at Guantanamo Bay have rights and interests in a fair trial, irrespective of whether or not charges have been brought against those individuals. Nations whose citizens were harmed by the behavior that underlies the charges have rights and interests. Nations that are parties to the Geneva Conventions, the ICCPR, the CAT and other treaties that bind the U.S. have an interest in what transpires at Guantanamo Bay. All nations, irrespective of any treaty participation, have interests in whether and how the U.S. is complying with customary international law, which binds not only the U.S. but also all nations.

[This introductory section on rights and interests of the international community is being developed further.]

65. The International Community

| Are you aware of any discussions involving representatives of other nations about the hearings you observed? | Yes | No | Don’t Know | Comment |
| Are you aware of any comments, criticisms, or praise by other nations regarding the hearings you observed? | | | | |
| Are you aware of any comments or criticisms about the Military Commission by states that members of the United Nations? | | | | |
| Are you aware of any comments or criticisms about the Military Commission by states that parties to the Convention Against Torture, that the U.S. has signed and ratified? | | | | |

868 The U.S. is a party to the Vienna Convention on Consular Relations. Other states that are party to this treaty who have citizens in custody at Guantanamo Bay have rights under the treaty.
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are you aware of any comments or criticisms about the Military Commission by states that parties to the ICCPR, that the U.S. has signed and ratified?</td>
<td></td>
</tr>
<tr>
<td>Are you aware of any comments or criticisms about the Military Commission by states that parties to the ICCPR?</td>
<td></td>
</tr>
<tr>
<td>Are you aware of any comments or criticisms about the Military Commission by states that parties to the Vienna Convention on Consular Relations, that the U.S. has signed and ratified?</td>
<td></td>
</tr>
<tr>
<td>Are you aware of whether any state has sought to exercise diplomatic protection against the U.S. related to any defendant whom that state has argued has been harmed by an unfair trial, treatment, or unfair detention or conditions of detention?</td>
<td></td>
</tr>
<tr>
<td>Are you aware of whether any state has sought to exercise diplomatic protection against the U.S. related to any victim whom that state contends has been harmed by any defendant or detainee?</td>
<td></td>
</tr>
</tbody>
</table>
IX. Rights / Interests of Non-Governmental (NGO) Observers

Independent, objective non-governmental organizations (NGOs), such as The Gitmo Observer, seek to ascertain whether all stakeholders are receiving a fair trial at the Guantanamo Bay Military Commissions. NGOs may seek to determine whether the Military Commissions comply with, or do not comply with, international and U.S. law. To be able to make this assessment, certain logistical, access and other conditions must be in place for the NGOs.

a. General – Why NGOs?

The Pentagon has stated that it seeks to have open, transparent Military Commission proceedings at Guantanamo Bay. To facilitate this openness and transparency, the Pentagon has permitted Non-Governmental Organizations (NGOs) to travel to Guantanamo Bay, Cuba to monitor the proceedings. This openness and transparency permits NGOs to be the eyes and ears of the proceedings to the outside world, unable to occupy one of the limited number of seats devoted to NGOs in the Guantanamo Bay courtroom. This openness and transparency permits NGOs to attend, observe, analyze, critique and report on Guantanamo Bay proceedings, with a bird’s eye view.

NGO representatives who have a firm grasp of the applicable, binding law will be able to witness facts on the ground at Guantanamo Bay, apply the law to the facts, and ascertain for themselves whether they believe that the Military Commissions are complying with, or not complying with, international and domestic law. The NGO representatives can publish their reports accordingly.

For NGOs to be able to do their job well – to attend, observe, analyze, critique and report well – they require the hand of the Pentagon.

[This introductory section on NGO Observers is being developed further.]

---

869 The Pentagon’s stated criteria in selecting NGO Observers are: (a) the reach of the applicant (e.g., audience size, readership, subscriptions, circulation, viewers, listeners, website hits, writings, broadcasts, professional standing, diversity of audiences, etc.); (b) the nexus of the applicant’s organizational mission to military commissions, wartime detention or prosecution, international law, and/or human rights; and (c) the extent to which applicant has provided longstanding and frequent coverage of issues relating to military commissions, wartime detention or prosecution, international law, and/or human rights. See http://www.mc.mil/Portals/0/Observer%20Selection%20Criteria.pdf. See also infra at TAN xxx – yyyy.
66. NGO Observers - Participation

<table>
<thead>
<tr>
<th>Presence &amp; Participation of NGO Observers</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>What other Observers were present during your observation mission?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If you observed at Guantanamo Bay, did the Office of Military Commissions inform you of the identities of other Observers before you departed on the mission, to permit you an opportunity to reach out to other NGO participants for coordination, collaboration or other purposes?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were any of the proceedings closed to Observers?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If any of the legal proceedings were closed to NGO Observers, what were those legal proceedings and what was the legal basis for closing the proceedings to NGO Observers?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
67. NGO Observe Facilities, Internet Access, and Other Aspects of NGO Observers Fulfiling Their Responsibilities

<table>
<thead>
<tr>
<th>U.S. Constitutional Rights of NGOs</th>
</tr>
</thead>
<tbody>
<tr>
<td>In your opinion, in conjunction with the Military Commissions, were NGO Observers afforded their First Amendment rights to free expression, including right to share information and the right to receive information?</td>
</tr>
<tr>
<td>In your opinion, in conjunction with the Military Commissions, were NGO Observers afforded their First Amendment rights to freedom of association, regarding, for example, being able to contact and spend time with other stakeholders in the Military Commission process?</td>
</tr>
<tr>
<td>Were any NGO Observers subject to any discipline action or reprimanded for allegedly breaching any Guantanamo Bay or Military Commission rules or procedures?</td>
</tr>
<tr>
<td>If any NGO Observer was subject to any disciplinary action or reprimand for allegedly breaching any Guantanamo Bay or Military Commission rules or procedures, what was the nature of the alleged breach and what was the outcome of the disciplinary action or reprimand?</td>
</tr>
</tbody>
</table>

68. NGO Access to Information, Contact with Other Stakeholders

<table>
<thead>
<tr>
<th>NGO Observer Access to Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Were any classified materials discussed? Did the red light go off indicating that classified materials was being discussed and the audio to the NGO Observer gallery was being turned off?</td>
</tr>
<tr>
<td>At Guantanamo Bay, did NGOs have access to the information they needed in order to carry out their NGO Observer responsibilities?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NGO Observer Discussion Opportunities with the Prosecution?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the NGO Observers have an official (or unofficial) meeting with the Chief Prosecutor or prosecution team members at Guantanamo Bay?</td>
</tr>
</tbody>
</table>
If the NGO Observers had an official (or unofficial) meeting with the Chief Prosecutor or with prosecution team members at Guantanamo Bay do you believe that the Chief Prosecutor or prosecution team members answered your questions candidly and directly?

Did the Chief Prosecutor or prosecution team members provide NGO Observers with written information about the hearings?

Did the Chief Prosecutor or prosecution team members provide NGO Observers with computer disks containing information, or provide electronic links to information?

**NGO Observer Discussion Opportunities with the Defense?**

Did the NGO Observers have an official (or unofficial) meeting with the Chief Defense Counsel, or with any Defense Counsel or defense team members at Guantanamo Bay?

Was the NGO Observer official (or unofficial) meeting with the Chief Defense Counsel separate from any meeting(s) with any Defense Counsel or any defense team members?

If the NGO Observers had an official (or unofficial) meeting the Chief Defense Counsel, or any Defense Counsel team or team members at Guantanamo Bay do you believe that the Chief Defense Counsel or Defense Counsel members answered your questions candidly and directly?

Did the Chief Defense Counsel or defense team members provide NGO Observers with written information about the hearings?

Did the Chief Defense Counsel or defense team members provide NGO Observers with computer disks containing information, or provide electronic links to information?

**NGO Observer Discussion Opportunities with Office of Military Commissions personnel, Joint Task Force Detention personnel, victims & victims’ families, the press, and other stakeholders?**

Did the NGO Observers have opportunities for substantive discussions with Office of Military Commissions personnel?

Did the NGO Observers have opportunities for substantive discussions with Joint Task Force Detention personnel?
<table>
<thead>
<tr>
<th>Question</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the NGO Observers have opportunities for substantive discussions with victims’ families?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the NGO Observers have opportunities for substantive discussions with the press?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the NGO Observers have opportunities for substantive discussions with any participants in the process other than the prosecution, defense, Office of Military Commissions, Joint Task Force Detention personnel, or press?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 69. NGO Observer Facilities, Internet Access, and Other Aspects of NGO Observers Filling Their Responsibilities

#### NGO Observer Facilities – Guantanamo Bay

<table>
<thead>
<tr>
<th>Question</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>At Guantanamo Bay, did NGO Observers have reasonable access to facilities needed to fulfill their observers’ responsibilities?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>At Guantanamo Bay, were facilities in the NGO Internet Resource Center adequate?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>At Guantanamo Bay, was a printer with printer supplies made available for NGO Observers to use?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>At Guantanamo Bay, were other materials made available to help facilitate NGO Observers to do their jobs?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### NGO Observer Facilities – Ft. Meade

<table>
<thead>
<tr>
<th>Question</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>At Ft. Meade, did NGO Observers have reasonable access to facilities needed to fulfill their observers’ responsibilities?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>At Ft. Meade, was a printer with printer supplies made available for NGO Observers to use?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>At Ft. Meade, were other materials made available to help facilitate NGO Observers to do their jobs?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### NGO Observer Internet Access

<table>
<thead>
<tr>
<th>Question</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>
At Guantanamo Bay, did NGO Observers have internet access by Ethernet in the NGO Resource Center? Wireless??

At Guantanamo Bay, if NGO Observers had internet access via Ethernet in the GTMO NGO Resource Center, what was the cost to the NGO Observer of that internet access?

At Guantanamo Bay, if NGOs were charged a fee to connect to the internet using Ethernet, what was the fee?

At Guantanamo Bay, if there was an internet fee for connecting via Ethernet, was the usage fee prorated if the hearings were for less than one week, or was the rate fixed and payable whether the internet was connected and used for one minute only or used for the entire week?

At Guantanamo Bay, if NGOs were charged a fee to connect to the internet using wifi, what was the fee?

At Guantanamo Bay, if there was an internet fee for connecting via wifi, was the usage fee prorated if the hearings were for less than one week, or was the rate fixed and payable whether the internet was connected and used for one minute only or used for the entire week?

At Ft. Meade, could NGO Observers access the internet while viewing the hearings?

NGO Accommodations

Were the Guantanamo Bay housing accommodations adequate?

Access to / Tours of Detention Facilities

Did the NGO Observers have a walking tour of Camp X-Ray or other detention facilities at which prisoners are no longer held?

Did the NGO Observers have a drive-by tour of Camp X-Ray or other detention facilities at which prisoners are no longer held?

Did the NGO Observers have a walking tour of Camp X-Ray or detention facilities at GTMO at which prisoners are currently held?

