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 and Victims’ Families, Witnesses, the Press, the Court, JTF-GTMO Detention Personnel, NGO Observers and Other Military Commission Stakeholders

Volume I: The Manual (pages 1 – 238)

by

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

19 February 2015 (2:15 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 Robert H. McKinney School of Law.

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.

© 2015 The Gitmo Observer (of Indiana U McKinney School of 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 and Victims’ Families, Witnesses, the Press, the Court, JTF-GTMO Detention Personnel, NGO Observers and Other Military Commission Stakeholders

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

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

Volume I – Main Manual (pages 1 – 238)

I. Preface .....................................................................................................................................7

II. How to Use this Guantanamo Bay Fair Trial Manual .............................................................11

III. Acknowledgements ................................................................................................................15

IV. Abbreviations ..........................................................................................................................17

V. What is the Right to a Fair Trial? ...........................................................................................19

A. “Rights” v. “Interests” ..............................................................................................................19
B. Briefing on this chapter of the Guantanamo Bay Fair Trial Manual .......................................19
C. Who are the Military Commission stakeholders? Who is entitled to a fair trial? .................20
D. International law as binding source in US Courts (including the Military Commissions) .......20
E. Substantive areas of law binding on the U.S. ...........................................................................21
F. International Humanitarian Law as a source of law for fair trials ...........................................22
  i. Treaty Law – International Humanitarian Law ..................................................................22
  ii. Customary International Law – International Humanitarian Law .................................24
G. International Human Rights Law as a source of law for fair trials .........................................25
  i. Treaty Law – International Human Rights Law .................................................................26
  ii. Customary International Law – International Human Rights Law .................................27
H. Domestic U.S. law & the right to a fair trial ............................................................................28
I. Rights not covered in this Guantanamo Bay Fair Trial Manual ..............................................28

VI. Roles & Responsibilities of NGO Observers ........................................................................29

A. The why and how of NGO Observers .......................................................................................29
B. Responsibilities of NGO Observers ..........................................................................................30
C. NGOs should be true to yourselves! .......................................................................................32
D. NGO Observers serve an extremely important role for all stakeholders ..............................33
VII. Background & Brief History of U.S. Military Commissions at Guantanamo Bay, Cuba

a. The 9-11 attacks and the immediate aftermath
b. Law governing U.S. Military Commissions
c. Who can be tried at by a Guantanamo Bay Military Commission?
d. Active Guantanamo Bay Military Cases
e. U.S. Military Commissions are “War Crimes Tribunals” not “Terrorism Tribunals”
f. Torture
g. Closing Guantanamo Bay

VIII. General Information About the Case to Be Observed

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

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

X. Rights of Victims & Victims’ Families

XI. Rights of the Prosecution

XII. Rights of the Press
XIII. Rights Related to Witnesses (Expert and Fact Witnesses)..................................................189
XIV. Rights & Interests of Joint Task Force-GTMO.................................................................193
XV. Rights of the U.S. public..................................................................................................195
XVI. Rights of the international community.......................................................................197
XVII. Rights and Interests of NGO Observers.................................................................199
XVIII. Conclusion (forthcoming).........................................................................................207

Glossary.................................................................................................................................209
Bibliography ..........................................................................................................................221
Index......................................................................................................................................233
Observation / Monitoring Note Pages................................................................................235

Volume II – Appendices (pages 239 – 430)

Preliminary pages for Vol II (Cover, Table of Contents, etc).................................................239
XIX. Appendices......................................................................................................................245

Appendix A: Sources of International Law.........................................................................247
1. International Humanitarian Law Treaties.......................................................................249
   a. Geneva Conventions of 1949, Common Article 3.......................................................251
   b. Protocol Additional I to the Geneva Conventions of 1949, article 75.......................253
   c. Protocol Additional II to the Geneva Conventions of 1949, article 6.......................255
   d. Third Geneva Convention (Prisoners of War) (Excerpt)... ...........................................257
2. International Human Rights Law Instruments..................................................................259
   a. Universal Declaration of Human Rights...............................................................261
   b. International Covenant on Civil & Political Rights, Article 14.................................263
   c. United Nations Convention Against Torture and other Cruel, Inhuman or Degrading
      Treatment or Punishment (excerpts)..................................................................265
   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.......................................................267
   e. List of Additional Non-Treaty International Instruments that Incorporate Rules of
      Customary International Law.................................................................................271
3. International Criminal Law Instruments (forthcoming)..................................................273

Appendix B: Sources of Domestic U.S. Law.........................................................................275
1. U.S. Non-Military Instruments.........................................................................................277
   a. United States Constitution (excerpts)........................................................................279
2. U.S. Military & Military Commission Law......................................................................281
[Eds--The Military Commission sources of law below will be re-arranged]

a. Uniform Code of Military Justice (UCMJ) (Excerpts)……………………………………..283
b. Military Commissions Act of 2009 (excerpts)………………………………………………285
c. Rules of the Military Commission (United States) (14 August 2012) (excerpts)………289
e. Military Commissions Trial Judiciary Rules of Court (24 April 2012, as amended 4 June 2013)(excerpts)…………………………………………………………………………………299
f. Military Commission Rules of Evidence (MCRE)………………………………………………..301
g. Department of Defense Media Ground Rules for Guantanamo Bay, Cuba (GTMO) (10 September 2010) (excerpt)…………………………………………………………………………………303

Appendix C: Charts of Fair Trial Provisions from International & Domestic Law Instruments…………………………………………………………………………………………………………………………307

a. International Human Rights Law Treaties…………………………………………………………309
c. Historical and Other International Humanitarian Law, International Criminal Law Instruments………………………………………………………………………………………………………312
d. U.S. Federal Law (U.S. Constitution)……………………………………………………………314
e. U.S. Military Commission Law; International Humanitarian Law Instruments…315

Appendix D: What You Need To Know Before You Travel to Guantanamo Bay or Ft. Meade on an NGO Observer Mission (forthcoming)…………………………………………………………317

Schematic of Guantanamo Bay Courtroom # 2…………………………………………………………………………………………………………………………………………………………………………………………….319

Appendix E: Al Nashiri case (U.S.S. Cole case) (Referred Charges of 28 September 2011)……321
Appendix F: Khalid Shaik Mohammad, et al (9/11 case) (Referred Charges of 2011 / 2012)….335
Appendix G: Hadi al Iraqi Case (Referred Charges of 4 February 2014)…………………………365

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)…………………………………………………………………………………………………………………………383

Appendix I: Statement of Honorable Brian P. McKeon, Principal Deputy Under Secretary of Defense for Policy (Testimony of Before the Senate Committee on Armed Services February 2015)……………………………………………………………………………………………………………………………389

Appendix J: Excerpt from Military Commission Website……………………………………………………………………………………………………………………………………………………………………………………………………395

Appendix K: White House Fact Sheet: New Actions on Guantánamo and Detainee Policy………399

Appendix L: Guantanamo: Why the U.S. Has a Naval Base in Cuba (By Professor Christopher Jenks)…………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………………
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 where 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 and 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.3

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).4 I was present in the Guantanamo Bay courtroom for Hicks’ guilty plea and sentencing.5

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 until 2014.


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 “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?

3 Cite to Military Commission archives.
I undertook to create a *Guantanamo Bay Fair Trial Manual* to outline fair trial rights that should be 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 Lounge” 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.

C. The future

---

© 2015

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

---

6 As of January 2015, an NGO representative is charged $150 to connect to the internet in GTMO “NGO Internet Lounge” using an ethernet cord at the beginning of any week of GTMO hearings. For the $150, the NGO representative may use the internet connection for up to a week. There are no refunds or and the $150 is not pro-rated fees if the hearings last less than a week. Thus, an NGO could end up paying $150 for one or two days of internet usage in the NGO Lounge.
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 infra at …*

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 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 Robert H. McKinney School of Law*

*U.S.A.*

Please contact *The Gitmo Observer* with any comments or constructive criticisms you may have!

*GitmoObserver@yahoo.com*

*www.GitmoObserver.com*

@*GitmoObserver*
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

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 attend, observe, analyze, critique and 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. The 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.

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 15 days for unclassified documents to clear review and be posted on the mc.mil website. 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, how many copies of these completed government forms must carried with travelers, 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 sitting 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.7 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.

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 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,

---

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.
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 (IU Affiliates), who are all faculty, staff, students and graduates of the 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 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 reports, or security staff, who are obligated to do their jobs without favor or disfavor to any side.

Gitmo Observer participants are free to 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 blog.

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.

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.
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 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 this guide are most relevant and helpful to them as they seek to carry out their own personal missions, the missions of their sending NGO,9 or the mission of whatever organization dispatched them to monitor the Guantanamo Bay Military Commissions.10

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.11 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.

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.

---

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.
III. Acknowledgements


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 Devereaux, Alyssa Duncan, Amanda Fiorini, Collin Gruver, Charles Niblick, Kunle Ogumnuyola, Luke Purdy, and Ellen Marie Queen. 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 (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), John Musser (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), both of whom were 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), Mike Bergin (Indianapolis), 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), Bart Brown (Chicago Kent School of Law), Rick Kammen (Kammen and Moudy), and Shahram Dana (The John Marshall School of Law), and George Edwards (Indiana University McKinney School of Law).

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 Library & Lounge 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

AAR  After Action Report
AE   Appellate Exhibit numbers
APACS Aircraft and Personnel Automated Clearance System
ASD/PA The Assistant Secretary of Defense for Public Affairs.
AUMF Authorization for the use of Military Force
CA   Convening Authority
CCTV Closed-Circuit Television Feed of Military Commission Proceedings
CDC  Chief Defense Counsel
CIPA Classified Information Procedures Act
CMCR Court of Military Commissions Review
CO   Commanding Officer
CSO  Court Security Officer
DC CA Court of Appeals for the DC Circuit
DCTHR European Court of Human Rights
DDC  U.S. District Court for the District of Columbia
DIA  Defense Intelligence Agency
DoD  U.S. Department of Defense
DoS  U.S. Department of State
DSO  Defense Security Officer
DTA  Detainee Treatment Act
ECHR European Convention on Human Rights and Fundamental Freedoms
EITSD Enterprise Information Technology Services Directorate
ELC  Expeditionary Legal Complex
GITMO U.S. Naval Station at Guantanamo Bay, Cuba
HVD  High Value Detainee
IACHR Inter-American Commission of Human Rights
IACtHR Inter-American Court of Human Rights
IAGO Inter-Governmental Organization
ICC  International Criminal Court
ICCCPR International Covenant on Civil and Political Rights
ICTR UN International Criminal Tribunal for the former Yugoslavia
ICTY UN International Criminal Tribunal for the former Yugoslavia
IGF  Immediate Reaction Force; Initial Reaction Force
JA   Judge Advocate
JAG  Judge Advocate General
JTF  Joint Task Force
JTF-GTMO Joint Task Force-Guantanamo Bay
MCA 2006 Military Commission Act of 2006
MCA 2009 Military Commission Act of 2009
MCRE Military Commissions Rules of Evidence
MCTJ Rules Military Commissions Trial Judiciary Rules of Court
MOC Media Operations Center
MS   Mitigation Specialist
MWD Military Working Dogs
NCIS Naval Criminal Investigative Service
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<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>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</td>
</tr>
<tr>
<td>OCP</td>
<td>Office of the Chief Prosecutor</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>OMCCA</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>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>SCI</td>
<td>Sensitive Compartmented Information</td>
</tr>
<tr>
<td>SCIF</td>
<td>Sensitive Compartmented Information Facility</td>
</tr>
<tr>
<td>SCt</td>
<td>United States Supreme Court</td>
</tr>
<tr>
<td>SJA</td>
<td>Staff Judge Advocate</td>
</tr>
<tr>
<td>SOP</td>
<td>Standard Operating Procedure</td>
</tr>
<tr>
<td>SOUTHCOM</td>
<td>Southern Command</td>
</tr>
<tr>
<td>TS/SCI</td>
<td>Top Secret / Sensitive Compartmented Information.</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>US ScT</td>
<td>United States Supreme Court</td>
</tr>
<tr>
<td>USCMCR</td>
<td>United States Court of Military Commission Review</td>
</tr>
<tr>
<td>USMC</td>
<td>United States Marine Corps</td>
</tr>
<tr>
<td>USN</td>
<td>United States Navy</td>
</tr>
<tr>
<td>VTC</td>
<td>Video Tele Conference</td>
</tr>
<tr>
<td>VWAP</td>
<td>Victim/Witness Assistance Program of the Office of Military Commissions</td>
</tr>
<tr>
<td>WHS</td>
<td>Washington Headquarters Service</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.

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.12

Criminal trials have stakeholders other than the prosecution and the defense, and 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.13 The Guantanamo Bay Fair Trial Manual recognizes this debate, and addresses it to the extent that 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.14 For example, the press has very 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.15 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 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

---

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

13

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

15 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.
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 (l) other individuals and entities.

Pursuant to international 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, these rights and interests must be respected.

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.

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 the U.S. and should be followed by the U.S. government.

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 16.

---

16 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.

17

18

19 Paqueta Habana, US (1901); see also …..
3 of the Geneva Conventions, that governs the right to a fair trial.\(^{20}\)

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\(^{21}\) (in the areas of international humanitarian law and international human rights law treaties);\(^{22}\) and

- **Customary international law** that binds the U.S. upon creation by operation of state practice and opinion juris\(^{23}\) (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*,\(^{24}\) 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.\(^{25}\)

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.\(^{26}\) 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 al Qaeda, which triggers the applicability of IHL,\(^ {27}\) and the Executive Branch has also recognized this.\(^ {28}\)

IHL and IHRL are closely related to each other, in that they both call for the protection of a wide

---

\(^{20}\) *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), rev’g 415 F.3d 33 (D.C. Cir. 2005); see also


\(^{23}\) 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.")*

\(^{24}\) 548 U.S. 557 (2006), rev’g 415 F.3d 33 (D.C. Cir. 2005)

\(^{25}\) 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)

\(^{26}\) For example, IHL protects civilians, combatants who have set aside their arms, medics, and others not participating in hostilities.

\(^{27}\)

\(^{28}\)
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:29

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.

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.

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

1. International Law (General International Law; International Humanitarian Law – a/k/a “Law of War” or “Law of Armed Conflict”; International Human Rights Law)

1. Geneva Conventions of 1949 (including Common Article 3)
2. U.N. International Covenant on Civil and Political Rights
3. U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
4. United Nations Charter
5. Norms contained in the Universal Declaration of Human Rights (as Customary International Law)
8. Other rules of Customary International Law

II. Domestic U.S. Law (Military & Non-Military U.S. Law)

9. U.S. Constitution (including Amendments thereto)
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 and other U.S. Federal Court Decisions (that interpret and apply international law and 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.