Did the NGO Observers have a drive-by tour of Camp X-Ray or detention facilities at GTMO at which prisoners are currently held?
<table>
<thead>
<tr>
<th>70. Threats, Intimidation, Security Issues, Monitoring the Observers; NGO Hurdles</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Threats, Intimidation, Security Issues, Monitoring the Observers</strong></td>
</tr>
<tr>
<td>Did you feel threatened in any way by personnel or others during your trip to Ft. Meade or Guantanamo Bay?</td>
</tr>
<tr>
<td>Were you aware of any government monitoring of your activities, movements or communications while at Guantanamo Bay?</td>
</tr>
<tr>
<td>Were you aware of any government monitoring of your activities, movements or communications while at Ft. Meade?</td>
</tr>
<tr>
<td>Did any observation, monitoring or other your observation mission limit your ability to carry out your observation objectives?</td>
</tr>
<tr>
<td>Did you encounter any logistical, security or other issues regarding your observation at Guantanamo Bay or Ft. Meade?</td>
</tr>
<tr>
<td>When you arrived at the Ft. Meade Visitor Center to collect your Ft. Meade access badge did you encounter any difficulties? Was your approved paperwork ready? Did you receive the correct (daily, weekly, yearly) badge? Did you have to wait long? Were you able to reach the viewing room on time?</td>
</tr>
<tr>
<td>Did you have difficulty securing entrance to Ft. Meade?</td>
</tr>
<tr>
<td><strong>Hurdles to NGO Observers</strong></td>
</tr>
<tr>
<td>Did you encounter any hurdles to your ability to carry out your NGO Observer responsibilities?</td>
</tr>
<tr>
<td>If you encountered any hurdles to your ability to carry out your NGO Observer responsibilities, what were those hurdles?</td>
</tr>
<tr>
<td>If you encountered any hurdles to your ability to carry out your NGO Observer responsibilities, were those hurdles overcome? How were those hurdles overcome? In what manner? Who facilitated the removal of the hurdles?</td>
</tr>
<tr>
<td>Were you as an NGO Observer able to fulfill your remit per your sending organization?</td>
</tr>
</tbody>
</table>
## 71. NGO Observers De-Briefing; Being Eyes and Ears of Outside World;

<table>
<thead>
<tr>
<th>NGO Observer Reports / De-Briefing Memos / Blog Posts / Scholarly Articles / Other Publications?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did you prepare a NGO Observation Report, De-Briefing Memo, Blog Post, or other publication on your hearing observations?</td>
</tr>
<tr>
<td>Did you publish your NGO Observer Report, De-Briefing Memo, or Blog Post, or Scholarly Article?</td>
</tr>
<tr>
<td>If you published your NGO Observer Report, De-Briefing Memo, or Blog Post, or Scholarly Article, what is the citation / URL?</td>
</tr>
</tbody>
</table>

### NGO Observer as Eyes and Ears to Outside World for Those Unable to attend Military Commission Hearings

As an NGO Observer did you feel as though you had the resources and facilities to serve as the eyes and ears to the outside world for those unable to attend U.S. Military Commission proceedings at Guantanamo Bay, Cuba or Ft. Meade?  
As an NGO Observer did you believe that you served as the eyes and ears to the outside world for those unable to attend U.S. Military Commission proceedings at Guantanamo Bay, Cuba or Ft. Meade?  
As an NGO Observer did you fulfill your and your organization’s goals of attending, observing, analyzing, critiquing and disseminating information about the Military Commissions at Guantanamo Bay, Cuba?  

### NGO Recommendations

Do you as an NGO Observer have any recommendations or comments to offer to any individual or entity associated with the U.S. Military Commissions at Guantanamo Bay, Cuba?  
Do you as an NGO Observer have any recommendations or comments to offer to any U.S. Military Commissions at Guantanamo Bay, Cuba stakeholder?
NGO Observers at Camp Justice, Guantanamo Bay, during hearings in the 9-11 case against Khalid Shaik Mohammad and other alleged perpetrators of the September 2001 Pentagon and World Trade Center attacks (June 2014).
X. Conclusion [Forthcoming]
Glossary
Glossary


505(g) Notice. Rule 505(g) of the MCA of 2009 requires the defense to file a document, commonly known as a 505 notice, to inform the prosecution and the Military Commission that the defense seeks to refer to classified material in live court.

505(h) Hearing. Pursuant to Rule 505(h) of the Military Commission Rules of Evidence, upon request and relevant demonstration of reasonable national security concern from the Government, the military judge may conduct an in camera presentation to determine whether the information at issue may be disclosed. (Source: Rule 505(h), the Military Commission Rules of Evidence)

505(h) Notice. Pursuant to Rule 505(h) of the Military Commission Rules of Evidence, prior to the in camera presentation, the Government shall provide the defense notice identifying the classified information at issue. (Source: Rule 505(h), Military Commission Rules of Evidence)

506 Hearing. Pursuant to Rule 506 of the Military Commission Rules of Evidence, upon any party’s motion or sua sponte, the military judge may hold a pretrial session to consider the disclosure of “government information”, which includes official communications and documents and other non-classified information within the custody or control of the Federal Government and is privileged.

802 Conference. After a case is referred, Rule 802 of the Military Commission Manual permits that the judge “may, upon request of any party or sua sponte, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.” Conferences under 802 are intended to inform the judge of anticipated issues and to resolve issues upon which the parties agree. The Conferences are not intended to litigate or decide contested issues. Matters raised at 802 conferences could include, for example, apprising the judge of issues or problems, or discussing schedules, issues related to voir dire, or courtroom seating arrangements. Hearings under 802 may be held before or during trial, and may be conducted by radio, telephone, or other method.

803.

806. Rule 806 of the Rules for Military Commissions (14 August 1012) is the general rule that provides that military commission hearings / trials shall be held in public. It provides in part:

(a) In general. Except as otherwise provided in chapter 47A of title 10, United States Code, and this Manual, military commissions shall be publicly held. For purposes of this rule, “public” includes representatives of the press, representatives of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities. Access to military commissions may be constrained by location, the size of the facility, physical security requirements, and national security concerns.

Abate. (See Abatement). To cause a proceeding to be interrupted or suspended.
Abatement. (See Abate). When a proceeding is interrupted or suspended. E.g., the judge may order that the case against a defendant be abated (or be in abatement) pending the outcome of some legal issues. See Stay. Continuance.

Accede (See Accession). Method by which a state may become party to a treaty when the state did not sign the treaty. A state may “accede” to a treaty. A state may become party to a treaty by the process of “accession”. Accession is a method through which a state expresses its consent to be bound to a treaty and thus becomes obligated to comply with the terms of the treaty in good faith. See Vienna Convention on the Law of Treaties.

Accession. (See Accede). Method by which a state may become party to a treaty when the state did not sign the treaty. A state may “accede” to a treaty. A state may become party to a treaty by the process of “accession”. Accession is a method through which a state expresses its consent to be bound to a treaty and thus becomes obligated to comply with the terms of the treaty in good faith. See Vienna Convention on the Law of Treaties.

Accused. A defendant charged with one or more Military Commission crimes.


Agency (The Agency). The Central Intelligence Agency. The CIA.

Alien. The Military Commission Act of 2009 provides that the “term ‘alien’ means an individual who is not a citizen of the United States.” (§ 948a(1))

Alien Unprivileged Enemy Combatant. The Military Commission Act of 2009 provides that “Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.” (10 U.S.C. § 948c, titled “Persons subject to military commissions”)

Amicus Curiae. Literally "friend of the court." Amici are disinterested persons, usually attorneys or experts in a relevant field, who appear and participate in judicial proceeding to assist the court by providing information and broadening their perspectives on issues raised by the parties. For example, an individual or group might file an Amicus Curiae Brief explaining why a procedure or standard of review should or should not be applied in a given case.

Amparo. The writ of Amparo, a procedural instrument to protect fundamental rights and freedoms not covered by habeas corpus, regardless of whether a public or private authority produced the violation. The writ derives from the domestic practice of Mexico and developed into different forms in Latin American countries. (Source: G. O. Hoyos, The Amparo Context in Latin American Jurisdiction: an approach to an empowering action, GlobaLex http://www.nyulawglobal.org/globalex/Amparo.htm)

Andreas Air Force Base. See Joint Base Andrews.

APACS (Automated Personnel and Aircraft Clearance System). Individuals embarking on Department of Defense authorized travel outside of the United States must be cleared for such travel through the DoD Foreign Clearance Program. The APACS is used to standardize the form of the clearance requests and provides a single communication venue to send, receive and process requests. It is designed to capture all the travel requirements.

Appeal (Appeal of Verdict). A challenge to a court’s verdict. Each case that includes a guilty verdict is referred to the U.S. Court of Military Commission Review. After the Court of Military Commission Review makes a decision, either party may appeal to the U.S. Court of Appeals for the District of
Columbia. By writ of certiorari, the United States Supreme Court may review the Court of Appeals judgment. (Source: http://www.mc.mil/aboutus.aspx )

**Appeal (Interlocutory Appeal).** Generally, only final judgments are appealable. However, an appeal from an interlocutory order, issued before a final judgment, is possible when: (1) the order conclusively determined the disputed question; (2) the order “resolve[s] an issue completely separate from the merits of the action”; and (3) the order is “effectively unreviewable on appeal from a final judgment.” *Hallock v. Bonner*, 387 F.3d 147(2d Cir. 2004), In context of the military commissions, the United States may take an interlocutory appeal to the United State Court of Military Commission Review of any ruling or order of the military judge (1) that terminates the proceeding with respect to a charge or specification; (2) that excludes evidence that is substantial proof of a fact material in the proceeding or (3) that relates to a matter of classified information under certain conditions. (See 10 USC §950d)

**Appellate Exhibit (AE).** A document or object identified by the U.S. Military Commission court as evidence. (Source: Rule 506, 505, 612, Military Commission Rules of Evidence)

**Armed Forces.** According to Customary International Humanitarian Law, the “armed forces” of a party to the conflict consist of “all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.” The U.S. Naval Handbook (1995) states that combatants include “all member of the regular organized armed forces of a party to the conflict…as well as irregular forces who are under responsible command and subject to internal military discipline, carry their arms openly, and otherwise distinguish themselves clearly form the civilian population.” (Source: Rule 4, ICRC Customary International Humanitarian Law; §5.3, United States, the Commander’s Handbook on the Law of Naval Operations NWP 1-14M/MCWP 5-2.1/COMDT PUB P5800.7)

**Arraignment.** Usually the first step in a criminal prosecution. In the arraignment, the defendant appears before the court to hear charges against him or her, and to enter a plea. Pursuant to Rule 904 of the Manual for Military Commissions, an arraignment “shall be conducted in a military commission session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead.” (Source: Rule 904, Manual for Military Commissions)

**Arrested**

**Article III Court.** A court established under Art. III of the U.S. Constitution. Article III courts include U.S. District Courts with original jurisdiction, U.S. Courts of Appeals, and the U.S. Supreme Court. These are also known as “federal courts”, as distinguished from “state courts” of the different U.S. states. The federal courts may only decide cases over which the Constitution grants them authority. Art. III, Sect. II of the Constitution describes the types of cases that federal courts may adjudicate. Judiciable controversies include those "between two or more states; between a State and Citizens of another State; between Citizens of different States; [or] between Citizens of the same State claiming Lands under Grants of different States." (U.S. Const. Art. III) The Constitution also provides that federal courts may hear cases involving relations with other nations.

**Attorney.** A person who is designated to practice law before relevant authorities. For Military Commissions proceedings, defendants do not have a free choice of attorneys. Instead, they only have access to military lawyers (JAGS) or civilian attorneys with the relevant security clearance. (Source: "Trial Guide for Military Commissions, 2004." United States Department of Defense. August 17, 2004).

**Attorney-client Privilege.** Stemming from the strong tradition of loyalty between the attorney and client, this privilege provides the client the right to prevent his attorney from disclosing any confidential
communications between the client and the attorney. The privilege is protected under federal and international law. (Source: Model Rules of Professional Responsibility, Rule 1.6, ICCPR Art. 14(3)(b))

**Authority (Persuasive Authority).** Distinguished from "binding authority", persuasive authority does not bind on a court, but carries some weight and may assist judges in making decisions. Persuasive authority may come from legal experts, other jurisdictions, scientific studies, polls, etc. (Source: "Binding Authority." West's Encyclopedia of American Law, edition 2. 2008. The Gale Group 3 Mar. 2015)

**Banana Rat.** Hutias, cavy-like rodents, commonly seen at the Guantanamo Bay Naval Base.

**Base Emergency Engineering Force (BEEF).** At Guantanamo Bay BEEF is the unit that provides Camp Justice services, including maintenance of the Quanset hut tents (including bedding, furniture, electricity), laundry, latrines, showers, and the grounds.

**Baseline review.** In October 2011, JTF-GTMO changed the military prison security policy. These changes included a review of communications between the defense counsels and detainees related to commission cases. As part of the review, Prison authorities seized all legal mail from high-value detainees. Defense attorneys of these detainees objected, alleging that the military authorities violated the attorney-client privilege. This review is known as “Baseline Review”. Source: [http://www.washingtonpost.com/pb/world/national-security/guantanamo-authorities-reading-attorney-client-mail-lawyers-say/2011/11/01/glQAXoQkdM_story.html](http://www.washingtonpost.com/pb/world/national-security/guantanamo-authorities-reading-attorney-client-mail-lawyers-say/2011/11/01/glQAXoQkdM_story.html)

**Bean Hole Cover.** See Bean Hole. The latchable door to a bean hole.

**Bean Hole.** The slot in “food tray slot” in the door of a detainee’s cell through which food is transferred in, empty food trays are transferred out, and through which detainee’s hands are inserted for shackling or unshackling. Items other than food may also be passed through bean holes. Standard Operation Procedure requires that the latchable bean hole covers be closed at all times except when serving food, shackling, passing items to detainees, or for medical checks.

**Binding (Binding Authority).** Distinguished from "persuasive authority". In international law, binding laws are rules that have legal force and impose obligations on the state parties upon signature, ratification of the treaty (for treaties), or simply as a member of the international community (for customary international law and *jus cogens*) In federal law, binding laws are rules that impose obligations on a court through relevant statutes or case law precedent. (Source: "Binding Authority." West's Encyclopedia of American Law, edition 2. 2008. The Gale Group 3 Mar. 2015)

**BEEF.** See Base Emergency Engineering Force

**Brig.** Abbreviation of Brigadier. Also the name of a military prison.

**Burden of Proof.** A party’s duty to establish facts proposed in court by evidence under certain thresholds. Examples of thresholds include "probable cause", "preponderance of the evidence", "clear and convincing evidence", and "beyond a reasonable doubt." In criminal cases, the burden of proof is on the prosecution and this must be established beyond a reasonable doubt.

**C-130.** Lockheed C-130 Hercules, a four-engine turboprop military transport aircraft.

**Camp Justice.** The expeditionary legal complex at the Guantanamo Bay Naval Base. Camp Justice is a tent city where non-governmental observers media, and other personnel live when participating in the Military Commissions. The courtroom is housed there, along with other facilities.

**Capital Case.** Pursuant to Rule 103(a)(3) of the Rules for Military Commissions, “capital case” refers to “a military commission to which a capital offense has been referred with an instruction that the case be treated as capital, and, in the case of a rehearing or new or other trial, for which offense death remains an authorized punishment under R.M.C.” (Source: Rule 103(a)(3), Rules for Military Commissions)

**Captured.** A person, usually a combatant, who is detained by a belligerent party in the battlefield.
**Charge.** At the defendant’s arraignment, the prosecution will accuse the defendant of having perpetrated a specific crime, called a charge. (Source: Black’s Law Dictionary)

**Chief Defense Counsel (CDC).** Chief Defense Counsel is a military position in the Department of Defense. It is the administrative head of the Office of the Chief Defense Counsel, and is a component of the Office of Military Commission. The CDC is responsible for supervising all defense activities, and for ensuring and facilitating the proper representation of all the defendants referred to trial before the Military Commission. (Source: [http://www.mc.mil/aboutus/organizationoverview.aspx](http://www.mc.mil/aboutus/organizationoverview.aspx); [http://www.defense.gov/news/May2003/d20030430milcominstno4.pdf](http://www.defense.gov/news/May2003/d20030430milcominstno4.pdf))

**Citizen of the U.S. (See Permanent Resident of the U.S.; National of the U.S.)**

**Civil Law.** Legal system originating from Roman law, in which codified codes serves as the primary source of law. Unlike in the common law system, case law does not bind under a civil law regime.

**Classified Information.** The Military Commission Act of 2009, § 948a(2) provides that the term ‘classified information’ means the following:

‘(A) Any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security.

‘(B) Any restricted data, as that term is defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).


**Client.** In military commission cases, usually refers to the defendant, who is the defense counsel represents and for whom the defense counsel works.

**Coalition Partner (of the U.S.).** The Military Commission Act of 2009 provides that the term ‘coalition partner’, with respect to hostilities engaged in by the United States, means any State or armed force directly engaged along with the United States in such hostilities or providing direct operational support to the United States in connection with such hostilities. (948a(3)

**Co-Defendant.** One of multiple defendants who has been charged for prosecution in the same case. (Source: Black’s Law Dictionary)

**Commanding Officer (CO).** Officer in command of a military unit. Pursuant to Art. 15 of Uniform Code of Military Justice, a commanding officer may impose non-judicial punishment “for minor offenses without the intervention of a court-martial”. (Source: Art. 15, Uniform Code of Military Justice)

**Commission (See Military Commission).** Pursuant to the Military Commission Act, a Military Commission is a military court exercising jurisdiction over alien unprivileged enemy belligerent who has engaged in hostilities, or who has purposefully and materially supported hostilities against the United States, its coalition partners or was a part of al Qaeda. (Source: §948, Military Commission Act 2009)

**Common Article 2 of the Geneva Conventions.** Each of the four Geneva Conventions contains an identical Article 2, and Article 2 is thus “common to” all four of the Geneva Conventions. Common Article 2 relates to armed conflicts of an international nature. Common Article 2 provides:

“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may
not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

Common Article 3 of the Geneva Conventions. Each of the four Geneva Conventions contains an identical Article 3, and Article 3 is thus “common to” all four of the Geneva Conventions. Common Article 3 relates to armed conflicts of a non-international nature. Common Article 3 provides:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further Endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

Common Law. In contrast to civil law, common law refers to a body of law developed by judges through precedents. The core principle for common law is stare decisis.

Competent (Tribunal). A form of judicial guarantee ensuring that the defendant receives a fair trial. Art. 14(1) of International Covenant on Civil and Political Rights and Art. 8(1) of American Convention on Human Rights mention the term “competent” tribunal, meant to ensure that the tribunal is independent and impartial. Noticeably, Art. 84(2) of Geneva Convention III provides that “in no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality.” This requirement also applies to military tribunals trying a prisoner of war. (Source: Art. 14(1), ICCPR; Art. 8(1), ACHR; Art. 84(2), GCIII)

Confidential. A category of classified information requiring clearance. According to Executive Order 12958, "confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe. (Source: Executive Order 12958 on Classified National Security Information)

Continuance. When the judge orders the date of a trial or hearing or other court appearance be postponed, by request of a party, by requested of all parties, or on the judge’s own motion (sua sponte). See Stay; Abate; Abatement.

Convening Authority (CA). The individual empowered to convene military commissions, refer charges, negotiate pre-trial agreements, and review records. Generally, the Office of Convening Authority is responsible for “the overall management of the military commission process.” (Source: http://www.mc.mil/aboutus/organizationoverview.aspx)
Convention. A term that refers to a treaty (source Vienna Convention on the Law of Treaties). For examples, the International Covenant on Civil and Political Rights. [Quote the definition of “treaty” from the Vienna Convention on the Law of Treaties.]

Conviction. The judicial determination that a defendant is guilty of a crime. Must be decided by a "beyond a reasonable doubt" standard.

Counsel (Learned Counsel). In capital cases, a defendant will be appointed a “learned counsel” who is specialized in capital litigations at the expense of the Department of Defense. The Learned Counsel may be a military attorney or a civilian defense attorney. (Source: http://www.mc.mil/aboutus/organizationoverview.aspx)


Court. Judicial tribunal authorized to resolve legal disputes.

Court Security Officer (CSO). A member of the military judge’s staff. In the courtroom during a proceeding, CSO positions next to the military judge. S/he has the ability to activate the censorship button and cut the radio feed if any classified information arises. (Source: http://www.reuters.com/article/2013/01/31/us-usa-guantanamo-idUSBRE90U0Z720130131; http://www.huffingtonpost.com/2013/01/28/guantanamo-secret-censor_n_2568595.html)

Crimes Against Humanity. Early developed by treaty law (1899 Hague Conventions) and international judicial practice (Nuremberg, ad hoc Tribunals for Former Yugoslavia and Rwanda, International Criminal Court), crimes against humanity generally refers to large-scale crimes shock the conscience of the humankind as a whole. Noticeably, terrorism per se is not explicitly included in the crimes against humanity under the International Criminal Court statute. Meanwhile, the terroristic activities meeting the elements of crime shall fall within the category of crimes against humanity. (Source: Crimes Against Humanity, Max Planck Encyclopedia of Public International Law) Crimes Against Humanity must be widespread or systematic, and can include slavery, torture, extrajudicial punishments, kidnappings, persecution, etc. Such crimes do not constitute Crimes Against Humanity if they are isolated in nature. Such isolated acts may, however, be deemed War Crimes under international law under the right circumstances.

Cross-Examine. A party’s questioning the witness testifying in favor of the opposing party. The purpose of cross-examination is usually to discredit the witness in order to cast doubt upon his testimony. The scope of questions asked during cross-examination is generally limited to topics raised during direct-examination. (Source: "cross-examination. " A Law Dictionary, Adapted to the Constitution and Laws of the United States)

Cruel, inhuman or degrading treatment of punishment. [Also reference to the 8th Amendment to the U.S. Constitution] Act prohibited by various human rights instruments and customary international law. The prohibition of torture and cruel, inhuman, or degrading treatment or punishment is absolute and non-derivable. Moreover, international tribunals and national courts have both decided that this prohibition has become jus cogens and binds on all states. (Source: Art. 5, Universal Declaration on Human Rights; Art. 7, ICCPR; Art. 5(2), ACHR; Art. 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Prosecutor v. Furundžija, Trial judgment, Case No IT-95-17/1-T, ICL 17 (ICTY 1998); ex parte Pinochet v Bartle and Commissioner of Police for the Metropolis, Appeal, [1999] UKHL 17, ILDC 1736 (UK 1999)) D.C. Circuit, United States Court of Appeals for the District of Columbia Circuit.
Customary International Law. A source of international law which has binding force upon states. Different from international treaties, customary international law refers to obligations arising from state practice and opinio juris.