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,30 which provides for fair trial standards during non-international armed conflicts.31 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.32

The U.S. Executive Branch, per President Obama, has recognized the binding nature of Common Article 3,33 and this position is thus followed by the U.S. Military Commission Chief Prosecutor, Brigadier General Mark Martins, acknowledges the applicability to the Military Commissions of Common Article 3.34

The U.S. Supreme Court in *Hamdan v. Rumsfeld* ruled that Common Article 3 applies to the Military Commissions,35 and Congress has also recognized this.36

Thus, pursuant to Common Article 3, the Military Commissions must provide judicial guarantees that

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.

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 independent 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.

30 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)).

31 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).

32 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).

33 General Martins stated:

*[All 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 . . . .*]


35

36

© 2015

E-mail - GitmoObserver@yahoo.com  @GitmoObserver The Gitmo Observer (of Indiana U McKinley School of Law)
are “recognized as indispensable by civilized peoples.”37 The Military Commissions must afford all stakeholders rights 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.”38

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. 39 Article 75 of Additional Protocol I provides in part that:40

37 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.).


39 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. Caraham, USAF; and (ii) CDR John C. W. Bennett, 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”).


40 The White House Fact Sheet of March 2011 provides:

Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, is similarly important to the international legal framework. Although the Administration continues to have significant concerns with Additional Protocol I, Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported.

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
“[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.

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.

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”.

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.

Other international instruments that incorporate the customary international law norms on the right to a fair trial include the Nuremberg Principles of 1950.
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)\(^{46}\) 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.\(^{47}\) The ICCPR, like other treaties that bind the U.S.,\(^{48}\) 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,\(^{49}\) and to be afforded to stakeholders in the Guantanamo Bay Military Commission setting.\(^{50}\) Many of these ICCPR rights are discussed in this Guantanamo Bay Fair Trial Manual.\(^{51}\)

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 the U.S. as “due process rights”.

The ICCPR extensively details the right to a fair trial, covering protections from pre-arrest stage to trial, 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).\(^{52}\) The ICCPR provides for the rights of the accused at all stages of proceedings against him.

---


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 promotion and protection 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”.

\(^{48}\) 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, \[http://www.yale.edu/lawweb/avalon/imttech.html\] (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)

\(^{49}\) 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.

\(^{50}\) 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?)

\(^{51}\) The ICCPR list of fair trial rights includes:

\(^{52}\) 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 speech is curtailed, the government may be breaching the article 19 free expression right of the intended speech recipients (e.g., the defendant’s family with whom the defendant may be banned from contacting, or the press to whom the defendant may not be permitted to send messages). Bear in mind that pursuant to international and domestic U.S. law, reasonable restrictions may lawfully be placed on speech. But, an analysis will need to be conducted to determine whether a breach has occurred or in occurring.
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. 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.

- **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. 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.

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

  **ii. Customary International Law of Human Rights.**

  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*, the *American Declaration on the Rights and Duties of Man*, 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*, *The Principles and Guidelines on the Right to a Fair Trial and Legal 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...* 

---

53 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.” (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.”).

54 [See Human Rights Committee General Comment no 29, para xyz.](http://www.unhchr.ch/udhr/lang/eng.htm)

55 [Universal Declaration of Human Rights](http://www.unhchr.ch/udhr/lang/eng.htm) 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.

56 [American Declaration on the Rights and Duties of Man](http://www.cidh.org/Basicos/basic2.htm) provides that “every person may resort to the courts to ensure respect for his legal rights”. (Article 18)

57 This document is reproduced in Appendix ABC.

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

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

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

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 Contain 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).

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.


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.

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.
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 (the Pentagon / Department of Defense) invites NGO Observers to monitor U.S. Military Commission hearings to demonstrate to the U.S. and international community that the rules under which the Commissions operate are legal under U.S. law and under international law, and that these rules are being applied in compliance with U.S. and international law. The Pentagon seeks to have NGOs 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 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 does mete out is seen as fair and pursuant to the rule of law. This is consistent with the 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 monitor the hearings via secure, live videolink at the Post Theater, which is located at the Ft. Meade military base in Maryland.

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 outside world. NGOs should not bow to pressure. What happens at Guantanamo Bay should not stay at Guantanamo Bay.

---


67 E.g., in compliance with the U.S. Constitution and federal statutes.

68 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.

69 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. See http://www.mc.mil/Portals/0/Observer%20Selection%20Criteria.pdf

70 Military Commissions Rules of Evidence (MCRE)(14 August 1012), 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.

72 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
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 Military Commission proceedings are fair, that is, 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). 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, 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 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.

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.

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.
2. **Observe Hearings and Trials** – With an independent, objective, open mind, witness the Guantanamo Bay proceedings firsthand. 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 the rest of your surroundings. You will need to refer back to your notes as you are analyzing the proceedings and reporting on them later. Talk with stakeholders (prosecutors, defense counsel, press, other NGOs) and learn of their headaches, their challenges, and their positive accomplishments. Have your *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 others, 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 and interests stakeholders, and what is required under law for rights and interests to be realized. 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 witnesses 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.

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 outside world. NGO Observers may not serve their host organizations or other interested parties 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”, 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 report reflects your honest assessment of what you observed. NGO Observers should be free and independent thinkers, capable of formulating sound and reasoned judgments, free from pressure from any stakeholders. 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 observer the proceedings in person.

NGO Observers with Brigadier General Mark Martins, Chief Prosecutor of the U.S. Military Commissions at Guantanamo Bay (11 August 2014)
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” 74. 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. 75

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

---

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

75 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

---

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.
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 or domestic U.S. law. The proceedings started 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 detail here.76 The MCA of 2009 has limited jurisdiction77

Much has been written about the failures of these earlier Military Commission iterations,78 and will not be repeated here.

b. Law governing U.S. Military Commissions


In 2004, the Supreme Court in Hamdi v. Rumsfeld ruled that the U.S., to further the AUMF, could detain persons captured in the Afghanistan conflict until the conflict ended. The Pentagon, through newly created Combatant Status Review Tribunals (CSRTs), sought to assess whether persons detained at Guantanamo were eligible for trial or for indefinite detention.

On the same day that it ruled in Hamdi, The Supreme Court ruled in Rasul v. Bush, that the federal habeas statute (28 U.S.C. § 2241) offered persons held at Guantanamo Bay the right to seek habeas. Rasul essentially overruled the provision of the Presidential Military Order of 13 November 2001 that had provided that persons subject to that Order could not access U.S. federal courts for enforcement of rights or for any other sort of relief.

Congress responded by enacting the Detainee Treatment Act of 2005 (DTA), that divested federal courts from 28 U.S.C. § 2241 jurisdiction to hear habeas challenges to Guantanamo Bay detention, instead providing the U.S. Court of Appeals for the D.C. Circuit with exclusive jurisdiction for reviewing determinations made at GTMO (CSRT) about detainee status. The DTA did not itself authorize military commissions.

In 2006 the United States Supreme Court ruled in Hamdan v. Rumsfeld that the Military Commissions in place at that time were in violation of law because, inter alia, they failed to satisfy the requirement in Common Article 3 of the Geneva Convention that such Military Commissions be a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” 548 U.S. 557 (2006), rev’g 415 F.3d 33 (D.C. Cir. 2005) Congress responded to the Supreme Court by enacting the Military Commission Act of 2006. In 2008, the U.S. Supreme Court, in Boumediene v. Bush, 553 U.S. 725, 128 S.Ct. 2229 (2008) deemed the MCA of 2006 unconstitutional because it suspended the writ of habeas corpus of prisoners held at Guantanamo Bay, and ruled that those prisoners had the right to challenge their detention in U.S. federal courts. By invalidating the Military Commissions created pursuant to the Presidential Military Order of 2001, the Supreme Court in Hamdan made clear that the attempts of the Bush administration to strip federal courts of jurisdiction were of no avail. The Supreme Court ruled that Military Commission created through Congressional action must follow rules like those in the Uniform Code of Military Justice (UCMJ).

77 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.

78For 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.,
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 Geneva Conventions) and that arise under international human rights law treaties (e.g., the International Covenant on Civil and Political Rights – ICCPR, and the United Nations Convention Against Torture and other forms of Cruel, Inhuman or Degrading Treatment of Punishment). 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.79

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,” which excludes any “privileged belligerent” who;
   (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.82


    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 scheduled at varying stages. The three cases were:

Seventy Years 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:

(a) 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);

(b) The 9-11 case (against Khalid Shaik Mohammad and four other alleged masterminds of the World Trade Center and Pentagon attacks of September 2001) (though one defendant had been severed for a separate trial, and then recommitted to trial with the other four defendants, and a second of the group also moved for severance). The for other defendants in this case are Walid Bin Attash, Ramzi bin al Shibh, Ammar al Baluchi, and Mustafa al Hawsawi.

(c) 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).

2009 in which pre-trial hearings were ongoing or scheduled at varying stages. The three cases were:

---

79 See infra at xxx – yyy.

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

81 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).

82 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.
(a) 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)).

(b) 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 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. As of December 2014, all five 9-11 defendants are scheduled to be tried in one joint trial though severance motions are still pending.

---

83 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.

84 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.
(c) the **Hadi al Iraqi case**. Hadi al Iraqi is an alleged to have been al Qaeda liaison to the Taliban, to al Qaeda in Iraq, 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. 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”, and 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 humanitarian law, and are thus war crimes.\(^85\) The remaining crimes are in the eyes of the U.S. violations of the law of war given that the acts underlying the crimes would be perpetrated during hostilities (armed conflict).\(^86\)

---

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


(2) **Salim Hamdan**. Sudanese. Osama bin Laden’s drive. Convicted at trial. Conviction overturned by Federal Court. (2008)


(7) **Majid Khan**. Pakistani. Guilty plea. Sentence postponed pending testimony against other high-value captives. (2012)


*Figures from Pentagon, NGO website, and press (including the Miami Herald)*

---

85 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.

86 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)
f. Torture
In December 2014, a U.S. Senate Select Committee disseminated an unclassified, redacted 525 page Executive Summary of a report on the CIA’s Rendition and Interrogation program. The report, which has become known as the “Torture Report”.

In November 2014, the United Nations 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 discussion about the Torture Report & the Committee Against Torture Report is forthcoming.]

87 Citation to “Torture Report”.

88 Citation to instances in which the report is referred to as the “Torture Report”.


---

g. Closing Guantanamo Bay
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.”

[More discussion about closing Guantanamo forthcoming.]

---

GTMO Statistics (as of 5 February 2015)*

- 20 -- Number of prisoners on first flight on 11 January 2002 (camp X-Ray opening; detainees in orange jumpsuits).
- 780 -- Total number of detainees held at the Guantánamo Bay since 11 September 2001 attacks.
- 600 -- Approximate number of the 779 released without charges since 2002.
- XYZ -- Number of detainees at Guantánamo Bay when President Obama took office on 20 January 2009
- 122 -- Number of 780 detainees still at Guantánamo, from 19 countries (as of 13 January 2014)
- 54 -- Number of detainees the US approved for transfer to home or third countries who remain at Guantánamo.
- 58 – Number being reviewed by Periodic Review Boards (PRB)
- 36 -- “forever prisoners” (set for indefinite detention “under the Law of War”, with no charge or trial)
- 9 -- Number of detainees who died at Guantánamo Bay (including suicides)
- 8 -- Number of detainees convicted at Guantánamo Bay (after trial or guilty plea).
- 10 -- Number of detainees currently being prosecuted or have been sentenced
- 7 -- Number of the 122 detainees currently at Guantánamo facing formal charges with active hearings.

*Figures from Pentagon, NGO website, press (including the Miami Herald), and DoD

NB: All statistics and photographs / images in this Manual will be verified with appropriate permissions sought and citations given.
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>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>What is the name of the NGO Observer?</td>
<td></td>
</tr>
<tr>
<td>What is the NGO Observer’s affiliation?</td>
<td></td>
</tr>
<tr>
<td>What are the NGO Observer’s observation dates?</td>
<td></td>
</tr>
<tr>
<td>Did the NGO Observer observe in the courtroom at Guantanamo Bay, Cuba?</td>
<td></td>
</tr>
<tr>
<td>Did 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>
<td></td>
</tr>
<tr>
<td>How many other NGO Observers were present at Ft. Meade or Guantanamo Bay?</td>
<td></td>
</tr>
</tbody>
</table>

Understanding Your NGO Observer Mission
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the NGO that is sponsoring your NGO Observer provide you with a <em>Terms of Reference</em> to outline your goals and responsibilities during your Military Commission observation mission?</td>
<td></td>
</tr>
<tr>
<td>If you are an NGO Observer, are your objectives (per your <em>Terms of Reference</em>) to attend, observer, analyze, critique and report on the U.S. Military Commissions at Guantanamo Bay, Cuba?</td>
<td></td>
</tr>
<tr>
<td>If you are an NGO Observer and your objectives (per your <em>Terms of Reference</em>) 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 <em>Terms of Reference</em>) regarding the Military Commissions?</td>
<td></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>
<td></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>
<td></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>
<td></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>
<td></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>
<td></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>
<td></td>
</tr>
<tr>
<td>What reporting obligations do you as an NGO Observer have pursuant to your <em>Terms of Reference</em>?</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
</tr>
</tbody>
</table>
**Preparation for NGO Observer Mission**

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Will your host NGO Organization reimburse you $150 for you to be able to connect to the internet in the GTMO “NGO Lounge”?</td>
<td></td>
</tr>
<tr>
<td>How did you prepare for your NGO Observer mission?</td>
<td></td>
</tr>
<tr>
<td>Did you review the <em>Guantanamo Bay Fair Trial Manual</em>?</td>
<td></td>
</tr>
<tr>
<td>Did your visit websites of NGOs that have sent NGO Observers to Guantanamo Bay, Ft. Meade or other Military Commission viewing sites, such as <a href="http://www.GitmoObserver.com">www.GitmoObserver.com</a> and mc.mil?</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
</tr>
<tr>
<td>Did you contact other NGO Observers before your departure for Guantanamo Bay, to coordinate travel arrangements, to discuss substantive issues, or for other purposes</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
</tr>
<tr>
<td>Before your departed for your Observation mission, did you feel that you were prepared?</td>
<td></td>
</tr>
<tr>
<td>Did your NGO Observation meet your expectations?</td>
<td></td>
</tr>
</tbody>
</table>
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 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>
<tr>
<td>(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?</td>
</tr>
<tr>
<td>(The numbers of the crimes correspond to their numbers in the MCA of 2009.)</td>
</tr>
</tbody>
</table>
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 Terrori (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?