D.C. Circuit. The U.S. Court of Appeals for the District of Columbia.

Death Penalty. Available type of punishment before the Military Commission. The Military Commission requires unanimous votes of its members on conviction and on sentence before a defendant can receive the death penalty. (Source: http://www.deathpenaltyinfo.org/rules-military-tribunals)

Death Penalty Mitigation Specialist (See Mitigation Specialist). A member of the defense team specialized in coordinating investigations of the defendant’s background, history, physical and mental situation, level of participation in the alleged offense, as well as other relevant evidence, in order to provide reasons why the defendant should not be sentenced to death. They are mandatory participants in all military commission capital cases. (Source: ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases. (Rev. Ed. Feb. 2003)

Declarant. A person who makes a statement or declaration.

Defendant. The accused person in a military commission.

Defense Counsel. The attorney who represents the defendant in a military commission.

Defense Intelligence Agency (DIA). DIA is a Department of Defense combat support agency, which produces, analyzes, and disseminates foreign military intelligence. (Source: http://www.dia.mil/About/FAQs.aspx)

Defense(s). The defendant’s assertion stating why the plaintiff/prosecution shall not prevail in the case before the court.

Defense Team. The defense counsel and others who are working on behalf of the defendant in a military commission. Team members may include paralegals, Learned Counsel, detailed counsel, interpreters, security officers, and others.

Deposition. A witness’ out-of-court testimony. Pursuant to Rule 702 of the Manual for Military Commissions, “A deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission.” (Source: Rule 702, Manual for Military Commissions)


Detail. An appointment of a person to a particular duty. §948 of the Military Commission Act provides the composition of the Military Commissions and detail of military judge, trial counsel, defense counsel, reporters, interpreters and other personnel. (Source: §948, Military Commission Act)

Detainee. A person who is held in custody by an authority. Pursuant to the Detainee Treatment Act, “Detainee” refers to a person “in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility.” (Source: Detainee Treatment Act Title X, H.R. 2863)

Detainee Information Management System (DIMS)

Detainee Information Management System-Fusion (DIMS-F)

Detention. Holding a person in custody. Most persons being held at Guantanamo Bay are in “pretrial detention”, with no charges filed against them.

DIMS. Detainee Information Management System.

DIMS-Fusion. Detainee Information Management System-Fusion. The U.S. Army website noted this about DIMS-Fusion:
Detainee Information Management System-Fusion (DIMS-F) has been selected as acquisition program of record. DIMS-F is a web-accessible automated information system that will integrate the best capabilities of the Detainee Information Management System (DIMS) and Detainee Reporting System.

Recent additions include medical and legal modules to ensure a robust, expeditionary, and single-system for detainee information and facility management. The DIMS-F provides an end-to-end system tied to Biometric Automated Toolset (BAT); Distributed Common Ground System-Army (DCGS-A); original Detainee Management System (DMS); capture tags; screening; property exploitation; interrogation plans and summaries; Intelligence Information Reports; collection, management, and dissemination (CM&D); and legal adjudication.

https://www.army.mil/article/114405

**Discovery.** A party’s inquiry into non-privileged matters relevant to the ongoing proceeding.

**Due Process.** The requirements of “Due Process” stem from the 5th and 14th Amendment of the Constitution. There are two aspects of “Due Process”—substantive due process and procedural due process. Substantive Due Process prohibits the government from depriving a person of life, liberty or property “arbitrarily”. Procedural Due Process requires that notice and hearing shall be guaranteed if a person is deprived of life, liberty or property. (Source: Max Planck Encyclopedia of Public International Law)

**Elmo.** A camera brand name, generally refer to real-time image capture devices for vision presentation.

**Enemy Combatant.** See Unprivileged Enemy Belligerent.


**Equality of Arms.** States shall guarantee that the parties in a legal proceeding have equal opportunity to state or defend their case. Equality of arms is the core notion of fair trial in both civil and criminal cases. (Source: Äärelä and Näkkäläjärvi v Finland, Merits, Communication No 779/1997, UN Doc CCPR/C/73/D/779/1997, IHRL 2823 (UNHRC 2001), 24th October 2001, United Nations Human Rights Committee). Essentially, the "equality of arms" principle mandates that parties have adequate resources and access to evidence and witnesses so as to have a "reasonable opportunity of presenting [their] case to the court under conditions which do not place [them] at substantial disadvantage" in relation to the opponent. (Source: Bulut v. Austra, ECHR, No. 17358/90)

**Escort.** Military officer accompanying others for security, guidance, and convenience.

**Evidence.** Witness testimony, written documents and other tangible objects used to seek to demonstrate the existence or non-existence of a fact matter in legal proceedings.

**Examine.** A party questioning a witness.

**Exculpatory evidence.** Evidence tending to negate the criminal defendant’s guilt or reduce the degree of guilt. Pursuant to 10 U.S.C. §949j (b), trial counsel in a military commission shall disclose the existence of exculpatory evidence. (Source: 10 U.S.C. §949j (b))

**Executive Order.** An order issued by the U.S. President as the head of Executive Branch providing instruction or direction to federal agencies and officials.

**Expeditionary Legal Complex (ELC).** A Guantanamo Bay complex constructed in 2008, that houses the secure courtroom where U.S. Military Commissions are conducted.
Expert Witness. A witness qualified as an expert by knowledge, skill, experience, training or education. Pursuant to Rule 703 of the Military Commission Rules of Evidence, an expert witness may testify in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. Rule 706 provides that the trial counsel, defense counsel and the military commission may obtain expert witnesses. Moreover, the accused may select his expert witnesses at his own expense. (Source: Rule 703, 706 of the Military Commission Rules of Evidence) However, the prosecution must approve all defense witnesses, and arrange for facilitation of their travel and other logistics for testimony at Guantanamo Bay, by video, or by other means.

Fair Trial. The right to fair trial is a fundamental human right that requires states to respect the rule of law and protect individuals from arbitrary treatment in judicial proceedings. A fair trial contains several components, including, for example: (1) competent, independent and impartial tribunal; (2) public trial; (3) equality of arms; (4) access to a court; (5) other guarantees ensuring the equality. The right to fair trial is provided for in various international human rights law instruments, including International Covenant on Civil and Political Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms and Fundamental Freedoms, American Convention on Human Rights, the Geneva Conventions, etc.

Family (Family of Victim) (See Victims)

Forcible Cell Extraction. Removal an inmate from his/her cell involuntarily with force.

Ft. Meade. Fort George G. Meade, Maryland, which is a military installation providing service, infrastructure and other support to service members, DoD civilian employees and other personnel. Ft. Meade is an observing site for Military Commission trials. The public may observe the trial proceedings through video and audio feed transmission. (Source: https://www.ftmeade.army.mil)

General Principles of Law. A source of international law. Listed in Article 38(1)(c) of the International Court of Justice Statute, it refers to a set of rules recognized by “civilized nations” and binds on states.

Geneva Conventions. The four Conventions of 1949 and three additional protocols are a central body of international humanitarian law (law of armed conflict), protecting persons not part of the hostilities during a conflict and setting limitations to belligerent parties’ methods of warfare based on humanitarian concern. Most provisions of the Geneva Conventions have achieved the status of customary international law, thus binding all states.

Gitmo (See Guantanamo Bay Naval Station, GTMO).

GTMO (See Guantanamo Bay Naval Station, Gitmo).

Guantanamo Bay Naval Station. A U.S. naval base located in Guantanamo Bay, Cuba. Currently, military commissions are held at the Guantanamo Bay Naval Station. (Source: http://www.mc.mil/FACILITIESSERVICES.aspx)

Habeas Corpus. A writ to challenge the legality of a person’s detention. The source of habeas corpus is Art. I, Section 9, Clause 2 of the Constitution. Congress has the power to suspend habeas corpus. The Executive Branch (U.S. President) does not have such power.

Hague Convention. The Hague Conventions of 1899 and 1907 include a series of international treaties and declarations addressing the laws and customs of warfare. The Convention’s provisions are considered to embody rules of customary international law, and thus bind States which are not formal parties. (Source: https://www.icrc.org/ihl/INTRO/195)

Hearing. A legal proceeding before a military commission judge during which the prosecution and defense counsel argue points of law and facts related to particular issues. The judge may make an oral ruling
“from the bench” at the conclusion of the hearing, or the judge may issue a written ruling after the hearing.

Hearsay. An out-of-court statement to prove the truth of the matter it asserts. Pursuant to Section III of the Military Commissions Rules of Evidence, hearsay evidence is inadmissible unless the witness is unavailable, and only then with notice to the opposing party, and only if it is material, probative, reliable and the interests of justice will be served by admission. (Source: Rule 801, 802, 803, Military Commissions Rules of Evidence) Hearsay evidence is more readily admissible before military commissions than before courts martial or Art. III courts.

Hostilities. The Military Commission Act of 2009, § 948a(9) provides that the term ‘hostilities’ means any conflict subject to the laws of war.

High-Value Terrorist Detainees (HVTD, HVD). Based on the Office of Director of National Intelligence’s Summary of HVTD Program, HVTD refers to “detainees who have been in the inner circle of al-Qaeda, occupying some of the most important positions in the organization, who hold information that cannot be obtained from other sources.” Currently there are 14 detainees on the Department of Defense’s list. (Source: http://www.defense.gov/pdf/thehighvaluedetaineeprogram2.pdf; http://www.defense.gov/pdf/detaineebiographies1.pdf)

Iguana. A genus of herbivorous lizards commonly seen at the Guantanamo Bay Naval Base.

Immediate Reaction Force (IRF). A team of military officers on stand-by to respond to emergencies. IRF specializes in the extraction of inmates who are combative, resistant, or possibly processing weapons in their cells. There have been allegations that IRF has been used as a "punishment squad" to terrorize detainees illegally. (Source: http://www1.umn.edu/humanrts/OathBetrayed/sop_2004.pdf)

Impartial (Tribunal). Subjectively, it requires that there be no personal prejudice by judges or jury members. Objectively, it requires that “there can be no legitimate doubt by any party that the judges or jury are not biased in any way.” (Source: Max Planck Encyclopedia of Public International Law; Karttunen v Finland, Merits, Communication No 387/1989, UN Doc CCPR/C/46/D/387/1989, (1993) 1-1 IHRR 78, IHRL 2753 (UNHRC 1992), 23rd October 1992, United Nations Human Rights Committee)

In Camera. Latin for “in chambers”. When the judge holds proceedings outside the view of the public and press.

Independent (Tribunal). A requirement that the judiciary functions distinctly and free from interference by the executive and other outside factors. (Source: Oló Bahamonde v Equatorial Guinea, Merits, Communication No 468/1991, UN Doc CCPR/C/49/D/468/1991, (1993) 1-2 IHRR 147, IHRL 1685 (UNHRC 1993), 20th October 1993, United Nations Human Rights Committee) For example, the military commissions should not be subject to interference by non-judicial military officers

Informational contraband. As opposed to physical item, anything containing information that JTF-GTMO determine to be “impermissible of inappropriate” for a detainee to possess, including documents, electronic media, and other materials. (Source: http://www.lawfareblog.com/wp-content/uploads/2012/03/2_Enclosure-1-Buzby-Memo.pdf)

Interlocutory Appeal (See Appeal (Interlocutory Appeal)). An appeal from an interlocutory order. Generally, the appealable issues are limited to final judgments. Provided by Hallock v. Bonner, 387 F.3d 147(2d Cir. 2004), an appeal from an interlocutory order is possible when: (1) the order must have conclusively determined the disputed question; (2) the order must “resolve an issue completely separate from the merits of the action”; (3) the order must be “effectively unreviewable on appeal from a final judgment.” In context of military justice, the United States may take an interlocutory appeal to the United States Court of Military Commission Review of any ruling or order of the military judge (1) that terminated the proceeding with respect to a charge or specification; (2) that excludes
evidence that is substantial proof of a fact material in the proceeding and (3) that relates to a matter of
classified information under certain conditions. (Source: 10 USC 950d)

**Interlocutory Order.** An order issued by a court that is not a final order of the court. An interlocutory order
would be issued during a hearing or proceedings, rather than at the end of the case. An interlocutory order
would not be a final order. Some interlocutory orders may be appealed.

**Interpreter.** Personnel providing simultaneous interpretation in the courtroom during proceedings, a
deposition, or outside the courtroom, for example during client meetings, witness interviews, or other
investigations. Office of Military Commission provides such service to support military commissions.
Pursuant to §948l of Military Commission Act, “the convening authority of a military commission
under this chapter may detail to or employ for the military commission interpreters who shall interpret
for the military commission, and, as necessary, for trial counsel and defense counsel for the military
commission, and for the accused.” Further, § 949g requires that the interpreters take an oath “to
perform their duty faithfully.” (Source: http://www.mc.mil/FACILITIESSERVICES/Services/TranslationInterpretation.aspx; §948l, §949,
Military Commission Act)

**Interrogation.** Formal questioning by law enforcement or the military of a person who is arrested or suspected
of committing a crime. (Source: Black’s Law Dictionary) Under federal and international law, torture
is not a permissible form of interrogation. (Source: 18 U.S. Code § 2340A, UN Convention against
Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)

**IRF (See Immediate Reaction Force; Initial Reaction Force).** A team of military officers stand-by to
respond to emergencies, specializing in the extraction of an inmate who is combative, resistive or
possibly processing weapon in the cell. Meanwhile, there has been allegations about IRF being used
as punishing squad terrorizing detainees and committing various inhumane activities. (Source:

**JAG (See Judge Advocate General).**

**JAG Corps (See Judge Advocate General Corps)**

**Joint Base Andrews.** Formerly “Andrews Air Force Base”.

**Joint Chiefs of Staff.** A body of military commanders in the Department of Defense, who serve as military
advisers to the President, the Secretary of Defense, and the National Security Council. According to
Departments shall assign all forces under their jurisdiction to unified and specified combatant
commands to perform missions assigned to those commands..."; the chain of command "runs from the
President to the Secretary of Defense; and from the Secretary of Defense to the commander of the
combatant command." (Source: http://www.jcs.mil/About.aspx)

**Joint Worldwide Intelligence Communications System (JWICS).** (pronounced “JAYwix), is a TS/ SCI
(Top Secret / Secure Compartmentalized Information) network operated by the US Defense
Intelligence Agency (DIA), and used in various U.S. agencies including the Department of State, the
Department of Homeland Security, the Department of Justice, and the Department of Defense.

**JTF-GTMO- Joint Task Force.** JTF-GTMO maintains detention operations at Guantanamo Bay, including
the oversight of members of Al-Qaida and other terrorist groups. The Task Force also assists the
Military Commissions in its investigations and trials of alleged war criminals. (Source: http://www.jtfgtmo.southcom.mil/xWEBSITE/fact_sheets/GTMO%20Overview.pdf)

**Judge Advocate. (See Judge Advocate General)**
Judge Advocate General (JAG). A military officer serving as a lawyer in a branch of the military (Army, Navy, Air Force, Marines and Coast Guard). Colloquially, individual JAG Corps officers are known as JAGs.

Judge Advocate General Corps (JAG Corps). JAG Officers usually serving as legal advisers in the military branch to which they are stationed. At Guantanamo Bay, JAG Officers often serve as prosecutors and defenders of detained individuals accused of terrorist acts.

Judge, Civilian. A judicial official administering justice, with a civilian status.

Judge, Military. A commissioned military officer certified by the Judge Advocate General as qualified for duty.

Jurisdiction (Personal Jurisdiction). Pursuant to Rule 202 of the Rules for Military Commissions and 10 U.S.C. § 948c, military commissions have personal jurisdiction over alien unlawful enemy combatant, which includes an individual who: (1) has engaged in hostilities against U.S. or its coalition partners; (2) has purposefully and materially supported hostilities against the U.S. or its coalition partners; or (3) was part of Al Qaeda at the time of the alleged offense under chapter 47A of 10 U.S.C. With regard to Guantanamo detainees, the individual’s combatant status shall be determined by the Combatant Status Review Tribunal. (Source: Rule 202, Rules for Military Commissions; 10 U.S.C. § 948c; 948a(1)(ii); 948a(7))

Jurisdiction (Subject Matter Jurisdiction). Pursuant to Rule 203 of the Rules for Military Commissions, military commissions may try any offense under the Military Commission Act or the law of war. The MCA defines the following offenses: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying quarter; taking hostages; employing poison or similar weapons; using protected persons or property as shields; torture, cruel or inhuman treatment; intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce or distinctive emblem; intentionally mistreating a dead body; rape; sexual assault or abuse; hijacking or hazarding a vessel or aircraft; terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying; attempts; conspiracy; solicitation; contempt; perjury and obstruction of justice. Noticeably, this list is not exhaustive. (Source: Rule 203, Rules for Military Commissions; 10 U.S.C. §§950p–950t)

Jury. A group of people selected in accordance with law and empowered to be trier of fact. Unlike in Art. III courts, the military commissions impanel military officers on active duty to play the role of jury. The Convening Authority selects the members from a list of nominations.

Jus cogens (see peremptory norm). Certain international law principles so fundamental that they do permit states to derogate from them. Such norms include the prohibition of use of force, prohibition of genocide, prohibition of slavery, etc. In other words, jus cogens violations are illegal even if a state has not signed a treaty or criminalized the act in its penal code. Individuals who commit jus cogens violations may be prosecuted by any state.

JWICS. See Joint Worldwide Intelligence Communications System. JWICS (pronounced “JAYwix), is a TS/SCI (Top Secret / Secure Compartmentalized Information) network operated by the US Defense Intelligence Agency (DIA), and used in various U.S. agencies including the Department of State, the Department of Homeland Security, the Department of Justice, and the Department of Defense.

Learned Counsel (See Counsel). In military commission capital cases (in which the defendant faces the death penalty), the military commission will appoint a “learned counsel” who is specialized in death penalty litigation. The Learned Counsel, who is paid by the Department of Defense, may be a military attorney or a civilian defense attorney. (Source: http://www.mc.mil/aboutus/organizationoverview.aspx)
Legal Advisor. A person in official capacity providing advises for legal matters.

Legal bin. A container for legal documents.

Legal mail. Communications between detainees and the defense attorneys related to their case.

Logistics Memo. A memorandum providing instructions or directions for logistics issues.

Looking 40 seconds into the future. There is a 40-second delay between the events at the Guantanamo Bay gallery and the video and sound transmitted to Ft. Meade. Thus, observers at the gallery will view the proceedings 40 seconds ahead of those viewing them on the television feed.

LPR. Lawful Permanent Resident of the U.S.


Manual for Military Commissions (M.M.C.). Contains rules of procedure and evidence for the Guantanamo Bay Military Commissions. The M.M.C. was promulgated in 2012.

Marks Center. Facility in Virginia that houses part of the Office of Military Commissions. Witnesses may travel to the Marks Center to testify by video in proceedings being held at Guantanamo Bay.

MCA 2006. Congressionally enacted legislation that authorized the Department of Defense to create military commissions with limited jurisdiction. This MCA of 2006 has been superseded by the MCA of 2009.

MCA 2009. Congressionally enacted legislation that authorities the Department of Defense to create military commissions with limited jurisdiction. The MCA of 2009 supersedes the MCA of 2006.

Member (Jury Member, See Jury). A group of people selected in accordance with law and empowered to be trier of fact. Unlike in Art. III court, in military commissions a panel of members who are active duty commissioned officers in military play the role of jury, and person who performs the jury function is a “member”. The Convening Authority selects the members from a list of nominations reasonably.

Memorandum of Understanding (see MOU)

National of the U.S. See Citizen of the U.S.; Lawful Permanent of the U.S.

NIPRNet. See Non-classified Internet Protocol (IP) Router Network (pronounced “NipperNet”). The Department of Defense uses NIPRNet for unclassified information, and permits users to access the internet. See SIPRNet and JWICS.

Military Commission. Pursuant to the Military Commission Act, a Military Commission is a military court exercising jurisdiction over alien unprivileged enemy belligerent who has engaged in hostilities, or who has purposefully and materially supported hostilities against the United States, its coalition partners or was a part of al Qaeda. (Source: §948, Military Commission Act 2009)

Military Commission Act of 2006 (MCA. or MCA of 2006). Congressionally enacted legislation that authorized the Department of Defense to create military commissions with limited jurisdiction. This MCA of 2006 has been superseded by the MCA of 2009.


Military Commissions Defense Office (MCDO). The office within the OMC that handles the defense counsel for all detainees who have counsel. Formerly known as the “Office of Chief Defense Counsel”.


Military Judge (See Judge, Military). A commissioned military officer certified by the Judge Advocate General as qualified for duty.

Military Objectives. Pursuant to customary international humanitarian law, “Military Objectives” are defined by their purpose. “Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” According to U.S. Manual for Military Commissions, “Military Objective” refers to combatants and those objects during hostilities “(1) which, by their nature, location, purpose, or use, effectively contribute to the opposing force’s war-fighting or war-sustaining capability; and (2) the total or partial destruction, capture, or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.” (Source: Part IV (1)(a)(1), Manual for Military Commissions; https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter2_rule8)

Military Working Dogs (MWD). Service dogs contributing to combat and security operations.

Mission. A particular duty assigned to certain unit or individual.

Mitigate.

Mitigation Specialist (or Death Penalty Mitigation Specialist). A member of the defense team who investigates the defendant’s background, history, physical and mental situation, level of participation in the alleged offense, along with other relevant evidence, to make a case against the death penalty.

Monitor (Trial Monitor; Trial Observer; NGO Observer). Individuals or organizations who attend, observe, analyze, critique, and disseminate information about military commission hearings or trials.

Motility. The ability to move spontaneously.

Motion. A party’s request to the court for ruling on a certain issue or on certain issues.

MOU (Memorandum of Understanding). An agreement between parties indicating a consensus on a certain issue. For Military Commission cases, it usually deals with access to classified information.


National Security Agency (NSA). National Security Agency is a member of the Intelligence Community, which is an executive branch agency conducting intelligence activity. The missions of NSA include: (1) Signal Intelligence, which means gathering information of U.S. adversaries; (2) Information Assurance, which means protect U.S. vital national security information; (3) Combining the first two, enabling “Network Warfare”, a military operation. (Source: https://www.nsa.gov/about/faqs/about_nsa.shtml)

NDA (See Non-Disclosure Agreement).