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

| What is the first crime the defendant is charged with? |
| What is the second crime the defendant is charged with? |
| What is the third crime the defendant is charged with? |
| What is the fourth crime the defendant is charged with? |
| What is the fifth crime the defendant is charged with? |
| What is the sixth crime the defendant is charged with? |
| What is the seventh crime the defendant is charged with? |
| What is the eight crime the defendant is charged with? |

Is the defendant an alleged member of al Qaeda?

Is the defendant an alleged member of the Taliban?

Defendant’s Custody Period and Location

When was the defendant taken into custody?

Where has the defendant been detained?

Was the defendant at any point held in a “black site” located outside the U.S.?

Is mental capacity an issue with regard to the defendant?

Is the defendant considered to be a High Valued Detainee (HVD)?
IX. General Categories of Rights of Guantanamo Bay, Cuba, Military Commission

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

Stakeholders........................................................................................................... 47

A. Right to be Presumed Innocent; Right to Have the Burden of Proof on the Prosecution... 49
B. Freedom from Retroactive Application of Criminal Laws (No Ex Post Facto Laws)……. 57
C. Freedom from Double Jeopardy (Ne Bis in Idem)................................................... 59
D. Right to Trial by Competent, Independent and Impartial Tribunal.......................... 61
E. Right to Effective Assistance of Counsel................................................................. 71
F. Right to Information & Access to Information........................................................... 81
G. Rights Related to Classified Information................................................................. 87
H. Rights to Adequate Time & Facilities to Prepare a Defense........................................ 95
I. Right to Prompt Judicial Proceedings...................................................................... 105
J. Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release; Right to Speedy Trial........................................................................................................... 107
K. Right to Liberty and Security of Person, including Freedom from Arbitrary Detention and Right to Review of Lawfulness of Detention.................................................. 111
L. Right to Humane Treatment & Humane Conditions of Detention............................... 113
M. Freedom from Torture, and Cruel and Inhuman Treatment or Punishment.............. 115
N. Freedom from Incommunicado & Solitary Confinement; Right to Access to the Outside World..................................................................................................................... 121
O. Rights to Interpreter / Translator.............................................................................. 123
P. Right to Public Proceedings......................................................................................... 127
Q. Freedom from Self-Incrimination; Right Not to be Compelled to Testify Against Oneself or to Confess Guilt...................................................................................................... 131
R. Right to Equality of Arms; Equality Before the Courts; Equal Protection of the Law... 139
S. Right to be Present at or Absent From Pre-Trial Hearings.......................................... 145
T. Right to Defend Oneself in Person or Through Counsel of His Own Choosing.......... 147
U. Right to Examine and Cross-Examine Witnesses...................................................... 151
V. Right to Exclusion of Illegally Obtained Evidence...................................................... 157
W. Right to Exclusion of Hearsay.................................................................................... 159
X. Rights of Detainees Who Were Juveniles When Taken to Guantanamo Bay............. 163
Y. Right to Appeal (Interlocutory, Conviction, Sentence)............................................... 165
Z. Rights to a Remedy (Victims, Detainees, Defendants)............................................... 183
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 to 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. 91

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 92 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 law.

91 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”).

92 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.”)
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.93

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.”

The United Nations Human Rights Committee, acting as an adjudicative body, found in Dimitry Leonodovich Gridin v Russian Federation,94 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,95 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.96

Secondary non-tribunal sources. Many law review articles and other secondary sources address the right to be presumed innocent.97

d. U.S. Constitution, U.S. Military Commission Act and Military Law & the Right to be Presumed Innocent; Burden of Proof on the Prosecution

93 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(e) (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”.


96 General Comment 32, para xyz.

97 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.pl/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).
Though the phrase “presumption of innocence” or “right to be presumed innocent” does not appear in the U.S. Constitution, the U.S. Supreme Court acknowledges that this right is entrenched in the due process clauses of the 5th and 14th amendment. The 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), 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).

The Military Commissions Act of 2009, the Uniform Code of Military Justice, 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. 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.

   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.

---

98 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).

99 441 U.S. 520, 582 n.11 (1979)

100 436 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.”)

101 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”.

---
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.\(^{105}\) 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)) |
|-----------------|---|---|---|
| **Comments About the Defendant’s Guilt** | Yes | No | Don’t Know |
| Do you know whether the prosecution has made comments about the guilt of the defendant? | | | |
| Do you know whether the judge has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest | | | |

\(^{105}\)See, supra
<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Unknown</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 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>Yes</th>
<th>No</th>
<th>Unknown</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>the press or others that the defendant might be guilty?</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>Right to Remain Silent</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>Does the burden of proof lie wholly on the prosecution throughout the process, for each crime charged?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
</tr>
</tbody>
</table>

Denying Defendant Access to Classified Information; Excluding Defendant from Portions of the Trial

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?

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?

Length of Pre-Trial Detention

How long was the defendant in detention pre-trial?

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?

Has the government indicated that if the defendant is acquitted of all charges, that the defendant would be released from Guantanamo Bay?

Has the government indicated that if the defendant is acquitted of all charges, that the defendant would not be released from Guantanamo Bay?

Role of Media

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?
| Does the burden of proof lie wholly on the prosecution throughout the process, for each element of each crime charged? |  |
| Are the procedural rules in these proceedings such that the prosecution retains the full burden of proof? |  |
B. Freedom from Retroactive Application of Criminal Laws (No Ex Post Facto Laws; Nullem Crime 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”, “nullem 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—nullem crimen sine lege (no crime without law).

Article I of the U.S. Constitution bans ex post facto laws, that is, laws with retroactive effect.106 Article 15(2) of the ICCPR similarly provides that defendants have the right to freedom from retroactive application of criminal law.

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.

[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)).107</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Question</strong></td>
</tr>
<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>
</tr>
<tr>
<td>Was the charged act punishable by law at the time it was allegedly committed?</td>
</tr>
</tbody>
</table>


107 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).
<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the crime charged violate international law at the time the</td>
<td></td>
<td></td>
</tr>
<tr>
<td>alleged offence was committed?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the crime charged violate domestic U.S. law at the time the</td>
<td></td>
<td></td>
</tr>
<tr>
<td>alleged offence was committed?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the crime charged violate domestic U.S. law at the time the</td>
<td></td>
<td></td>
</tr>
<tr>
<td>alleged offence was committed?</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>
</tr>
</tbody>
</table>
C. Freedom from Double Jeopardy (Ne Bis In Idem). \(^{108}\)

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:

Nor 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.

An exception may be that a second prosecution may not be automatically barred if it is in a different country from the first prosecution. \(^{109}\) This follows from the concept of state sovereignty, and that a court of one sovereign state cannot bind a court of another sovereign state, so the second state need not honor the trial in the first state.

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?

---

\(^{108}\) 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.”

\(^{109}\)
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.110

[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>Question</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>

---

110 See, e.g., Zoran Kupreškid et al., Case No IT-95-16-T, Trial Judgment, 14 Jan. 2000.
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. Stakeholders to a criminal trial will 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.

a. General

International and domestic U.S. law prescribe the nature of courts in which criminal trials are held, the competence of judges and judicial officers in these courts, and the ability of judges and judicial officers to be independent, impartial, competent and effective in performing their duties. International and domestic law place high demands on the court (military commission) and its personnel, who are charged with ensuring that all stakeholders received the fair trial to which they are entitled.

b. Binding Treaties calling for independent, impartial and competent tribunals

The right to trial by a 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 Common Article 3 of the Geneva Conventions,111 in ICCPR (art 14(1)).112

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.

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.

c. Customary international law norms calling for independent, impartial and competent tribunals

Customary international law principles, incorporated into many non-binding international law

111 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.

112 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).
instruments and as interpreted in international and domestic jurisprudence, call for independent, impartial and competent tribunals.

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

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.

Additional Protocol I, to the Geneva Conventions expressly requires an “impartial” court, as follows:

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:

d. U.S. statutory law calling for independent, impartial and competent tribunals

- UCMJ
- Military Commission Act of 2009, § 949b


e. 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: (a) criteria related to the appointing, assessing and retaining of Military Commission Judges; and (b) whether Military Commission judges are free from undue external influences. 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

113 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).


115 § 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 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.

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

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. Similarly, no higher authority should be permitted to remove judges from proceedings once they have commenced, except for good and just cause. 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. However, the MCA of 2009 prohibits the Convening Authority from assessing a trial judge’s effectiveness, fitness or efficiency.

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 defense)

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 on the one hand, the role 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 organs.

The Military Commission is not independent if the Executive Branch (e.g., the President or Vice-President, the Secretary of Defense, or officers through the military chain) 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, which should in any event should only exceptionally be used to try civilians.

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.

---

117 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.)

118 See id.

119

120

121 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. Judges are required to recuse themselves if . . .

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

123 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.)
f. 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) subjectively impartial, that is, 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: unequitable treatment of the prosecution versus the defense; disparate and unequitable 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 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 judgement to be influenced by personal bias or prejudice, nor harbour 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” \(^{124}\)

\(^{124}\) General Comment No. 32, id at para xyz. (citing UN Human Rights Committee Communication No. 387/1989, Karttunen v. Finland, para. 7.2.)
ii. Appearance of Bias or Prejudice (Objective Impartiality)

The Military Commissions and their judges “must also appear to a reasonable observer to be impartial.”125

g. 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.]

<table>
<thead>
<tr>
<th>7. Right to Trial by an Independent Tribunal (Military Commission Act of 2009, § 949b; ICCPR, art 14(1))</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Independence of the Judge &amp; Court</td>
<td></td>
</tr>
<tr>
<td>When was the judge assigned to the case?</td>
<td></td>
</tr>
<tr>
<td>When is the judge’s temporary assignment set to expire?</td>
<td></td>
</tr>
<tr>
<td>Was the judge in the case removed, and a new judge assigned as a substitute?</td>
<td></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>
<td></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>
<td></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>
<td></td>
</tr>
<tr>
<td>If the judge in the case removed and a new judge was assigned as a substitute, did either the prosecution or defense complain?</td>
<td></td>
</tr>
<tr>
<td>If the judge in the case removed and a new judge was assigned as a</td>
<td></td>
</tr>
</tbody>
</table>

125 Id.
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>substitute and either the prosecution or defense complained, what was</td>
<td></td>
</tr>
<tr>
<td>the result?</td>
<td></td>
</tr>
<tr>
<td>Did either the prosecution or defense conduct voir dire on the judge</td>
<td></td>
</tr>
<tr>
<td>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</td>
<td></td>
</tr>
<tr>
<td>actual or an air of lack of independence of the judge, for example,</td>
<td></td>
</tr>
<tr>
<td>where a judge’s decisions might be or be seen to be influenced by</td>
<td></td>
</tr>
<tr>
<td>expected remuneration based on non-removal or reappointment?</td>
<td></td>
</tr>
<tr>
<td>The GTMO courtroom has a 40-second delay in transmitting</td>
<td></td>
</tr>
<tr>
<td>courtroom audio to NGO Observers sitting behind a glass wall. If a</td>
<td></td>
</tr>
<tr>
<td>trial participant mentions classified information, the judge may flash</td>
<td></td>
</tr>
<tr>
<td>a red light to signal that the audio will be cut to the Observers. Did</td>
<td></td>
</tr>
<tr>
<td>the court appear to be in control of the 40-second audio delay and red</td>
<td></td>
</tr>
<tr>
<td>light? Did it appear as though individuals aside from the judge or the</td>
<td></td>
</tr>
<tr>
<td>court security officer caused the red light to flash and the audio to</td>
<td></td>
</tr>
<tr>
<td>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</td>
<td></td>
</tr>
<tr>
<td>actual or an air of lack of independence of the judge, for example,</td>
<td></td>
</tr>
<tr>
<td>where a judge’s decisions might be or be seen to be influenced by</td>
<td></td>
</tr>
<tr>
<td>expected remuneration based on non-removal or reappointment?</td>
<td></td>
</tr>
<tr>
<td>The GTMO courtroom has a 40-second delay in transmitting</td>
<td></td>
</tr>
<tr>
<td>courtroom audio to NGO Observers sitting behind a glass wall. If a</td>
<td></td>
</tr>
<tr>
<td>trial participant mentions classified information, the judge may flash</td>
<td></td>
</tr>
<tr>
<td>a red light to signal that the audio will be cut to the Observers. Did</td>
<td></td>
</tr>
<tr>
<td>the court appear to be in control of the 40-second audio delay and red</td>
<td></td>
</tr>
<tr>
<td>light? Did it appear as though individuals aside from the judge or the</td>
<td></td>
</tr>
<tr>
<td>court security officer caused the red light to flash and the audio to</td>
<td></td>
</tr>
<tr>
<td>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</td>
<td></td>
</tr>
<tr>
<td>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</td>
<td></td>
</tr>
<tr>
<td>outside of the prosecution exerted influence of the prosecution on a</td>
<td></td>
</tr>
<tr>
<td>decision whether to charge a particular offense, to charge an offense</td>
<td></td>
</tr>
<tr>
<td>in a particular way, to drop a charge against a defendant, to appeal an</td>
<td></td>
</tr>
<tr>
<td>adverse ruling, or regarding any other matter?</td>
<td></td>
</tr>
<tr>
<td>Were you aware of any incident in which a Military Commission staff</td>
<td></td>
</tr>
<tr>
<td>member was subject to undue influence by the Department of Justice or</td>
<td></td>
</tr>
<tr>
<td>any other entity outside of the court staff?</td>
<td></td>
</tr>
</tbody>
</table>
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?

<table>
<thead>
<tr>
<th>8. Right to Trial by an Impartial Tribunal (Military Commission Act of 2009, § 949b; ICCPR, art 14(1))</th>
</tr>
</thead>
<tbody>
<tr>
<td>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?</td>
</tr>
<tr>
<td>Did the judge appear to be even-handed, as between the prosecution, defense and other actors?</td>
</tr>
<tr>
<td>Did the judge offer all relevant stakeholders an opportunity to be heard on motions and other matters before the court?</td>
</tr>
<tr>
<td>Did it appear as though the judge considered the law carefully, and ruled on motions without bias or favor towards any side?</td>
</tr>
<tr>
<td>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?</td>
</tr>
<tr>
<td>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?</td>
</tr>
<tr>
<td>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?</td>
</tr>
<tr>
<td>Did the judge make any statements or take any actions that might suggest that the judge was biased in favor of the defendant(s)?</td>
</tr>
<tr>
<td>Question</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Did the judge make any statements or take any actions that might suggest that the judge was biased against the defendant(s)?</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>
</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>
</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>
</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>Question</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competence of the Court</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<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>Did the judge exercise proper control over the courtroom and proceedings?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td>Rating</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 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>Rating</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 about 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 rights 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
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\(^{126}\) and the ICTR Statute\(^{127}\).

Historical international instruments documents that bind the U.S. and that provide for the right to

---

\(^{126}\) 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”);

\(^{127}\) 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”)

---
The U.S. is bound by right to counsel customary international law rules that are incorporated into non-binding treaties such as Geneva Conventions, Protocol Additional, ACHR, and the ECHR. 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, ACHPR, and the ECHR.

Implicit in the right to adequate facilities is the defendant's right to competent representation, 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. Further, the European Court of Human Rights has held that the defendants have the right to represent themselves, the right to counsel of one's own choosing, and the right to legal aid. Defendants have the right to counsel before trial, The right to effective assistance of counsel applies before the trial commences (pre-trial), during trial, 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.

c. U.S. Military and Military Commission law

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

128 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”).
129 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.”)
130 See Article 75(4) (“shall afford the accused before and during his trial all necessary rights and means of defense”).
131 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”);
132 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”)
133 See art. 11 (“Everyone charged with a penal offense 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.”);
134 See Art. 7(1) (“The right to defense, including the right to be defended by counsel of his choice”);
135 See infra notes abc – xyz and text accompanying notes.
136 See Ocalan v. Turkey; see also Louis Doswald-Beck, Human Rights in Times of Conflict and Terrorism, Oxford University Press 2011, p.360.
137 Pakelli v. Germany, 6 EHRR 1 (1983)
138 Pakelli v. Germany, 6 EHRR 1 (1983)
139 Pakelli v. Germany, 6 EHRR 1 (1983)
140 S. v. Switzerland, 14 EHRR 670
141 Quaranta v. Switzerland, Series A No. 205
142 Poitrimol v. France, 18 EHRR 130
143 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
Military Commissions Act of 2009, § 948k provides that “defense counsel shall be detailed for each military commission”. Similarly, the Uniform Code of Military Justice, article 38, section b provides for detailed defense counsel in courts martial.

d. General right to effective assistance of counsel—U.S. Constitution & U.S. cases

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” or “effective assistance of counsel”.

The right to effective assistance of counsel applies to any and all Military Commission counsel, regardless of whether the counsel is military or civilian, or detailed, appointed, or otherwise retained, whether or not at the expense of the U.S. government.

Federal Courts have also held that the 14th Amendment's Due Process Clause requires criminal defendants to "have sufficient time to advise with counsel and prepare his defense." (Powell v. State of Alabama, 287 U.S. 45 (1932). According to the Court in Powell, 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, 767 F.2d 1443 (9th Cir. 1985), 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. Milton v. Morris, 767 F.2d 1445 (9th Cir. 1985).

In many of the Guantanamo Bay cases the defendants face the death penalty. Under the 6th Amendment to the U.S. Constitution, pursuant to Powell v. Alabama, 287 U.S. 45 (1932), defendants in death penalty cases have the right to counsel, and pursuant to Strickland v. Washington, 466 U.S. 668 (1984), for the right to be counsel to be realized, the counsel must not be ineffective. The right to counsel begins pre-trial, continues during trial, and is present post-trial upon appeal if there is a conviction.

e. 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”.

Military Commissions Regulations, Art. 9 provides:

“Every 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 Uniform Code of Military Justice, art. 27, provides that “defense counsel shall be detailed for each general and special court-martial”

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.


146 Capital cases in the U.S. Military Commissions include the 9-11 cases, in which 5 defendants face the death for allegedly masterminding the attacks on the World Trade Center and Pentagon on 11 September 2014, and the al Nashiri case, in which one defendant faces the death penalty for allegedly masterminding the attack on the U.S.S. Cole docked in Yemen in October 2000.

Criminal defendants have the right to counsel when faced with imprisonment (Argersinger v. Hamlin, 407 U.S. 367 (1979)), and in all felony cases (Gideon v. Wainwright, 372 U.S. 335 (1963)).

147 E.g., Brewer v. Williams, 430 U.S. 387 (1977), etc…”
f. 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:149

i. the general right to effective assistance of counsel (U.S. Constitution, Sixth Amendment),150 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 (ICCPR, art 14(3)(d));

ii. the right to communicate with counsel of his own choosing (ICCPR, Article 14(3)(b));

iii. the right to adequate time and facilities to prepare for his defense (ICCPR, article 14(3)(b));

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.

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.152 To determine whether counsel has been competent, he European Court determines whether the defendant received "effective defense in practice."153 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.154

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, 155 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.156

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

---

149 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)

150 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).

151 HRCte, General Comment 32, § 38


153 Id.

154 Id.

155 The right to communicate with counsel of his own choosing is also provided for in the following international instruments: Body of Principles on Detention) (d); European Convention, Article 6(3) (c). The Human Rights Committee has stated that “all persons who are arrested must immediately have access to counsel.” (Concluding Observations of the Human Rights Committee, Georgia, UN Doc. CCPR/C/79/Add.75, 5 May 1997, para 27). 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 47.

156 United States v. Pinson, 56 MJ 489
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." 157

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. The attorney-client privilege protects written communications on paper, electronically or otherwise, and protects oral communications however made.

It would violate the attorney-client privilege, under U.S. and international law, if the rooms in which Guantanamo Bay detainees speak with their lawyers contain listening devices through which privileged communications may be listened to, recorded, or otherwise monitored. It would violate the attorney-client privilege for JTF-GTMO detention personnel to require that the door of a defendant’s interview room be left open during lawyer consultation periods when oral communications can be overheard by detention personnel outside the room. It would violate attorney-client privilege for defense table microphones to be permitted to pick up soto voce communications between the defendant and his counsel.

v. Learned Counsel

If a Military Commission 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. This right is provided for in the Military Commissions Act of 2009, section xyz.

vi. Death Penalty Mitigation Specialist

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. Mitigation specialists may also work before the charges are filed by United States v. Pinson, 56 MJ 489 the death penalty.

Mitigation specialists are counsel to the defense, and 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. 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 should have access to the defendant, 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.

vii. 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

157 U.S. v., 51 F.3d 249 (11th Cir. 2005).
viii. 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.

<table>
<thead>
<tr>
<th>10. Right to Effective Assistance of Counsel</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>

<table>
<thead>
<tr>
<th>11. Right to Death Penalty Counsel (“Learned Counsel”) if a Death Penalty Case</th>
<th>Yes</th>
<th>No</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>
<tr>
<td>Does it appear as though the “Learned Counsel” have access to all the resources necessary to provide a defense to the death penalty charges?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does it appear as though “Learned Counsel” is actively involved in the defense?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### 12. Right to Communicate with Counsel of His Own Choosing (ICCPR, art 14(3)(b))

<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 the ability to consult with his counsel in confidence?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were you aware of any allegations of improper hurdles in place that prevented full and frank communications between the defendant and his counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any improper hurdles currently in place that prevent full and frank communications between the defendant and his counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the defendant have the ability to communicate with his counsel via e-mail?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the defendant have the ability to communicate with his counsel via telephone?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defense alleged that the prosecution has interfered with defense counsel ability to communicate with their client?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the defendant have the ability to communicate with his counsel via skype or other video-conference mechanism?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the defendant have the ability to communicate with his counsel via letters (mail, post)?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Must defendant wait until counsel travels to Guantanamo Bay, Cuba for the defendant to communicate counsel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are all means through which defendants can communicate with counsel protected interception, screening, or improper review by detention staff or other governmental authorities?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do all communications between defendant and counsel have the required level of confidentiality?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 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>Are all communications between defendant and counsel have the required level of confidentiality?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<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>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>
</tbody>
</table>

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?
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>If this is a death penalty case, has the defendant provided effective</td>
<td></td>
</tr>
<tr>
<td>assistance of a death penalty mitigation specialists to gather</td>
<td></td>
</tr>
<tr>
<td>information and present it to try to convince the jury, should there</td>
<td></td>
</tr>
<tr>
<td>be a conviction, to try to convince the jury not to impose the death</td>
<td></td>
</tr>
<tr>
<td>penalty?</td>
<td></td>
</tr>
<tr>
<td>Does it appear as though the prosecution, the court, the detention</td>
<td></td>
</tr>
<tr>
<td>facility staff have interfered with or are interfering with the</td>
<td></td>
</tr>
<tr>
<td>relationship between the death penalty mitigation specialist and the</td>
<td></td>
</tr>
<tr>
<td>client?</td>
<td></td>
</tr>
<tr>
<td>Have claims been made that any death penalty mitigation specialist</td>
<td></td>
</tr>
<tr>
<td>was denied a security clearance in a timely fashion or was otherwise</td>
<td></td>
</tr>
<tr>
<td>inhibited from developing or maintain an attorney client relationship?</td>
<td></td>
</tr>
</tbody>
</table>
F. Right to Information & Access to Information

The right to information and access to information requires different criminal trial stakeholders to be provided with certain information at certain times. The defendant is entitled to receive certain information from the prosecution. The prosecution is entitled to receive certain information from the defense. Victims and Victims’ families are entitled to certain information.

[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.]

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 he has and is entitled to discovery of certain information possessed by the prosecution. One category of information the defendant is entitled to receive from the defendant is exculpatory information, or information that would tend to demonstrate the lack of guilt of the defendant.

1. U.S. Constitutional

One provision of the U.S. Constitution that specifically addresses the right to Information is the 6th Amendment, that provides in relevant part:

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

2. Binding Treaties that address the right to Information that bind the U.S. include:

- Common Article 3:

ICCPR article 14(1)(a) provides that

[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.

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

Commencement and Conduct of Trial Proceedings
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:

Commencement and Conduct of Trial Proceedings
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.

3. 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: Right to Personal Liberty
    4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
  - Article 8: 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
  - Article 5: Right to Liberty and Security
    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;

4. **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**
  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:
3. 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.
4. 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), M: Provisions Applicable to Arrest and Detention:
  1. Rights upon arrest:
     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.
     2. Resolution on the Right to Recourse and Fair Trial of the African Commission on Human and Peoples’ Rights (1992) provides that “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 that “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
  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.

5. Uniform Code of Military Justice (UCMJ provisions)

UCMJ provisions that discuss the right to Information include:

- 10 U.S.C.A. § 830, Art. 30: Charges and specifications
  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.

- 10 U.S.C.A. § 830, Art. 32: Investigation
  (a) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel . . .

### 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))\(^{158}\)

<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>
<tr>
<td>Was the defendant informed of his right to bring habeas corpus claims in U.S. federal courts?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the defense have access to court records?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

### 16. Right to Discovery

<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 defense have equal access to the court?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is the defense given timely access to these records?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the prosecution provided all the discovery required?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the prosecution refused to provide discovery?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has discovery been provided to defense in a timely manner?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{158}\) 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).
Has the court made appropriate discovery orders?  
Has the defense turned over any discovery it is required to?  

| 17. Right to Receive Exculpatory Information (Military Commission Act of 2009, section xxx; ICCPR art. 14) |
|--------------------------------------------------|---|---|---|---|
| Has the prosecution withheld exculpatory information?  
Are you aware of any complaints that the prosecution has withheld any exculpatory information? |

159 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.

7. “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.
      - His right to challenge the lawfulness of his detention
  - 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:
8. 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.”

9. 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. Sedaghaty**, 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–Viloria, 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.”)
10. 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>
<tr>
<td>Question</td>
<td>Yes</td>
<td>No</td>
<td>Partial</td>
<td>Not Applicable</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-----</td>
<td>----</td>
<td>---------</td>
<td>----------------</td>
</tr>
<tr>
<td>If the defendant was informed in a language he could understand of the charges against him, when was that notification made?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant provided with information in a language he/she could understand on how to avail himself of his rights?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the information provided to the defendant general or specific in nature?</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 various items of classified information?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the trial judge refused to grant access to any stakeholder of classified information?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
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>
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.160 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.161

The right to adequate time and facilities apply both to the defendant and the defendant's counsel162 and extend to the entire defense team.163 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.164 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."165

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).

---


161 Id.

162 This right requires that the defendant's lawyer be available at every relevant portion of the proceedings. (General Comment 32, § 38)

163 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.")

164 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"

165 See Steyler, Constitutional Procedure at 234.
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 rights 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.

c. “Adequate time and adequate facilities” considered jointly; Defining “adequate” time and facilities

Though bodies such as the UN Human Rights Committee and legal commentators have attempted to distinguish between the meaning of "adequate time" and "adequate facilities"—for example as those phrases appear in ICCPR Article 14(3)(b)—frequently the two requirements are considered jointly, almost intertwined in meaning, and are be referred to as “adequate time and facilities” rather than “adequate time” and “adequate facilities”.

Considering the two terms separately, the Human Rights Committee in its General Comment 13 notes that "adequate time" depends on the circumstances of each individual case and closely relates to the availability of evidence.

Due to the overlapping nature of the definitions of "time and "adequacy" in Comment 13, the Human Rights Committee generally examines the adequacy or inadequacy of time and facilities as one combined element when considering individual cases. For example, in Khoroshenko v. Russian Federation, the Committee determined that the defendant's combined right to "adequate time and facilities" was

---

166 See, e.g., Right to Effective Assistance of Counsel (p. 6), Right to Information & Access to Information (p. 13), Rights Related to Classified Information (p. 17), and Right to Equality of Arms (p. 39).

167 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.")

168 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.

169 See, e.g., (the right to adequate time and facilities to prepare a defense is “a corollary of the principle of equality of arms”). See also Trechsel, Human Rights in Criminal Proceedings at p. 227 (Noting that under the equality in arms principle, a defendant's right to adequate facilities also includes his right to make investigations, including, inter alia, the ability to interview potential witnesses, to research material evidence, and to contact experts.) Trechsel notes that this right extends to defense counsel as well as to the defendant himself. Id. IN Ofner v. Austria, Application 524/59, the ECHR Commission noted that "to determine whether the right to adequate time and facilities for the preparation of the defense has been respected, account must be taken of the general situation of the defense and not only the situation of the accused."

Like the right to "adequate time", the right to "adequate facilities" has been associated with the "equality in arms" principle.

170 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."


violated because, *inter alia*, the defendant was not provided with certain documents "necessary to his 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.\(^{174}\)

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”\(^{175}\)

These rights are also provided in numerous international instruments that do not bind the U.S.\(^{176}\)

In *Wright v. Jamaica*,\(^{177}\) 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 defense 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*,\(^{178}\) 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.\(^{179}\) Alternatively, the right to adequate time and facilities applies whenever the defendant has been given notice of the charges

---

\(^{174}\) See, e.g.,

\(^{175}\)See ICCPR Article 14(3)(b).