News Media Representatives (NMR). Personnel representing media who are provided access to Naval Station, Guantanamo Bay Cuba. NWRs are subject to Media Ground Rules for Guantanamo Bay, Cuba.

Non-disclosure Agreement (NDA). A binding legal agreement between parties protecting the confidentiality of certain information. Form 4414 provides the general form of Sensitive Compartmented Information Nondisclosure Agreement between the defendant and the United States. (Source: Regulation for Trial by Military Commission)

NGO. A non-governmental organization.

NGO Lounge. See NGO Resource Center.

NGO Internet Café”). See NGO Resource Center.

NGO Observer. NGO Monitor. An individual representing a non-governmental organization who attends, observes, analyzes, critiques, and disseminates information about military commission hearings or trials. See Monitor.

NGO Resource Center. (formerly “NGO Lounge” or “NGO Internet Café”). Space at Guantanamo Bay in which NGOs can work as they carry out their mission of attending, observing, analyzing, critiquing, and reporting on the U.S. Military Commissions.

Non-classified Internet Protocol (IP) Router Network (NIPRNet -- pronounced “NipperNet”). The Department of Defense uses NIPRNet for unclassified information, and permits users to access the internet. See also SIPRNet and JWICS.

Non-legal Mail. Communications except for Legal Mail. (See Legal Mail)

Objection. A statement one party makes in order to oppose the other party’s statement in court. The objecting party shall state the basis for the objection. (Source: Black’s Law Dictionary)

Observer (Trial Observer; Trial Monitor; NGO Observer). Individuals or organizations who attend, observe, analyze, critique, and disseminate information about military commission hearings or trials.


Office of Legal Counsel (of the Department of Justice). An agency of the Department of Justice. The OLC assists the Attorney General and provides legal advice to other branches of the Department of Justice. (Source: http://www.justice.gov/agencies)

Office of Military Commissions (OMC). General name given to all components involved in the military commissions.


Office of the Chief Defense Counsel OCDC or OMC-D). OCDC is responsible for providing a defense for each defendant before the military commissions. (Source: http://www.mc.mil/ABOUTUS/OrganizationOverview.aspx)

Office of the Chief Prosecutor (OCP or OMC-P). OCP is responsible for prosecution before the military commissions. (Source: http://www.mc.mil/ABOUTUS/OrganizationOverview.aspx)
Office of the Convening Authority (OMC-CA). OMC-CA is responsible for “the overall management of the military commissions process.” Source: http://www.mc.mil/ABOUTUS/OrganizationOverview.aspx


Opinio Juris. A constituent element of customary international law. Opinio Juris refers to a state's subjective sense of obligation to act in a certain way because it is bound by the law.

Orders. A determination or instruction issued by the court upon some matter raised in the proceeding.

Original Classification Authority (OCA). According to Executive Order 13526, the President designated the OCAs “to classify information originally as Top Security or Secret.” (Executive Order 13526 Original Classification Authority) (Source: http://www.whitehouse.gov/the-press-office/executive-order-original-classification-authority)

Paralegal. A person assisting an attorney on legal issues but who is not a licensed attorney.

Pardon. An official nullification of punishment for a crime.

Party (Party to a Criminal Case). Prosecution or defendants in a criminal proceeding.

Party (Party to a Treaty). State or entity with treaty-making capacity that has expressed its consent to be bound by a treaty.

Per Curiam. A "per curiam" decision by a court is issued in the name of and on behalf of the court itself, and not on behalf of any specific judge or judges. Per curiam opinions are not necessarily unanimous, and some per curiam opinions have dissents. An example of a per curiam Guantanamo Bay U.S. Military Commission decision is al-Bahlul v. United States, 840 F.3d 757, 758, (D.C. Cir. 2016) (en banc).

Peremptory norm (see jus cogens). Certain international law principles so fundamental that they do not allow any derogation by states. Such norms include the prohibition of use of force, prohibition of genocide, prohibition of slavery, etc.


Periodic Review Board. PRB. In a 2011 Executive Order, President Obama ordered all remaining detainees at Guantanamo Bay to be permitted to periodically reviewed to determine whether they pose a threat to the national security of the U.S., and if they are found not to pose such a threat, they could be repatriated to their home country or transferred to a third country.

PRB. See Periodic Review Board.

Precedent. A decision by court, whose holding represents identical or similar features to the factual or legal question of the present case. Precedent may be either binding or persuasive. Decisions are binding if the precedent comes from a higher court within the same jurisdiction as the one adjudicating the new case. Precedent is merely persuasive if it comes from a different jurisdiction, or if the relevant content is dicta, i.e. statements made in passing which are not relevant to the holding.

Preferred. When the prosecution decides to accuse a defendant of a specific crime in a court martial, the prosecution prefers the charge.

Pre-Trial Hearing. An informal meeting held before trial among the parties and the judge to resolve substantive and procedural issues.

Prisoner (See Detainee). A person who is held in custody by an authority. Pursuant to Detainee Treatment Act, “Detainee” refers to a person “in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility.” (Source: Detainee Treatment Act Title X, H.R. 2863)

Privilege.
Privilege, Attorney Client.
Privilege, Work Product.
Privilege, Priest / Penitent.
Privilege, National Security.

Privileged Belligerent. The Military Commission Act of 2009 provides that “the term ‘privileged belligerent’ means an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War. (§ 948a(6)).

Proceeding. The process of a civil lawsuit or criminal prosecution.

Program. Usually refers to CIA Rendition, Detention and Interrogation Program. The global operation aiming at apprehending and interrogating terrorist suspects run by the U.S. Central Intelligence Agency.

Protected Information. Information of which the disclosure could reasonably be expected to detriment to the national security. This is distinguished from “classified information”.

Protected Person. Under international humanitarian law, those do not take active part in hostilities shall be protected from military attack. Geneva Conventions and Additional Protocols generally provide that the sick, wounded and shipwrecked not taking part in hostilities, prisoners of war, other detained persons and civilians are “Protected Persons”. (Source: Geneva Conventions 1949; ICRC Customary International Humanitarian Law, https://www.icrc.org/eng/war-and-law/protected-persons/overview-protected-persons.htm)

Protected Property. Under international humanitarian law, “Protected Property” shall be free from military attack in an armed conflict as long as it is not used for military purposes. (Source: Geneva Conventions 1949, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter2_rule9)

Protective Order. A court order prohibiting certain conduct, e.g. prohibiting discovery for the purpose of protecting classified information. Pursuant to Rule 505(e) of Military Commissions Rules of Evidence, upon the Government’s request, the military judge may issue protective orders to prevent the “compromise of information disclosed to the defense.” (Source: Rule 505, Military Commissions Rules of Evidence)

Prudential Search. According to the U.S. Attorney’s Manual, section 2052. Titled “Contacts with The Intelligence Community Regarding Criminal Investigations or Prosecutions”, a prudential search is:

A search of Intelligence Community (IC) files, usually prior to indictment, for pre-existing intelligence information undertaken because the prosecutor and the Department have objective articulable facts justifying the conclusion that the files in question probably contain classified information that may have an impact upon the government’s decision whether to seek an indictment and, if so, what crimes and defendants should be charged in that indictment. A prudential search should include a search for Brady material and other information that would be subject to the government’s post-indictment discovery obligations. Upon an appropriate threshold showing of necessity by the prosecutor, a prudential search may include a narrowly drawn request for specific investigative leads to assist the prosecutor to reduce or eliminate the relevance of classified information to his/her case.


Public Affairs Officer (PAO). PAO is primarily responsible for assessing and assisting public affairs and developing working relationships with the media.

Ratify (Ratified, Ratification)
RDI (rendition, detention, and interrogation). Run by the U.S. Central Intelligence Agency, RDA is a global operation aimed at apprehending and interrogating terrorist suspects.

Referral (of Charge)

Regulations for Trial by Military Commissions (2011 Edition)

Rendition. Transfer a person to another jurisdiction for the purpose of arrest, detention and interrogation. Extradition is the most common form of rendition. In this context, it often refers to "extraordinary rendition", which means the extrajudicial transfer of a person between jurisdictions.

Reservation. A statement made by a state or entity, purporting to exclude the legal effect of certain treaty provision in its application to such state or entity. (Source: Section 2, Vienna Convention on Law of Treaties)

SCI. (See Sensitive Compartmented Information). Based on the Director of Central Intelligence Directive 1/19, SCI refers to “classified information concerning or derived from intelligence sources, methods, or analytical processes, which is required to be handled within formal access control systems established by the Director of Central Intelligence.” (Source: http://www.fas.org/irp/offdocs/dcid1-19.html)

SCIF (See Sensitive Compartmented Information Facility). Based on the Director of Central Intelligence Directive 1/19, SCIF refers to “an accredited area, room, group of rooms, buildings, or installation where SCI may be stored, used, discussed, and/or processed.” (Source: http://www.fas.org/irp/offdocs/dcid1-19.html)

Secret. A category of classified information requiring clearance. According to Executive Order 12958, “secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.” (Source: Executive Order 12958 on Classified National Security Information)

Secret Internet Protocol Router Network (SIPRNet). A computer networks used by US government departments (e.g., Defense Department, State Department) to transmit information up to the classification level "SECRET". See also NIPRNet and JWICS.

Secretary of Defense. Chief executive officer of the Department of Defense. The Secretary of Defense has "authority, direction and control over the Department of Defense", and is further designated by the same statute as "the principal assistant to the President in all matters relating to the Department of Defense." (Source: 10 U.S.C. § 113)

Secretary of State. Chief executive officer of the Department of State, who is appointed by the President with advice and consent of the Senate. The Secretary of State’s primarily role involves advising the President on foreign affairs and policies.

Security Classification Review Team (of the DoD). A DoD component serves as classification authority, in addition to the original classification authority, responsible for reviewing classified materials. Pursuant to the Regulation for Trial by Military Commissions, “all requests for the declassification of classified materials intended to be used by the Defense in a military commission shall be in writing, and submitted, through trial counsel, to the DoD Security Classification/Declassification Review Team, when the materials originate with DoD, or to the original classification authority of any non-DoD federal departments or agencies.” “Requests for further declassification of classified materials, or for reconsideration of a declassification decision, shall be in writing, and submitted, through trial counsel, to the DoD Security Classification/Declassification Review Team, when the materials originate with DoD, or to the original classification authority of any pertinent non-DoD federal department or agency.” (Source: Regulation for Trial by Military Commission; 10 U.S.C. § 949p-1(c))
Security Declassification Review Team (of the DoD). A DoD component serves as classification authority, in addition to the original classification authority, responsible for declassification of relevant materials. (See Security Classification Review Team).

Security Officer. Personnel (military or civilian) in official capacity responsible for protecting persons and property.