\(^{176}\)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(c)(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.”


\(^{178}\)no. 9300/81 § 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.

\(^{179}\)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

---

180Campbell 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.


182See 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.

183In 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.

184Trechsel, 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 ..."

185Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 221; Trechsel, Human Rights in Criminal Proceedings, p. 221. Also see Ross v. United Kingdom above.

186Trial 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.

187Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 221; Samer v. Germany, Application 4319/69.

prepare its case;\footnote{189}

5. The importance of the proceeding’s stage being prepared, with more time needed for trial preparation than preparation for a non-trial hearing;\footnote{190}

6. "The level of knowledge defense counsel is expected to have of the issue at hand;\footnote{191}

7. The stage in the proceedings\footnote{192};

8. The accused's representation of himself;\footnote{193}

9. The number of hours counsel work, with no expectation that lawyers work extra hours on a case;\footnote{194} and

10. The time needed for new counsel to research and comprehend the case’s arguments and history should earlier counsel be replaced.\footnote{195}

\section*{f. 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."\footnote{196} 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:\footnote{197}: 

1. Access to an attorney without delay\footnote{198}

\begin{itemize}
\item\footnote{189}{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. (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.}
\item\footnote{190}{Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 22.}
\item\footnote{191}{Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 22; \textit{Id.}, see also \textit{Huber v. Austria}, Application 5523/72. See \textit{infra}.}
\item\footnote{192}{\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.}
\item\footnote{193}{Clayton, Tomlinson, \textit{FAIR TRIAL RIGHTS} at 180, which discusses factors courts have used to determine whether a defendant was granted adequate time to prepare a defense.}
\item\footnote{194}{Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 221; \textit{Id.}}
\item\footnote{195}{Trechsel, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS at 221; \textit{Id.}}
\item\footnote{196}{Clayton, Tomlinson, \textit{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.}
\item\footnote{197}{See \textit{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."}
\item\footnote{198}{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}
2. Ability to communicate with, to be visited by, and to consult with an attorney\footnote{Cubas 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.}

3. Ability to communicate with an attorney without interception or censorship and in full confidentiality\footnote{Trial 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."}, not within the hearing of law enforcement officials (though the consultation may be within sight of law enforcement officials\footnote{The 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. Csalim 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;}

4. Physical facilities that permit confidential communication with counsel of defendant’s choice\footnote{Basic Principles on the Role of Lawyers (1990), Principle 8.}

5. Access to appropriate and necessary information, documents, files\footnote{But 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) and Lamy 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.}

6. Access to the prosecution's files,\footnote{Clayton, Tomlinson, FAIR TRIAL RIGHTS at 181. See also Kremzow v. Austria (1993), 17 EHR 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.}

7. Access to exculpatory material\footnote{Clayton, Tomlinson, FAIR TRIAL RIGHTS at 222-230, which goes into detail on various factors courts have}
9. Notification of consular rights

10. "[A]ll aspects that facilitate effective participation such as interpretation, legal assistance and legal aid, among others."\(^{209}\)

\textbf{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 \textit{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 \textit{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.\(^{210}\)

\[This Right to Adequate Time & Facilities to Prepare Defense introductory section is being developed further. An Indiana University McKinney School of Law student is assigned to research this topic.\]

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|}
\hline
 & Yes & No & Don't Know & Comment \\
\hline
Has the defendant complained about lacking adequate time to prepare a defense? &  &  &  & \\
\hline
\end{tabular}
\end{table}

\(^{208}\)Trechsel, \textit{HUMAN RIGHTS IN CRIMINAL PROCEEDINGS} at 222-230, \textit{Id}.

\(^{209}\)Catherine S. Namakula, Language and the Right to Fair Hearing in International Criminal Trials, p. 82.

\(^{210}\)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 \textit{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"). \textit{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 \textit{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/CE.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>Has the defendant’s counsel complained about lacking adequate time to prepare a defense?</td>
<td></td>
</tr>
<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 remedies 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>
</tbody>
</table>
Have there been any changes in defendant’s counsel or defense team that may affect the amount of time needed to prepare his defense?

Has defense counsel been forced to work extra hours to compensate for inadequate time?

### 21. Right to Adequate Facilities to Prepare Defense (ICCPR, art 14(3)(b))

<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 complained about lacking adequate facilities to prepare a defense?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant’s counsel complained about lacking adequate facilities to prepare a defense?</td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>What remed(ies) did the military judge order to remedy any lack of adequate facilities to prepare a defense?</td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does it appear as though the defendant has adequate facilities to prepare for his defense?</td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></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>
<td></td>
<td></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>
<td></td>
<td></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>
<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>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>
<td></td>
<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>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the defendant have access to electronic databases needed for his defense?</td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></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>
<td></td>
<td></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>
<td></td>
<td></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>
<td></td>
<td></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>
<td></td>
<td></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>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has defense counsel been forced to work extra hours to compensate for inadequate time?</td>
<td></td>
<td></td>
<td></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)) |
|---|---|---|---|
| **Was the defendant brought before a court promptly?** | Yes | No | Don’t Know |
| **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?** | | | |

---

211 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 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 alleged criminal behavior of the defendant?</td>
<td></td>
</tr>
<tr>
<td>Was the defendant brought before any other type of Guantanamo Bay non-judicial tribunal or process (e.g., Combat Status Review Tribunal–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.212

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.213

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”.214

c. International law

[This Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release introductory section is being developed further.]

23. Right to Trial Without Undue Delay (ICCPR, art 14(3)(c), art 9(3) & (4))

<table>
<thead>
<tr>
<th>General Questions</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

---

212 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.

213 The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”.

214 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**

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>How many years / months transpired between the time the defendant was captured / arrested and the time Military Commission charges were referred against the defendant?</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
</tr>
<tr>
<td>Did the judge discuss or make a ruling as to whether any delay between the capture / arrest and the referral of charges was excusable?</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
</tr>
</tbody>
</table>

**Delay Between Time Charges Referred and Today (if the trial has not yet commenced)**

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>If the trial has not yet commenced, how many years / months have transpired between the time the charges were referred and today?</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
</tr>
<tr>
<td>Did the judge determine that any delay between the referral of charges and the proposed trial commencement date is attributable to the prosecution?</td>
<td></td>
</tr>
</tbody>
</table>
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?

**Delay Between Time Charges Referred and the Date the Trial Actually Commenced**

Did the judge discuss or rule on whether any delay between the referral of charges and the commencement date of the trial is excusable?

Did the judge determine that any delay between the referral of charges and the time the commencement trial date is attributable to the defendant?

Did the judge determine that any delay between the referral of charges and the trial commencement date is attributable to the prosecution?

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?

**Reasons for any delay?**

What is your understanding of the major causes of any delay in the proceedings?

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?

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.

Does it appear as though any delay has been caused by the judge’s failure to rule on motions in a timely fashion?

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?
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?

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?

When is the defendant’s trial scheduled to begin?

In your opinion, is the length of time between arrest / capture / detention and the proposed trial date reasonable?

<table>
<thead>
<tr>
<th>24. Right to Speedy Trial (ICCPR, art 14(3)(c), art 9(3) &amp; (4))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has the defendant complained about not receiving a speedy trial?</td>
</tr>
<tr>
<td>Has the prosecution commented in the issue of a speedy trial?</td>
</tr>
<tr>
<td>Has the judge commented in the issue of a speedy trial?</td>
</tr>
</tbody>
</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…

a. General

International and domestic law require the defendant to be afforded the right to liberty and security of person. All persons have the right to freedom from arbitrary detention (ICCPR, art 9(1)). 215

ICCPR Article 9(1) provides:

Everyone has 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.

ICCPR Article 9(4) 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.

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)) 216

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 against a person, the U.S. government may lawfully and appropriately detain that person. Such deprivation of liberty cannot be arbitrary.

At the heard of

[This introductory Liberty, Security, Arbitrary Detention, and Lawfulness of Detention section is being developed further.]

215 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).

216 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.
25. Right to Liberty and Security of Person, including Freedom from Arbitrary Detention (ICCPR, art 9(1))

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</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>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does it appear that the defendant’s right to freedom from arbitrary detention has been afforded to him?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant complained about any alleged denial of his right to liberty and security of his person?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant complained about any alleged denial of his right to freedom from arbitrary detention?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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. 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.]

a. 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)),217 and that all defendants have the right to humane conditions of detention. 218

b. 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.

217 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.

218 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.
### 27. 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>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>
</tbody>
</table>

| Has the defendant been treated with the respect for the inherent dignity of the human person? |
| Has the defendant been treated with humanity? |

### 28. Right to Humane Conditions of Detention – Pre-Trial Hearing Stage

<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>
</tbody>
</table>

| At which specific Guantanamo Bay camp is defendant being held? |
| What are the general conditions of the defendant’s detention? |
| Does the defendant appear to have access to proper nutrition, and to be properly nourished? |
| Do the defendant’s clothes appear to be clean? |
| Are you aware of any complaints related to the defendant having access to appropriate and adequate bathing facilities? |
| Are you aware of any complaints related to the defendant having access to appropriate medical facilities? |
| Are you aware of any complaints related to the defendant having access to appropriate educational materials? |
| Are you aware of any complaints related to the defendant having access to appropriate recreational facilities? |
| Has the defendant been subject to disciplinary measures while in detention? |
| Has the defendant been placed in solitary confinement? |
| Does the defendant have access to the outside, or is the defendant kept inside at all times? |
M. Freedom from torture, and cruel and inhuman treatment or punishment

The right to freedom from torture, and cruel and inhuman 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 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)), and this prohibition applies to all Guantanamo Bay defendants before and during any hearings.

This prohibition extends to all forms of waterboarding, certain methods of “enhanced interrogation”, and to some forms of force-feeding.

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

---

219 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

220 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 on Detention 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.”)

221

222

223
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.]

<table>
<thead>
<tr>
<th>29. Right to be Free From Torture (ICCPR, arts 7, 9(1); 10(1))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the defendant allege torture during pre-pre-trial detention?</td>
</tr>
<tr>
<td>What was the nature of any alleged torture during the Pre-Charges (Pre-Pre-Trial) stage?</td>
</tr>
<tr>
<td>Has it ceased?</td>
</tr>
<tr>
<td>What remedy, if any, did the court order?</td>
</tr>
<tr>
<td>Was the remedy effective?</td>
</tr>
<tr>
<td>Prisoner access to international fora to complain about torture?</td>
</tr>
<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>
</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>
</tr>
</tbody>
</table>
Have defense counsel sought to raise torture-related claims on behalf of the defendant before non-U.S. tribunals and other intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

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 intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</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 intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Has the defendant been directly or effectively prohibited from raising torture-related claims in non-U.S. tribunals and other intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

### 30. Right to be Free From cruel, inhuman or degrading treatment or punishment (ICCPR, arts 7, 9(1); 10(1))

Did the defendant allege cruel, inhuman or degrading treatment during the Pre-Charges stage?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

What was the nature of any alleged cruel, inhuman or degrading treatment during the Pre-Charges stage?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Has it ceased?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

What remedy, if any, did the court order?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Was the remedy effective?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>

Prisoner access to international fora to complain about cruel, inhuman, degrading treatment or punishment?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
</table>
Has the defendant raised cruel, inhuman or degrading treatment or punishment-related claims in non-U.S. tribunals and other inter-governmental 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-governmental 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-governmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

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-governmental 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 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-governmental 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 cruel, inhuman or degrading treatment or punishment-related claims in non-U.S. tribunals and other inter-governmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?

### 31. Right to be Free from Water Boarding

<table>
<thead>
<tr>
<th>Was the defendant water-boarded at any stage, up to and including the pre-trial hearing stage?</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>
</tbody>
</table>

If so, was this fact communicated to the judge, prosecution, or jury?
32. Right to be Free from Enhanced Interrogation

<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 undergo enhanced interrogation technique, up to and including at the pre-trial hearing stage?</td>
<td></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>
<td></td>
</tr>
<tr>
<td>If so, are you aware of the nature of the enhanced interrogation that the defendant underwent?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of whether the defendant underwent the interrogation method of rectal hydration? If so, has it stopped?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of whether the defendant underwent the interrogation method of beating? If so, has it stopped?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</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>33. Rights Regarding Enteral Feeding (“Forced Feeding” – through tube in the nose to the stomach)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Yes</strong></td>
</tr>
<tr>
<td>Is there evidence of current or past “Forced Feeding” of the defendant?</td>
</tr>
<tr>
<td>If so, was this fact communicated to the judge, prosecution, or jury?</td>
</tr>
<tr>
<td>Are you aware of any videos that exist of the defendant being force fed?</td>
</tr>
<tr>
<td>Are you aware of any complaints by the defendant about pain or discomfort associated with his forced feeding?</td>
</tr>
<tr>
<td>Do you know how many days the defendant has been force fed?</td>
</tr>
<tr>
<td>Are you aware of any videos that exist of the defendant being force fed?</td>
</tr>
<tr>
<td>Are you aware of whether olive oil was used as a lubricant in the force feeding of the defendant?</td>
</tr>
<tr>
<td>Is the defendant now on a hunger strike or has the defendant ever been on a hunger strike?</td>
</tr>
<tr>
<td>Did the defendant appear to you to be undernourished?</td>
</tr>
<tr>
<td>If so, was this fact communicated to the judge, prosecution, or jury?</td>
</tr>
<tr>
<td>Are you aware of the length of time the defendant is or was on a hunger strike?</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>
</tr>
</tbody>
</table>
N. Freedom from Incommunicado & Solitary Confinement; Right to Access to the Outside World

The right to freedom from incommunicado & solitary confinement; right to access to the outside world requires…

a. General

Defendants set for trial by Military Commission are not convicted criminals. International and domestic U.S. law require that they be provided freedom from incommunicado and solitary confinement and the right to access to the outside world.

[This Right to Freedom from Incommunicado / Solitary Confinement and Right to Access to the Outside World introductory section is being developed further.]

<table>
<thead>
<tr>
<th>34. Prohibition on Incommunicado Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Yes</strong></td>
</tr>
<tr>
<td>Can the defendant communicate with family?</td>
</tr>
<tr>
<td>Can the defendant interact with other detainees?</td>
</tr>
<tr>
<td>Can the defendant communicate with consular representatives of his home country?</td>
</tr>
<tr>
<td>Can the defendant communicate with the ICRC (Red Cross)?</td>
</tr>
<tr>
<td>Can the defendant communicate with habeas counsel?</td>
</tr>
<tr>
<td>Can the defendant communicate with lawyers about bringing a claim before non-U.S. tribunals or other inter-governmental organizations?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>35. Solitary Confinement – Pre-Trial Hearing Stage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Yes</strong></td>
</tr>
<tr>
<td>Can the defendant communicate with other prisoners?</td>
</tr>
<tr>
<td>Can the defendant communicate with detention facility staff?</td>
</tr>
</tbody>
</table>
How many hours per day is defendant locked in his cell without?

<table>
<thead>
<tr>
<th>36. Right to Access to the Outside World</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the defendant have access to the outside world?</td>
</tr>
<tr>
<td>Can the defendant access a telephone?</td>
</tr>
<tr>
<td>Can the defendant’s family visit? Access via Skype?</td>
</tr>
<tr>
<td>Is counsel permitted to share with the defendant information about the outside world?</td>
</tr>
</tbody>
</table>

© 2015
The Gitmo Observer (of Indiana U McKinney School of Law)
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, cloaked in attorney-client, work product, or other privileges, without charge to the defendant. 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

International law and domestic U.S. law require the government to ensure that the defendant has an opportunity to communicate on issues related to the criminal case at all phases of the proceedings. The government is required to ensure that the defendant has the opportunity to communicate through interpreters, when the communications are oral. The government is also required to ensure that the defendant has the opportunity to communicate through translators, when the communications are written.

The interpreter / translator should be competent, capable of performing at a high level. They should be able to assist the defendant when the defendant wants to learn the substance of words that are spoken or written in a language the defendant does not understand, and when the defendant wants to convey thoughts to another person and the other person does not understand the language spoken or written by the defendant.

The interpreter / translator should be independent and impartial, and they should take an oath that they will interpret / translate honestly and without favor or prejudice for or against the defendant, under fear of prosecution. 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 or translated. The U.S. government should not pressure or otherwise seek to unduly influence an interpreter or translator.

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.

The defendant has the right to an interpreter and the right to a translator at all stages of the proceedings, from pre-trial, through the trial, and if necessary upon appeal of a conviction and sentence.

b. Right to an Interpreter

Under international and domestic U.S. law, Guantanamo Bay defendants have the right to free assistance of an interpreter if the defendant does not speak the language used in court. This interpreter


226 Prosecutor v. Maroslav and ors IT-98-30/1-A.

227 Id. at para. 33.
should be available to interpret for the defendant during court proceedings, during communications between the defendant and his counsel, and involving the defendant and others with whom he may wish or need to communicate as he prepares for his defense.228

c. Right to a translator

International and domestic U.S. law require Guantanamo Bay defendants to have the right to free assistance of a translator to translate documents used in court if the defendant cannot understand or read them.229 This translator should be available to translate documents presented in court, and to translate documents generated or used in the preparation of his defense.

[This Right to an Interpreter / Translator is being developed further. More is forthcoming.]

<table>
<thead>
<tr>
<th>37. Right to Interpreter (ICCPR, art 14(3)(f))</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Yes</strong></td>
</tr>
<tr>
<td>Does the defendant have access to an interpreter to help facilitate communication with his counsel?</td>
</tr>
<tr>
<td>Is the interpreter competent in the defendant’s language / dialect?</td>
</tr>
<tr>
<td>Did the judge explain to the interpreter the interpreter’s rights?</td>
</tr>
<tr>
<td>Did the judge warn the interpreter that it was a crime to knowingly interpret falsely?</td>
</tr>
<tr>
<td>Did the judge explain the right to challenge interpreters?</td>
</tr>
<tr>
<td>Were there any challenges to the interpreter?</td>
</tr>
<tr>
<td>Were there any challenges to any interpretation?</td>
</tr>
<tr>
<td>Did the judge explain to the interpreter the interpreter’s rights?</td>
</tr>
<tr>
<td>In your view, was the interpretation of good quality?</td>
</tr>
</tbody>
</table>

228 The right to have the free assistance of an interpreter if he cannot understand or speak the language used in court is also provided for in the following international instruments: European Convention, Article 6(3)(e); American Convention, Article 8(2)(a); African Commission Resolution, Paragraph 2(E)(4); ICC Statute, Article 67(1)(f); ICTY Statute, Article 21(4)(f); and ICTR Statute, Article 20(4)(f).

229 The right to have the free assistance of an interpreter if he cannot understand or speak the language used in court is also provided for in the following international instruments: European Convention, Article 6(3)(e); American Convention, Article 8(2)(a); African Commission Resolution, Paragraph 2(E)(4); ICC Statute, Article 67(1)(f); ICTY Statute, Article 21(4)(f); and ICTR Statute, Article 20(4)(f).
### 38. Right to Translation (Translation of Documents) (ICCPR, art 14(3)(f))

<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 provided with translations of judicial documents needed for his defense?</td>
<td></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>
<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>
<td></td>
</tr>
<tr>
<td>Is the translator competent in the written language of the defendant?</td>
<td></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>
<td></td>
</tr>
<tr>
<td>Did the judge warn the translator 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 translators?</td>
<td></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>
<td></td>
</tr>
<tr>
<td>In your view, was any translation of good quality?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
[Page Intentionally Blank]
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 defendants have the right to public criminal proceedings. But other U.S. Military Commission stakeholders who also share the right to public proceedings include the prosecution, the victims and victims’ families, and the public.

[This Right to Public Proceedings introductory section is being developed further. An Indiana University McKinney School of Law student is assigned to research this topic.]

a. General
International and domestic law provide that defendants, and all other stakeholders, are entitled to public pre-trial hearings, trials, and post-trial hearings.

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.

i. International law instruments that bind the U.S.
International instruments that bind the U.S. that provide for a public trial include:

- ICCPR Article 14(1) provides [emphases added]:
  - “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;
  - “any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

ii. Non-binding international instruments that provide for the right to public hearings:

International instruments that do not bind the U.S. but that incorporate binding customary

---

230 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 Karuttunen 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, Habeaus 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).
international law norms that do bind the U.S. and that require public hearings include:

- **Universal Declaration of Human Rights** ("Everyone is entitled in full equality to a fair and public hearing");

- UDHR article 11 (1) also provides 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."

- **American Declaration of the Right and Duties of Man**, Article XXVI ("every person accused of an offense has the right to be given impartial and public hearing")

- **European Convention on Human Rights**, article 6(1) ("In the determination of his civil rights and obligation or any criminal charge against him, everyone is entitled to a fair and public hearing");

  ICC statute, Article 64 (1) states that:
  "The trial shall be held in public. The trial chamber may, however, determine that special circumstances require that certain proceedings be in close session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence"

- **ICC Statute**, Article 67(1) ("In the determination of any charge, the accused shall be entitled to public hearing").

However the ICC statute recognizes an exception to the principle of public hearing in article 68 (2) It provides thus;

"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. In particular ...."

iii. **U.S. Non-military law that requires public hearings**

Provisions of the U.S. Constitution that provide for public hearings in criminal cases include:

- Sixth Amendment to the U.S. Constitution provides that “In all criminal proceedings, the accused shall enjoy the right to a . . . public trial”.

- The First Amendment to the U.S. Constitution provides for the right to access to criminal proceedings.

iv. **U.S. Military Law requires public hearings**

The Military Commissions Act of 2009 provides that military commission judge may close parts of a trial only to protect against revealing information that might be injurious to national security, or to ensure physical safety of individuals (10 U.S.C. 949d[c]).

The rules of military commission RMC 806 (a) states that military commission shall be publicly held, which shall include access to press, representatives of national and international organization, and members of the military and civilian communities.

As the manual for Military Commission acknowledges, “Access to military commission may be constrained by location, size of the facility, physical security requirements, and national security concerns.”

c. **U.S. federal case law**

A right to public proceedings extends to the pretrial proceedings that are integral to the trial phase,
such as jury selection and evidentiary hearings\textsuperscript{231}

A right to public proceedings extend to the pretrial proceedings that are integral to the pre-trial phase, such as jury selection and evidentiary hearing. (See Rovinsky V. McKaskle, 772 F. 2d. 197 5th cir. 1984) It is worthy of note however that despite the constitutional backing for public proceedings, both military commission and juvenile hearings are typically held in closed session.

The First Amendment right of public access extends to trials by court-martial\textsuperscript{232}

\begin{center}
\begin{tabular}{|l|c|c|c|c|}
\hline
 & Yes & No & Don’t Know & Comment \\
\hline
Does the public have access to pre-trial proceedings? & & & & \\
\hline
Is the public access reasonable under the circumstances? & & & & \\
\hline
Were improper hurdles in place that prevented the level of public hearing required by law? & & & & \\
\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
Can the public access the Guantanamo Bay proceedings via closed circuit television \textit{at Ft. Devins, Massachusetts}? & & & & \\
\hline
Can the public access the Guantanamo Bay proceedings via closed circuit television \textit{at Ft. Meade, Maryland}? & & & & \\
\hline
Can the public access the Guantanamo Bay proceedings via closed circuit television \textit{at Camp Bulkeley (at Guantanamo Bay, Cuba)}? & & & & \\
\hline
Can the public access the Guantanamo Bay proceedings via closed circuit television \textit{at any other location}? & & & & \\
\hline
\end{tabular}
\end{center}

\textsuperscript{231} Romsky v. McKaskle, 722 F. 2d 197 5th Cir. 1984

Q. Freedom from Self-Incrimination; Right Not to Be Compelled to Testify Against Oneself; Right Not to Be Compelled to Confess Guilt

No defendant may be forced to incriminate himself, forced to testify against himself, or forced to confess guilt. The government is not permitted to use direct or indirect coercion or other pressure to undermine the defendant’s exercise of these rights. Abrogating these rights would also counter a defendant’s right to remain silent, his right to be presumed innocent, and other rights. These rights are non-derogable, even in times of emergencies.

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.233 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.234

In Miranda v. Arizona,235 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.”236 If a defendant is compelled to reveal information that is self-incriminating, that information may not be admitted against the defendant in court.237

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.238 Determining


234 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)

235 384 U.S. 436 (1966)

236 Id. at xyz; See also Dickerson v. United States, 530 U.S. 428 (2000) (upholding Miranda v. Arizona, ruling that xyz.)

237 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)

238 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.)
whether compelled self-incrimination exists, courts may look to the nature and degree of the compulsion, to whether any relevant safeguards exist in the procedure.\(^\text{239}\)

The right against self-incrimination can be claimed by a defendant in any case, including the Guantanamo Bay Military Commission.\(^\text{240}\) In court, no comments are permitted concerning a defendant’s refusal to testify.\(^\text{241}\) 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.\(^\text{242}\)

c. Military Commission Instruments; UCJM

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”.\(^\text{243}\) 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.\(^\text{244}\)

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.”\(^\text{245}\)

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

\(^{239}\) Francis v. United Kingdom, European Court of Human Rights (Application no. 15809/02 and 25624/02) Judgment of 29 June 2007, para 53-56

\(^{240}\) 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.)

\(^{241}\) California v. Griffin, 380 U.S. 609 (1965)

\(^{242}\) 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.”

\(^{243}\) These rights are also addressed in MCA of 2009, §§ 831(c), 948(b(d), 949(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”).

\(^{244}\) 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.”

\(^{245}\) 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.”
3 of the Geneva Conventions, and thus the U.S. is obligated under international law to afford these rights 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 14(3)(g)). General Comment No. 32, para. 41, promulgated by the United Nations Human Rights Committee \(^{246}\) 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.” \(^{247}\)

The Third Geneva Convention, article 99, prohibits compelled self-information and confessed guilt as follows: \(^{248}\)

> 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. \(^{249}\) and other instruments\(^{250}\)

---

\(^{246}\) 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.

\(^{247}\) 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)

\(^{248}\) Furthermore, Article 17 of the Third Geneva Convention provides: “Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal, or serial number, or failing this, equivalent information.”

> The right is also found in other tribunals created by operation of treaties that bind the U.S., such as the ICTY and ICTR that were created by UN Security Council Resolution. (See ICTY Statute, Article 21(4)(g) (“the accused shall be entitled to the following minimum guarantees, in full equality…not to be compelled to testify against himself or to confess guilt.”); ICTY Rules of Procedure and Evidence, Rule 84(A) & Rule 90(E); ICTR Statute, Article 20(4)(g) (“the accused shall be entitled to the following minimum guarantees, in full equality…not to be compelled to testify against himself or to confess guilt.”); and ICTR Rules of Procedure and Evidence, Rule 90(E).

The Rome Statute of the International Criminal Court, to which the U.S. is not a party, provides in article 55(1)(a) that a person “[s]hall not be compelled to incriminate himself or herself or to confess guilt.”. See also ICC Statute, article 67(1)(g).

\(^{249}\) 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, presupposes that the prosecution in a criminal case seek to prove their case aginst the accused without resort to evidence obtained through methods of coercion or oppression…the right is closely lined with the presumption of innocence.” ID.


\(^{250}\) 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, V 21; Declaration of Minimum Humanitarian Standards, article 9 (“No one shall be compelled to testify against
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.\textsuperscript{251} And, the prosecution may not use against the defendant evidence obtained through coercion or oppression in defiance of the defendant’s will.\textsuperscript{252} Furthermore, comments about an accused’s failure to testify are not permitted.\textsuperscript{253} Finally, like in \textit{Miranda},\textsuperscript{254} a defendant must be informed of his right against self-incrimination before he is questioned by government authorities.\textsuperscript{255}

<table>
<thead>
<tr>
<th>40. Freedom from Self-Incrimination, (Military Commission Act of 2009 § 948r(b); ICCPR, art 14(3)(g))</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Out of Court Statements</strong></td>
</tr>
<tr>
<td>Is the prosecution seeking to offer into evidence any out-of-court statement(s) made by the defendant?</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>
</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>
</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>
</tr>
<tr>
<td><strong>In Court Statements?</strong></td>
</tr>
<tr>
<td>Did the defendant make any in-court statements?</td>
</tr>
</tbody>
</table>

---

\textsuperscript{251} Pishchalnikov v. Russia, European Court of Human Rights (Application no. 7025/04) Judgment of 24 September 2009, para 77.


\textsuperscript{253} E.g., R. v. Noble, 1 SCR 874 (1977)

\textsuperscript{254} 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>Pre-Trial or Trial Testimony</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<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>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Informed of Rights; Waiver of Rights</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 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>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Torture; Enhanced Interrogation; Compulsion</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<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?

**Voluntary, Willing**

Did the defendant affirmatively state or otherwise indicate that he was exercising his right to remain silent?

**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?

**Immunity**

Was the defendant granted immunity for making a statement testifying?