Self-Executing. A self-executing treaty refers to a treaty, upon ratification, whose provisions can be applied domestically within the state party without the need of further transformation (by legislative or administrative measures). In Foster and Elam v Neilson, the Supreme Court ruled that a treaty is self-executing when it “operates of itself without the aid of any legislative provision”, and is not self-executing when “the terms of the stipulation import a contract.” (Source: Max Planck Encyclopedia of Public International Law; Foster and Elam v Neilson, 27 US (2 Pet) 253 (1829))

Sensitive Compartmented Information (SCI). A type of classified information concerning or derived from intelligence sources, methods, or analytical processes requiring handling with formal access control systems established by the Director Central Intelligence (DCI). Due to the sensitivity of the SCI, it requires special procedures for the protection of SCI. (Source: Intelligence Community Classification and Control Markings Implementation Manual, Office of the Director of National Intelligence) (Source: )

Sensitive Compartmented Information Facility (SCIF). An area where SCI being processed, stored, used of discussed. The requirement of SCIF is stipulated in Intelligence Community Directive No. 705. (Source: ) [List the requirements of a SCIF]

Stakeholder. Individual or organization holding certain interest upon the subject. The stakeholders of Guantanamo proceedings include defendants and defense counsel, the prosecution, victims and victims’ families, judges and judicial staff, fact and expert witnesses, the press, governments with detained citizens, governments whose citizens were injured by the alleged crimes, Guantanamo Bay detention facility staff (Joint Task Force – Guantanamo), and the general international and U.S. publics.

Shackles. Metal devices use to constrain the detainees’ ankles or wrists.

SIPRNet. Secret Internet Protocol Router Network. A computer networks used by US government departments (e.g., Defense Department, State Department) to transmit information up to the classification level "SECRET". See also NIPRNet and JWICS.

SOP. (Standing Operating Procedure or Standard Operating Procedure). Written instructions guiding certain routine activities.

SOUTHCOM. Southern Command. SOUTHCOM is a joint military command located in Doral, Fla., as one of the nine unified Combatant Commands in the Department of Defense. SOUTHCOM’s Area of Responsibility includes the land mass of Latin America south of Mexico, the waters adjacent to Central and South America and the Caribbean Sea. (Source: http://www.southcom.mil/aboutus/Pages/About-Us.aspx)

Special Trial Counsel. Department of Justice attorneys detailed by the Chief of Prosecutor in 911 case in order to resolve the potential conflicts of interest issue stemming from an investigation by Federal Bureau of Investigation in April 2014. (Source: http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE292QQ).pdf)

Staff Judge Advocate (SJA). A judge advocate designated as the principal legal advisor for a judge advocate.

Stakeholder

Stay. When the court orders a temporary or indefinite halt to the hearing, trial, or other proceeding. See Continuance. Abate. Abatement.
Sua Sponte. Literally, "On its own." Refers to judges taking action without request from the parties.

Subpoena. A court order compelling a person to appear before court or tribunal. If such person fails to comply, he or she shall be subject to judicial penalty.

Supreme Court (U.S.). Established by Art. III of the U.S. Constitution, the last resort of U.S. federal court system, holding the judicial power of U.S. It consists of the Chief Justice of the U.S. and eight associate justices.

Swearing of Charges. Pursuant to § 948q of the Military Commission Act, charges against an accused in a military commission “shall be signed by a person…under oath before a commissioned officer of the armed force authorized to administer oaths”, stating “(1) the signer has personal knowledge of, or reason to believe, the matters set forth therein; and (2) they are true in fact to the best of the signers knowledge and belief.” (Source: http://www.gpo.gov/fdsys/pkg/BILLS-109s3930enr/pdf/BILLS-109s3930enr.pdf)

Sworn Charges. Charges which have been sworn by a person subject to the Uniform Code of Military Justice, pursuant to the requirement of the Military Commission Act.

Terms of Reference (TOR). A list or statement describing the purpose and background of certain project. An NGO that sends an NGO Observer to Guantanamo Bay to monitor hearings would ordinarily present that NGO Observer with a Terms of Reference explaining what the NGO Observer should do to satisfy the goals of the NGO.

Top Secret-Sensitive Compartmented Information (see TS/SCI- TS/SCI)

Torture. The definition of “Torture” varies among international human rights law instruments. Pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, an act of torture is defined by several elements: (1) severity of the pain or suffering inflicted on the victim; (2) intentional infliction of the pain or suffering; (3) the purpose of inflicting the pain or suffering; and (4) infliction by, at the instigation of, or with the consent of a person acting in an official capacity. With regard to U.S. position, 18 U.S.C. §2340 provides that “torture” means “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” (Source: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 18 U.S.C. §2340)

Translator. Pursuant to §948s of the Military Commission Act and Rule 308 of the Manual for Military Commissions, the accused shall be informed the charges with the language he or she understands. Office of Military Commission provides services for translation of written legal materials, such as charges, to ensure that the accused informed of relevant information. Translator refers to personnel providing such service. (Source: §948s, Military Commission Act; Rule 308, Manual for Military Commissions)

Treaty. In international law, formal agreement among sovereign states and/or international entities, imposing contractual obligation upon state parties. The general legal rules regulating treaties enforcements are codified in the Vienna Convention on the Law of Treaties.
Trial. “A formal judicial examination of evidence and determination of legal claims in an adversary proceeding.” (Source: Black’s Law Dictionary)

Trial Counsel. Military prosecutors who are responsible for prosecuting Military Commission cases on behalf of the U.S. (See 10 U.S.C. § 949c(a))

Trial Judiciary. A Corp in military justice system providing military judges and hearing officers. [Military Commission Act Source…..]. A court or adjudicatory body, sitting by an adjudicator.

Tribunal.

TS/SCI- TS/SCI (Top Secret-Sensitive Compartmented Information). A category of classified information requiring the highest level of clearance. According to Executive Order 12958, “top secret” shall be applied to information, “the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.” (Executive Order 12958 on Classified National Security Information) (Source: http://www.fas.org/sgp/clinton/EO12958.html)

United States Court of Military Commission Review (USCMCR). USCMCR is an appellate court to review the finding and sentence of military commission case submitted to it. (Source: http://www.mc.mil/ABOUTUS/OrganizationOverview.aspx)

Unprivileged Enemy Belligerent. Privileged Belligerent. See Unlawful Enemy Combatant. The Military Commission Act of 2009 (§ 948a(7)) provides that “the term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who—“(A) has engaged in hostilities against the United States or its coalition partners; “(B) has purposefully and materially supported hostilities against the United States or its coalition partners; or “(C) was a part of al Qaeda at the time of the alleged offense under this chapter.

Unlawful Enemy Combatant. See Unprivileged Enemy Belligerent.

Victim. [Get Definition in the Military Commission Act]

Victim Outreach Specialists (VOS)

Victim/Witness Assistance Program. The Office of Military Commissions Victim/Witness Assistance Program (VWAP) is organized as a Directorate under the Office of Military Commissions Chief Prosecutor. According to the Military Commission website, the “Victim/Witness Assistance Program Directorate is committed to making military commissions accessible to victims and their family members, and to providing logistical support for witnesses participating in military commissions.” (http://www.mc.mil/VICTIMWITNESSASSISTANCE.aspx) According to the website, the Office of Military Commissions Victim/Witness Assistance Program “is committed to ensuring that victims are: Treated with fairness and respect for the victim’s privacy and dignity; Reasonably protected from the accused offender; Free to confer with the Victim/Witness Assistance Program Director; Afforded an opportunity to speak with the prosecutors assigned to the case; Notified of court proceedings; and Provided information about the conviction, sentencing, imprisonment and transfer of the offender, for the duration of military commission proceedings.” Id.

Victims and Victims’ Families (VFM). [Get definition in the Military Commission Act] The Office of Military Commissions Victim/Witness Assistance Program is committed to ensuring that victims are: Treated with fairness and respect for the victim’s privacy and dignity; Reasonably protected from the accused offender; Free to confer with the Victim/Witness Assistance Program Director; Afforded an opportunity to speak with the prosecutors assigned to the case; Notified of court proceedings; Provided information about the conviction, sentencing, imprisonment and transfer of the offender, for the duration of military commission proceedings.
Defense-Initiated Victims Outreach (DIVO). A defense-initiated victims outreach program seeks to provide a bridge between victims and their families and the attorneys who represent the defendant, especially in capital cases.

Victims’ Advocate.

Victims’ Families (See Victims and Victims’ Families (VFM).

Video Tele Conference. (See VTC)

Vienna Convention on the Law of Treaties (VCLT). The treaty adopted in 1969, setting out the law and procedure for making, operating and terminating treaties. It is generally, the rules contained in the treat are constitute customary international law regarding treaties. Rules contained in the VCLT bind states whether or not they are parties to the VCLT. For example, even though the United States has not ratified the VCLT, it still "considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.” (Source: U.S. State Department <http://www.state.gov/s/l/treaty/faqs/70139.htm>

VTC (Video Tele Conference). Conduct of a video conference allowing people in two geographical locations to communicate by simultaneous two-way video and audio transmissions. In Guantanamo, VTC has been used for witness testimony and communication between detainees and families. (Source: <https://www.icrc.org/eng/resources/documents/news-release/2011/saudi-arabia-news-2011-02-16.htm>)

WHS (Washington Headquarters Service). WHS provides information technology support throughout the National Capital Region including the Pentagon and the Office of the Secretary of Defense. (Source: http://www.whs.mil)

With Prejudice. Barring a party’s further action upon certain claim. If a party’s claim is dismissed “with prejudice”, then that party is barred from bringing that claim again in the future.

Withdrawn Charge(s). Prosecution’s taking back a formal accusation of offense(s) against the defendant.

Withdrawn Plea. Defendant’s taking back of a formal response of “guilty” or “not guilty”.

Without Prejudice. Not affecting a party’s legal rights upon a certain claim.

Witness. A person called upon by a party to give testimony before the court or jury in a legal proceeding.

Work Product. See Privilege, Work Product. Written or oral materials prepared by an attorney or under the direction of an attorney in the course of a legal representation in anticipation of litigation. A privilege is attached to work product and the other party to an action cannot compel the party possessing the work product to turn it over.
Bibliography [To be completed]

US Domestic Law Instruments

18 U.S.C. § 3771
28 U.S.C. § 2241 (Federal Habeas Statute)
Authorization to Use Military Force (AUMF)
Detainee Treatment Act of 2005 (DTA)
Executive Order 13107 (1998)
Executive Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*
Federal Habeas Statute (28 U.S.C. § 2241)
Federal Register, 16 November 2001 (Volume 66, Number 222), Presidential Documents, Page 57831-57836

**Federal Rules of Evidence, Rule 802**
Manual for Military Commissions (United States) (14 August 1012)
Manual for Military Commissions, Rule 506(a)
Manual for Military Commissions, Rule 919
Military Commission Act of 2009, § 831(c)
Military Commission Act of 2009, § 948d (titled “Jurisdiction of military commissions”)
Military Commission Act of 2009, § 948r(b)
Military Commission Act of 2009, § 949l(c) (1)
Military Commission Act of 2009, 10 U.S.C. § 950t(2)
Military Commission Act of 2009, 10 U.S.C. § 950t(23)
Military Commission Act of 2009, 10 U.S.C. § 950t(3)
Military Commission Act of 2009, Rule 301
Military Commission Act of 2009, Rule 304
Military Commission Act of 2009, Rule 608
Military Commission Rules of Evidence (14 August 1012), Rule 104(f)
Military Commission Rules of Evidence (14 August 1012), Rule 806
Military Commissions Trial Judiciary Rules of Court (24 April 2012, as amended 4 June 2014)

**Military Rules of Evidence, Rule 802**
Presidential Military Order of November 2001 (calling for the creation of the first U.S. Military Commission at Guantanamo Bay, Cuba)
Regulations for Trial by Military Commissions (2011 Edition), Section 1-4
Rules of the Military Commission (United States) (14 August 1012)
Uniform Code of Military Justice (UCMJ), §831 Article 31
United States Constitution, Amendment 1
United States Constitution, Amendment 14, § 1
United States Constitution, Amendment 4
United States Constitution, Amendment 6
United States Constitution, Amendment 8
United States Constitution, Article 1, § 1.
United States Constitution, Article 1, § 9, clause 3
United States Constitution, Article VI, cl. 2.
United States Constitution, Ex Post Facto Clause
Zadroga Act

International Instruments

African Charter on Human and Peoples’ Rights
African Commission Resolution, Paragraph 2(D);
African Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, § N(d) (e)
African Fair Trial Guidelines (see Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003))
American Convention on Human Rights
American Declaration of the Rights and Duties of Man
Arab Charter on Human Rights
Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
Basic Principles for the Treatment of Prisoners (Adopted by United Nations General Assembly Resolution 45/111 of 14 December 1990)
Basic Principles Judiciary (see United Nations Basic Principles on the Independence of the Judiciary)
Basic Principles Lawyers (see United Nations Basic Principles on the Role of Lawyers)
Body of Principles on Detention or Imprisonment (see Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment)
Charter of the International Military Tribunal at Nuremberg (8 August 2945)
Common Article 3 to the 4 Geneva Conventions of 1949
Control Council Law
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment


(www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81?Opendocument)

European Convention on Human Rights, article 6(2)

European Union Charter of Fundamental Rights, Article 48(1)


First Geneva Convention

Fourth Geneva Convention


General Comment No. 26, supra note xyz, para abc

General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the

Covenant, para. 11 (2004).