---

### 42. Right not to be Compelled to Confess Guilt (ICCPR, art 14(3)(g))

<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 confess guilt?</td>
<td></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>
<td></td>
</tr>
<tr>
<td>Did the court accept the defendant’s guilty plea?</td>
<td></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>
<td></td>
</tr>
<tr>
<td>If the defendant confesses guilt, did he confess guilt during the trial?</td>
<td></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>
<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>
<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>
<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>
<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?

Were any arguments made that torture was used to compel the defendant to confess guilt?

Were any arguments made that cruel, inhuman or degrading treatment was used to compel the defendant to confess guilt?

Were any arguments made that enhanced interrogation was used to compel the defendant to confess guilt?

Were any arguments made that the defendant was in any way compelled to testify against himself?

---

### 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 &quot;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 inequitable 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.256 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.”257

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)258 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…”259

Further explanation by the UN Human Rights Committee provides interpretation on the rights of equality of arms, equality before the courts, 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

256 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)


258 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.)

259 ICCPR, art. 14(1)
and equality of arms with the goal of ensuring that neither side is treated with any discrimination.\textsuperscript{260} By ensuring equality of the parties before courts and tribunals, the right to equality of arms is also ensured.\textsuperscript{261} 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”.\textsuperscript{262} There may be no “actual disadvantage or other unfairness” to the defendant.\textsuperscript{263} 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\textsuperscript{264}, and that the rights equality before the court and of arms require the following:

\begin{itemize}
\item**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)).\textsuperscript{265}

\item**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.”\textsuperscript{266}

\item**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)).\textsuperscript{267}
\end{itemize}

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)\textsuperscript{268}, and the International Criminal Tribunal of Rwanda Statute, article 20(4)\textsuperscript{269}, 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

\begin{itemize}
\item General Comment 32 on Article of the ICCPR, UN Doc CCPR/C/GC/32, Human Rights Committee (2007). (hereinafter “GC 32”).

\item Id.

\item Id.

\item Id.

\item Id.

\item The Committee gives the example of only the prosecutor, and not the defendant, being able to appeal a decision. Id.

\item Id.

\item GC 32, supra note 83; See also section H of this Checklist.

\item GC 32, supra note 83; See also section U of this Checklist.

\item GC 32, supra note 83; See also section O of this Checklist

\item 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 \textit{full equality}”) (emphasis added)

\item 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 \textit{full equality}”) (emphasis added)
\end{itemize}
protection. These treaties include the *American Convention*\(^{270}\) the *African Charter*, \(^{271}\) and the *ICC Statute*.\(^{272}\)

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.\(^{273}\) It is the “rights of the defence” which establish said equality, which is why such rights have been instituted.\(^{274}\) 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.\(^{275}\) 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.\(^{276}\)

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.\(^{277}\) 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.\(^{278}\) Also in 1994 was the case of Barbera, Messegue 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.\(^{279}\)

However, there are limits to guaranteeing such rights. Equality does not mean identical in the sense of these rights.\(^{280}\) 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.”\(^{281}\)

---

270 American Convention on Human Rights, article 8(2) (“…During the proceedings, every person is entitled, with full equality, to the following minimum guarantees”)

271 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.”)

272 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”)


274 Id.


276 Id.

277 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.”)

278 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.”


280 Prosecutor v. Tadic, Case No. IT-94-I-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.)

281 Id.
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 Appeals since the charges he was convicted of are not recognized as war crimes when he was convicted.\(^{282}\)

Though, the court did not render any discussion or holding regarding the equal protection issues contained within the 2006 Act.\(^{283}\) 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.\(^{284}\)

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.\(^{285}\) 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.\(^{286}\) 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.\(^{287}\) However, there are area of concern. Defendants are not allowed to choose their own counsel; they are currently appointed military lawyers.\(^{288}\) 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.\(^{289}\) It is of particular concern that trial prosecutors may refuse to produce a witness, very much unlike US federal criminal procedure.\(^{290}\) There has also been discussion on detainees rights to a trial without “undue delay”.\(^{291}\) Concerning equal protection specifically, arguments have additionally been made that both the 2006 and 2009 Military Commission Acts are per se discriminatory.\(^{292}\)

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.”\(^{293}\)


\(^{283}\) Id.

\(^{284}\) 10 U.S.C. § 949j

\(^{285}\) 10 U.S.C. § 950c.

\(^{286}\) 10 U.S.C. § 948a, § 948s, § 949a(2)(B)-(C), § 949a(C), and § 949c(b)(7).

\(^{287}\) Frakt, supra note 80.

\(^{288}\) Id at 581.

\(^{289}\) Id. at 582-3.

\(^{290}\) Id. at 583 (However, as Frankt points out, such a refusal may be made in military court martial proceedings.)

\(^{291}\) Id. at 583.

\(^{292}\) 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”).

\(^{293}\) 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 United States
f. The US Constitution and Domestic Case Law

The US Constitution has a few relevant Amendments regarding equality of arms, equal protection and 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></th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prosecution Staff &amp; Resources</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<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>
</tbody>
</table>

294 See Due Process clauses under the 5th and 14th Amendments to the US Constitution.

295 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 receive a constitutionally “adequate” defense, not that the parties to a criminal prosecution be equally matched.”)

296 Id.
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>How many analysts are assigned to the prosecution?</td>
<td></td>
</tr>
<tr>
<td>How many interpreters are assigned to the prosecution?</td>
<td></td>
</tr>
<tr>
<td>How many translators are assigned to the prosecution?</td>
<td></td>
</tr>
<tr>
<td>How many investigators are assigned to the prosecution?</td>
<td></td>
</tr>
</tbody>
</table>

### Defense Counsel & Defense Resources

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<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 many 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>
</tbody>
</table>

### Equal Before the Courts -- Prosecution & Defense

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<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…

a. General

The defendant has the right to be present at pre-trial hearings. (Military Commission Act of 2009, § xx; ICCPR, art 14(3)(d))

[This Rights to be Present at Pre-Trial Hearings introductory section is being developed further.]

<table>
<thead>
<tr>
<th>45. Right to be Present (Military Commission Act of 2009, § xx; ICCPR, art 14(3)(d))</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is the defendant afforded the right to be present for all proceedings?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant been improperly prohibited from being present from any proceedings?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant been present for every court appearance that he wished to be present for?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the defendant exercised his prerogative to be absent from any proceedings?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant present?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant explained his rights?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the defendant testify?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant removed from the courtroom during the proceeding while it was ongoing?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant was removed, what was the court’s reason?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the court remove the defendant because classified information was going to be discussed?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

297 The defendant’s right to be present at pre-trial hearings is provided for in many international instruments, including:
### 46. Right to be Absent from Pre-Trial Hearings

<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 court remove the defendant because of behavior of the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant was removed, did the court give the defendant warning that his behavior might lead to exclusion?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant was removed, did the defendant return to the courtroom?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the defendant was removed, during his absence, was testimony given by any witnesses?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant given the opportunity to defend himself in person?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
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...

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) and Powell v. Alabama, 287 U.S. 45 (1932). The Military Commissions Act provides for these rights in Article ABC.

These rights are provided for in Article 14(3) of the ICCPR, which is a treaty that binds the U.S. 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 are provided for in numerous international instruments, which have incorporated this right which has risen to the level of customary international law. For example, these rights are provided for in the American Human Rights Convention, article 8 and in Articles 18(3), the European Convention on Human Rights, Article 6(3) and 21(4) of the Statute of the International Criminal Tribunal for the former Yugoslavia.

The European Court of Human recognizes these rights in its jurisprudence, for example, in Pakelli v. Germany, 6 EHRR 1 (1983) (right to represent oneself, right to counsel, right to legal aid), S. v. Switzerland, 14 EHRR 670 (pre-trial right to counsel), and Quaranta v. Switzerland, Series A No. 205 (counsel during trial).

[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.]

### 47. Right to Defend Oneself in Person – Pre-Trial Hearing Stage

<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 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>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>
</tbody>
</table>

**1. Was counsel provided with appropriate information and**
<table>
<thead>
<tr>
<th>resources to be used to <strong>mitigate</strong> any sentence if convicted?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the defense have the opportunity to obtain and comment on the observations filed or evidence adduced by the other party?</td>
</tr>
<tr>
<td>Were there any obstacles that limited the defendant’s right to access to competent and effective defense through counsel?</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 and

(b) the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

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 prosecution. This right is incorporated into the Sixth Amendment of the U.S. Constitution, which provides that defendants shall have 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 examine and cross-examine those witnesses guarantees 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.

298 U.S. Constitution, Sixth Amendment; Military Commission Act of 2009, § xx; ICCPR, art 14(3) (c)). 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 1 of the Geneva Conventions, art 75(4)(g) (“Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him”); ICC Statute, art 67(4)(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(c)(iii).

299 Military Commission Act of 2009, § xx; ICCPR, art 14(3) (c). 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) (c); ICTR Statute, Article 20(4) (c).
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 Examination and Cross-Examination of Witnesses

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.300 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 its 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:

---

300 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.

(B) 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></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.]

51. Right to Exclusion of Illegally Obtained Evidence

<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 have excluded from evidence information he alleged to be illegally obtained?</td>
<td></td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the prosecutor seek to introduce evidence obtained through torture of the defendant?</td>
<td></td>
<td></td>
<td></td>
<td></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”.

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, courts martial, and the Military Commission each have rules limit the admissibility of hearsay. The federal court and courts-martial rules are “impose largely similar restrictions on the usage of hearsay evidence.” 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; (b) 

---

304 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.

305 The Federal Rules of Evidence, Rule 802 limits the admissibility of hearsay in U.S. federal courts.


310 For example, the Fourth Circuit in the Mousaoui 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”\textsuperscript{311}; and (c) the defendant did not have an opportunity to cross-examine original person who made the statement (the “affiant” or “declarant”).

\begin{itemize}
  \item \textbf{b. Types of hearsay likely to arise at Guantanamo Bay Military Commissions}
      \begin{itemize}
        \item \textbf{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;
        \item \textbf{ii. Notes of retired U.S. Military personnel interrogators.}
        \item \textbf{iii. Statements by CIA interrogators.}
        \item \textbf{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;
        \item \textbf{v. Current Guantanamo Bay defendants.} Other prisoners currently incarcerated at Guantanamo Bay who are not co-defendants; and
        \item \textbf{vi. Former Guantanamo Bay defendants.} Former prisoners, released from Guantanamo Bay, with or without trial or conviction.
      \end{itemize}

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—

\begin{itemize}
  \item \textbf{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
  \item \textbf{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—
    \begin{itemize}
      \item \textbf{(I)} the statement is offered as evidence of a material fact;
      \item \textbf{(II)} the statement is probative on the point for which it is offered;
    \end{itemize}
\end{itemize}

would be admissible since it is not being used against the defendant. However, it could still be inadmissible due to untrustworthiness on other grounds.

\textsuperscript{311} 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”: United States v. Udorzec, 515 F. 3rd 260 (4th Cir. 2008) ()
(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.
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. 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. 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 Section on the Right of Detainees Who Were Juveniles When Taken to Guantanamo Bay is being developed further.]

52. Right of Detainees Who Were Juveniles When Taken to Guantanamo Bay

<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 a juvenile when originally arrested or captured?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant a juvenile when transported to Guantanamo Bay?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the defendant housed at Guantanamo Bay in quarters separate from adult detainees?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the juvenile detainee…?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

312 One of the more well-known of these is Canadian Omar Khadr who was captured and taken to Guantanamo Bay when he was 15. After spending a decade imprisoned in Guantanamo Bay, he pleaded guilty to several crimes and was repatriated to Canada where he remains incarcerated.

313 See General Comment on the Right to a Fair Trial, para xxx; see also Human Rights Committee General Comment No. 17 (on Article 24(4)). Article 40 of the Convention on the Rights of the Child (CRC) addresses the issue of juvenile suspects and defendants. Though the U.S. has not ratified the CRC, the principles in article 40 have risen to the level of customary international law, and thus bind the U.S.
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 Commission provide for three distinct categories of appeals: (a) an interlocutory appeals; (b) an appeal of a verdict; and (c) an 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.

As a way 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.  

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.

[The Section on the Right to Appeal is being developed further.]

---

53. Right of Appeal

<table>
<thead>
<tr>
<th>General Appeals Inquiry</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<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>
</tbody>
</table>
### Interlocutory Appeals

Has either the prosecution or defense sought an interlocutory appeal of an adverse ruling before or during the trial?

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?

If there have been interlocutory appeals, what has been their nature?

If there have been interlocutory appeals, what has been their outcome?

### Appeal of Verdict

If a verdict was reached against a defendant, to the best of your knowledge, was he informed of his right to appeal the verdict?

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?

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)?

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?

If a verdict was reached against a defendant, did the appellate tribunal publish a reasoned judgment in response to the appeal of the verdict?

Did the prosecutor seek to appeal any aspect of the verdict?