General Comment No. 32 -- Article 14: Right to equality before courts and tribunals and to a fair trial, United Nations Human Rights Committee, UN Doc CCPR/C/GC/32 (23 August 2007)

Geneva Conventions of 1949


Habeas Corpus in Emergency Situations; Inter-American Court, Advisory Opinion OC-9/87, 6 October 1987


Human Rights Committee Concluding Observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18

Human Rights Committee General Comment no 29, para xyz.

ICTR Statute, article 20(3) (see Statute of the UN International Criminal Tribunal for Rwanda)

ICTY Statute (See Statute of the UN International Criminal Tribunal for the former Yugoslavia)

ICTY Statute, article 21(3)

IMT Tokyo Charter

Inter-American Court, Advisory Opinion OC-8/87, 30 January 1987, Habeas Corpus in Emergency Situations


International Committee of the Red Cross Customary International Humanitarian Law, Rule 100.

International Covenant on Civil & Political Rights, Article 14

International Military Tribunal for the Far East Charter (19 January 1945)


Nuremberg Charter (see Charter of the International Military Tribunal

Nuremberg Principles of 1950.

Nuremberg Rules of Procedure (29 October 1945)


Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of

Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by United Nations General Assembly Resolution 37/194 of 18 December 1982


Protocol Additional I to the Geneva Conventions of 1949, article 75

Protocol Additional II to the Geneva Conventions of 1949, article 6


Rome Statute of the International Criminal Court (ICC Statute), articles 66(1), 67(1)

Second Geneva Convention


Statute of the UN International Criminal Tribunal for Rwanda (ICTR Statute)

Statute of the UN International Criminal Tribunal on the former Yugoslavia (ICTR Statute)

Third Geneva Convention (Prisoners of War) (Excerpt)

Tokyo Charter (Charter of the International Military Tribunal for the Far East,


UDHR (see Universal Declaration of Human Rights)

United Nations Basic Principles on the Independence of the Judiciary

United Nations Basic Principles on the Role of Lawyers

United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

United Nations Guidelines on the Role of Prosecutors


United Nations Standard Minimum Rules for the Administration of Juvenile Justice, UN General Assembly resolution 40/33, November 29, 1985

Universal Declaration of Human Rights


Affidavit

Monographs

Alexander, S. L., Media and American Courts
Brown, Bartram S. (ed), Research Handbook on International Criminal Law (20xx)
Clayton, Richard & Tomlinson, Hugh, Fair Trial Rights 181-184 (2d Ed) (Oxford Univ. Press 2010)
Hale, Christopher “Kip” & Bair, James P. (eds), International Due Process and Fair Trial Manual (ABA Center….)
Harris, O’Boyle, and Warbrick (1995) 252
Leanza, Piero and Pridal, Ondrej, The Right to a Fair Trial
Maffei, Stefano, The Right to Confrontation in Europe: Absent, Anonymous and Vulnerable Witnesses
Meron, T., Human Rights and Humanitarian Norms as Customary Law 64-65 (1989)
Namakula, Catherine S., Language and the Right to Fair Hearing in International Criminal Trials (Springer International Publishing. 2014).
National Conference of Lawyers and Representatives of the Media (ABA), The Reporter’s Key: Rights of Fair Trial and Free Press
Wigmore, John Henry, Evidence in Trials at Common Law 5, § 2511, at 504 (2d ed. 1923)

Articles


Baradaran, Shima, *Restoring the Presumption of Innocence*, Ohio State Law Review, 724, at 726


Memorandum to Mr. John H. McNeill, Assistant General Counsel (International), OSD, responding to 26 March 1986 memorandum from Mr. McNeill asking “our views on which articles of the Protocol are currently recognized as customary international law”


Scheffer, David, ‘Remarks’ (2002) 96 *American Society of International Law Proceedings*, 404, 406.). For further discussion,


University of Minnesota Human Rights Library, Chapter Six: Right to a Fair Trial <http://www1.umn.edu/humanrts/monitoring/adminchap6.html>


**Cases**


*Allan v. United Kingdom*


*Argersinger v. Hamlin*, 407 U.S. 367 (1979)),

*Barbera, Messegue and Jabardo v. Spain*, 11 EHRR 360 (1994)

*Bell v. Wolfish*, 441 U.S. 520, 582 n.11 (1979)


*Brusco v. France* European Court of Human Rights (Application no. 1466/07) Judgment of 14 October 2010;

*Cairo Declaration on Human Rights in Islam*, article 19(e) (1990)

*California v. Griffin*, 380 U.S. 609 (1965)


Crane v. Kentucky, 476 U.S. 683, 690 (1986)).
Dikme and Others v. Turkey, Application No. 20869/92, Judgment, ECHR, November 7, 2000, §§ 61-64.
Dimitriy Leonodovich Gridin v Russian Federation,
Doughty v. Beto, 396 F.2d 128 (5th Cir. 1968)
Fey v. Austria, 24 February 1993, 255 Ser. A 13, para. 34;
Fox, Campbell, and Hartley v. United Kingdom, Judgment, ECHR, October 28, 1994, §40.
Francis v. United Kingdom, European Court of Human Rights (Application no. 15809/02 and 25624/02)
Judgment of 29 June 2007, para 53-56
Gideon v. Wainwright, 372 U.S. 335 (1963)
Glasser v. United States, 315 U.S. 60, 70 (1942).
Guesdon v. France, para. 10.2.
Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012)
Hamdi v. Rumsfeld, 542 U.S. at 516.
Huber v. Austria, (1974) 46 CD 99
Hulki v. Turkey,
Iglin v. Ukraine, no. 39908/05 § 65, ECHR (2012)
Irving v. Australia, UN Human Rights Committee Communication No. 880/1999, paras. 8.3, 8.4
Karttunen v. Finland, UN Human Rights Committee Communication No. 387/1989, para. 7.2.)
Kremzow v. Austria (1993), 17 EHRR 322.
Lamy v. Belgium (1989) 11 E.H.R.R. 529, § 29
Madani v. Algeria, UN Human Rights Committee Communication No. 1172/2003, para. 8.7.)
(UNHRC 2000), 18th July 2000, Human Rights Committee
http://www1.umn.edu/humanrts/undocs/session69/view770.htm
Milton v. Morris, 767 F.2d 1443 (9th Cir. 1985)
Ocalan v. Turkey;
Ofner v. Austria, Application 524/59
Oló Bahamonde v. Equatorial Guinea, Communication No. 468/1991, para. 9.4.)
Pakelli v. Germany, 6 ECHR 1 (1983)
Paqueta Habana, 175 U.S. 677, 700 (1900)
Poitrimol v. France, 18 ECHR 130

Prosecutor v. Casimir Bizimungu, ICTR-99-50-I.


Prosecutor v. Maroslav and others, IT-98-30/1-A.


Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of Appeals Chamber (Int’l Crim. Trib. or the Former Yugoslavia July 15, 1999)


Quaranta v. Switzerland, Series A No. 205

R. v. Noble, 1 SCR 874 (1977)

Rasul v. Bush


Romsky v. McKaskle, 722 F. 2d 197 5th Cir. 1984

Ross v. United Kingdom


Saadi v. United Kingdom, Judgment (Chamber), ECHR, July 11, 2006, §55.


Taylor v. Kentucky, 436 U.S. 478, 486 (1978)). See also People v. Riley, 33 N.E.2d 872, 875 (Ill. 1941)

U. v. Luxemburg Application 10142/82.

U.S. v. Sedaghaty, 728 F.3d 885, 904-05 (9th Cir. 2013)


Uebergang v. Australia, UN Human Rights Committee Communication No. 963/2001, para. 4.2


United States v. Aref, 533 F.3d 72, 80 (2d Cir. 2008)

United States v. El-Mezain, 664 F.3d 467, 523-24 (5th Cir. 2011).

United States v. Gardner, 611 F.2d 770, 774-75 (9th Cir. 1980)

United States v. Gecas, 120 F. 3d 1419, 1484 (11th Cir. Fla. 1997)

United States v. Gurolla, 333 F.3d 944, 951 (9th Cir. 2003).

United States v. Klimavicius–Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998)


United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004);


United States v. Pinson, 56 MJ 489

United States v. Rewald, 889 F.2d 836, 847–48 (9th Cir. 1989)

United States v. Reynolds, 345 U.S. 1, 7–8, (1953)

United States v. Rezaq, 134 F.3d 1121, 1143 (D.C. Cir. 1998)

United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988).
United States v. Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993)

United States v. Udeozor, 515 F. 3rd 260 (4th Cir. 2008)


X and Y v. Austria (1978), 15 DR 160, Ecomn HR.

X v. Austria, 2 DR 68, ECommHR (1975).

S.D. v. Greece, ECHR, Applic. No. 53541/07, 11 June 2009, p. 76


Nowicka v. Poland, ECHR, Applic. No. 30218/96, 3 December 2002

**Government Documents (U.S.)**


**Websites**


http://www.vcf.gov/

http://www.vcf.gov/faq.html#eli1

www.GitmoObserver.com

**Twitter Feeds**

@CarolRosenberg

@GitmoObserver

@GitmoWatch

@TheGitmoReport

**Sources To Be Sorted**

**8. Monographs**


9. Law Review Articles & Other Resources


• Roberto Iraola, *Double Jeopardy and Sovereignty*, 47 No. 4 CRIM. LAW BULLETIN ART 6 (2001).

• Yvonne McDermott, *Double speak and double standards: Does the jurisprudence on retrial following acquittal under international criminal law spell the end of the double jeopardy rule?*, in *The Challenge of Human Rights: Past, Present, and Future* (David Keane, Yvonne McDermott, eds., 2011).