### Appeal of Sentence

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?
<table>
<thead>
<tr>
<th>Question</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<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>
<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 of his sentence (even though the verdict was of guilt and sentenced)?</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 his sentence?</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 his sentence?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the prosecution seek to appeal any aspect of the sentence?</td>
<td></td>
<td></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 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>
X. 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. 316

c. Right to a remedy

Article 3(3) of the ICCPR provides:

315 See [http://www.vcf.gov/](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](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/](http://www.justice.gov/)). 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](http://www.vcf.gov/faq.html#eli1))

316
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

317 Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.
http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

© 2015 The Gitmo Observer (Indiana U McKinney School of Law)
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.318 It collected $534 from over 2 million donors, and distributed it via grants.319 This fund dissolved in 2004.320

[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/)]

319 Id.
320 Id.
55. Rights of the Victims

<table>
<thead>
<tr>
<th>Victim’ Right to Information</th>
<th>Y es</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</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>
</tr>
</thead>
</table>

<p>| Were any victims present at the viewing site during your observation mission? | | | | |
| If any victims were present at the viewing site during your observation mission, how many attended the proceeding? | | | | |
| Did you learn the identities of the any victims who were present at the viewing site during your observation mission? | | | | |</p>
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Can victims access the proceedings via closed circuit television at Camp Bulkeley at Guantanamo Bay, Cuba?</td>
<td></td>
</tr>
<tr>
<td>Can victims access the proceedings via closed circuit television at Ft. Devins, Massachusetts?</td>
<td></td>
</tr>
<tr>
<td>Can victims access the proceedings via closed circuit television at Ft. Meade, Maryland?</td>
<td></td>
</tr>
<tr>
<td>If there was a conviction, did the victims exercise a right to present a victim’s impact statement?</td>
<td></td>
</tr>
<tr>
<td>Were victims’ families excluded from any of the proceedings while you were present?</td>
<td></td>
</tr>
<tr>
<td>Have there been undue delays in proceedings that have affected the victims’ ability to attend hearings?</td>
<td></td>
</tr>
<tr>
<td><strong>Victims’ Right to Participate; Right to be Heard</strong></td>
<td></td>
</tr>
<tr>
<td>Were victims allowed to speak at any time during the proceeding, in person?</td>
<td></td>
</tr>
<tr>
<td>Were victims allowed to speak at any time during the proceeding through counsel?</td>
<td></td>
</tr>
<tr>
<td>Were victims allowed to speak at any time during the proceeding through another representative?</td>
<td></td>
</tr>
<tr>
<td>Were you aware of any victims participating in the proceeding via documents, presented in person, through counsel, or through another representative?</td>
<td></td>
</tr>
<tr>
<td>Have there been undue delays in proceedings that have affected the victims’ ability to participate?</td>
<td></td>
</tr>
<tr>
<td><strong>Treatment of Victims</strong></td>
<td></td>
</tr>
<tr>
<td>Did it appear as though the victims were treated with fairness, and respect for their dignity and privacy?</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
</tr>
<tr>
<td>If there was a conviction, did the victims receive restitution?</td>
<td></td>
</tr>
</tbody>
</table>
### 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>
</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>
</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>
</tr>
<tr>
<td>Question</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>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?</td>
</tr>
<tr>
<td>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?</td>
</tr>
<tr>
<td>Has the government facilitated communication between and among families of victims of the crimes?</td>
</tr>
<tr>
<td>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?</td>
</tr>
<tr>
<td>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?</td>
</tr>
<tr>
<td>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?</td>
</tr>
</tbody>
</table>

**Victims’ Families Right to Be Present**

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
<th>Answer</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Were any victims’ families present at the viewing site during your observation mission?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If any victims’ families were present at the viewing site during your observation mission, how many attended the proceeding?</td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Can victims’ families access the proceedings via closed circuit television at Camp Bulkeley at Guantanamo Bay, Cuba?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Can victims’ families access the proceedings via closed circuit television at Ft. Devins, Massachusetts?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Can victims’ families access the proceedings via closed circuit television at Ft. Meade, Maryland?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If there was a conviction, did the victims’ families exercise a right to present a victim’s impact statement?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were victims’ families excluded from any of the proceedings while you were present?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Questions</td>
<td>Yes</td>
<td>No</td>
<td>Not Observed</td>
</tr>
<tr>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-----</td>
<td>----</td>
<td>--------------</td>
</tr>
<tr>
<td>Have there been undue delays in proceedings that have affected the victims’ families’ ability to attend hearings?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Victims’ Families Right to Participate; Right to be Heard</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were victims’ families allowed to speak at any time during the proceeding, in person?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were victims’ families allowed to speak at any time during the proceeding through counsel?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were victims’ families allowed to speak at any time during the proceeding through another representative?</td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have there been undue delays in proceedings that have affected the victims’ families’ ability to participate?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Treatment of Victims’ Families</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did it appear as though the victims’ families were treated with fairness, and respect for their dignity and privacy?</td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If there was a conviction, did the victims’ families receive restitution?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Right to Fair Trial for Victims’</strong></td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Defense Initiated Victims Outreach Liaisons</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were there any Defense Initiated Victims Outreach liaisons present at the proceedings you observed?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Are you aware of any contact between any <strong>Defense Initiated Victims’ Outreach</strong> liaisons and any victims’ families in the case you observed?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If you became aware of any contacts between any <strong>Defense Initiated Victims’ Outreach</strong> liaisons and any victims’ families in the case you observed, what were those contacts?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are you aware of any contact between the <strong>Office of Military Commissions Victims / Witness Assistance Program</strong> and any victims’ families in the case you observed?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If you became aware of any contacts between the <strong>Office of Military Commissions Victims / Witness Assistance Program</strong> and any victims’ families in the case you observed, what were those contacts?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
XI. Rights 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

International law and domestic U.S. law recognize that the prosecution has the right to a fair trial. The defendants and other stakeholders also have the right to a fair trial, but that does not diminish the prosecution’s right, particularly as the prosecution is representing the interests of society.

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

- Freedom from pressure (10 U.S.C. § 949(b)
- Freedom from coercion, unauthorized influence

### 57. Rights of the Prosecution

<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 it appear as though the prosecution received a fair trial?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the judge treat the prosecution fairly?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the prosecution have the resources it needed to attempt to prove guilt beyond reasonable doubt?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the prosecution complain about any prejudice or unfairness to the prosecution by the judge?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the prosecution claimed that individuals or entities outside of the prosecution exerted or sought to exert undue influence on the prosecution?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
NGO Observers with Brigadier General Mark Martins, Chief Prosecutor of the U.S. Military Commissions at Guantanamo Bay (June 2014)
XII. Rights of the Press

Rights of the press require…

[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

Rights of the press require the press to have access to the proceedings absent an overriding government interest, access to non-confidential court documents, access to tour the facilities, the ability to receive information and disseminate it to the public, and the ability to advocate on behalf of the public.

Regarding the Guantanamo Bay Military Commissions, the press has the right to freedom of expression, which includes the right to gather information and disseminate it to the public. These rights are based in international law (treaties and customary international law) that bind the U.S., in the U.S. Constitution (e.g., the First Amendment), and in federal statutes (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.

b. U.S. Constitutional Law and Press Freedoms

Under United States law, the press has a right to be present at criminal trials and pretrial hearings. The right stems from the First Amendment to the United States Constitution, which provides in part:

“Congress shall make no law . . . abridging the freedom . . . of the press . . .”

Although long recognized as a common law right, the U.S. Supreme Court did not declare a constitutional right 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.

However, this right is not absolute. In Richmond Newspapers, the Court stated that, “[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.” Therefore, despite their First Amendment right of access to criminal proceedings, the press and public may still be excluded, provided the trial court applies a heightened scrutiny analysis to protect the First Amendment interests at stake.

In 1981, the Court expanded upon the right of access to criminal trials by holding that mandatory closure rules are unconstitutional. In Globe Newspaper Co. v. Superior Court, the Court struck down a Massachusetts statute which automatically excluded press and public from the courtroom during the testimony of a minor victim in a sex offense trial. In reaching its decision, the Court applied a strict scrutiny approach: “It must be shown that the denial is necessitated by a compelling government interest,
and is narrowly tailored to serve that interest.” 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.

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 by 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 tests, a qualified First Amendment right of access attaches, which requires a heightened scrutiny inquiry to justify closure. According to the Court, in order 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 since *Richmond Newspapers* that the First Amendment protects access to criminal proceedings, and no discovered reported case since have upheld complete closure of a trial.322

c. Federal Statute

Although there is no absolute right of access to criminal trials in the United States, considerable importance is attached, both under the First Amendment and in federal statute, to the notion of open judicial proceedings. The text of 28 CFR 50.9 (the U.S. Justice Department’s policy with regard 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.

d. Right of Access to Judicial Documents

The right of access to judicial documents exists at common law and under the First Amendment.323 However, this right is not absolute. As established after September 11, 2001, the press does not have the right of access to sealed records.

Laws passed after the terrorist attacks on September 11, 2001, such as the USA Patriot Act of 2001, made it more difficult for journalists to obtain records regarding surveillance information. The Homeland Security Act, passed in 2002, criminalized leaks of information and gave immunity from prosecution to businesses that shared information with the government. The press has had some success in obtaining documents but only after getting courts to intervene.324


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 *U.S. v. Moussaoui* (65 F. 3rd 881), the Fourth Circuit court held that unclassified documents attached to the Moussaoui case’s appendices should be released on a document-by-document basis, provided the First Amendment presumption outweighed the need for secrecy. The court ordered that all classified information under the Classified Information Procedures Act (CIPA) would remain under seal. However, the press and general public were provided access to unclassified materials in the classified and unclassified appendices after the materials had been redacted.

In a similar case, in 2003, the Center for National Security Studies filed a Freedom of Information (Foi) complaint to obtain information about detainees. However, the D.C. Circuit court said the information could remain sealed (*Center for National Security Studies et. al. v. U.S. Department of Justice*).

e. Freedom of the Press in the International Human Rights Law

Freedom of the press is a fundamental human right recognized and protected by the law of most modern States. The right to freedom of the press was first established in the constitutions and laws of a number of Western countries. It was not until the United Nations Organization came into being that the right to freedom of the press was recognized and protected on a global scale.

In 1948, the Universal Declaration on Human Rights (UDHR) established the idea of ‘freedom of expression’ for the first time. The right to freedom of expression includes the freedom to seek, receive, and impart information and ideas through any media. This idea was expanded in the International Convention on Civil and Political Rights (ICCPR) twenty years later.

Because the United States is a member of the ICCPR, it must respect, protect, and carry out all of the human rights. Specifically, the United States is expected to ensure that the public, especially the journalists, get access to information and impart information in a fast, objective, and favorable manner.

In addition, the European Convention on Human Rights (1950), the American Convention on Human Rights (1969), and the African Charter on Human and Peoples Rights (1981) have acknowledged the right to freedom of expression.

---

325 ICCPR Article 19 is quoted in full in Appendix xyz.

326 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.

327 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.

328 African Charter on Human and Peoples Rights Article 9 provides: that “1. Every individual shall have the right to receive
In addition to the human rights documents, the right to freedom of the press is also protected by many international and regional organizations. The UN Educational, Scientific, and Cultural Organization (UNESCO) works to protect the interests of journalists and promote the freedom of the press. The UNESCO Convention (1945) describes the objectives of the organization as to encourage the freedom of exchange of opinions (both by languages and images) and intellect in order to enhance the understanding and consolidate solidarity among nations.

f. When the Press may Be Excluded

ICCPR article 14(1) provides that the press may be excluded from a trial, but only in rare circumstances, such as for reasons of moral, public order (ordre public), national security, or privacy of parties, if interests of justice would be prejudiced.329

Additionally, instruments of international tribunals provide instructions on when trial may be closed to the press. 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 Trial Chamber must make public the reason for its order.

g. JTF-GTMO Media Rules

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.330 The 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.”331

According to JTF-GTMO, it has established “ground rules” intended “to protect operational security and to ensure the security of personnel, as well as the integrity of military commission proceedings.” 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.”

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

---

329 ICCPR Article 14(1) provides, in relevant part:

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.

330 Department of Defense Media Ground Rules for Guantanamo Bay, Cuba (GTMO) (10 September 2010), Para 1 (http://www.jtfgtmo.southcom.mil/xWEBSITE/media/Media%20Ground%20Rules.pdf)

331 Id.
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

The ground rules have specific guidelines for a category of information known as “protected information”, which is not the same as “classified information”.

### 58. Right of the Press to Access to Information

<table>
<thead>
<tr>
<th>Does the press have reasonable access to the proceedings?</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the press have reasonable access to stakeholders in the proceedings?</td>
<td>Yes</td>
<td>No</td>
<td>Don’t Know</td>
<td>Comment</td>
</tr>
</tbody>
</table>

Was the press given reasonable and 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?

<table>
<thead>
<tr>
<th>Had the press filed Freedom of Information Act (FOIA) requests for information related to any of the defendants?</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the press have a walking tour of Camp X-Ray, or other detention facilities at which prisoners are no longer held?</td>
<td>Yes</td>
<td>No</td>
<td>Don’t Know</td>
<td>Comment</td>
</tr>
<tr>
<td>Did the press have a walking tour of detention facilities at GTMO at which prisoners are currently held?</td>
<td>Yes</td>
<td>No</td>
<td>Don’t Know</td>
<td>Comment</td>
</tr>
<tr>
<td>Did the press have tours of the GTMO courtroom?</td>
<td>Yes</td>
<td>No</td>
<td>Don’t Know</td>
<td>Comment</td>
</tr>
<tr>
<td>Has the press complained about inadequate access depriving them of the ability to carry out their press responsibilities?</td>
<td>Yes</td>
<td>No</td>
<td>Don’t Know</td>
<td>Comment</td>
</tr>
</tbody>
</table>

### 59. Facilities for the Press

<table>
<thead>
<tr>
<th>Did it appear as though the press had all the technical and logistical support they needed to do their jobs efficiently and effectively?</th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did it appear as though the press had adequate access to the internet?</td>
<td>Yes</td>
<td>No</td>
<td>Don’t Know</td>
<td>Comment</td>
</tr>
<tr>
<td>Did it appear as though the press Media Operations Center (MOC) adequately met the needs of the press?</td>
<td>Yes</td>
<td>No</td>
<td>Don’t Know</td>
<td>Comment</td>
</tr>
</tbody>
</table>
60. Rights of the Press

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Don’t Know</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did it appear as though rights of the press were afforded to them?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Was the press attending the proceedings national, local, or international?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were there adequate facilities for the press inside the courtroom?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were there adequate facilities for the press outside the 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>
</tbody>
</table>
XIII. Rights Related to Witnesses (Fact Witnesses and Expert Witnesses)

Rights of witnesses require…

a. General

Fact and expert witnesses at criminal proceedings have rights under international and domestic U.S. law.332

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.]

332 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>
</tbody>
</table>
### Testimony of Fact Witnesses

<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 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>

### Safety and Security of Fact Witnesses

<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 court mention provisions to help prevent retaliation against fact witnesses?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>What provisions or mechanisms did the court mention were in place to help prevent retaliation against fact witnesses?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 62. Rights Related to Expert Witnesses

<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 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>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>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>
<tr>
<td>Did those expert witnesses testify on behalf of the prosecution or the defense?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Testimony of Expert Witnesses; National Security and Classified Information</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Were all expert witnesses subject to cross-examination?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In your opinion, did the court grant adequate time for the expert witnesses to be cross-examined?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any fact witnesses testify in closed session with the NGO Observers excluded?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did any fact witnesses testify in closed session with the defendant excluded?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Safety and Security of Expert Witnesses</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the court mention provisions to help prevent retaliation against expert witnesses?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>What provisions or mechanisms did the court mention were in place to help prevent retaliation against expert witnesses?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
XIV. Rights and Interests of Joint Task Force-Guantanamo Bay (JTF-GTMO)

a. General

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 Military Commission-related functions at Guantanamo Bay, Cuba. Members of JTF-GTMO 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), and 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). 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.
### 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>

---

**JTF-GTMO personnel escorting a Guantanamo Bay prisoner.**

**U.S. Coast Guard at Guantanamo Bay**

XV. Rights 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.]

### 64. Rights of the U.S. Public

<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>
</tbody>
</table>

In your opinion, has the U.S. Military Commission process failed to provide information to the U.S. public that it should have?

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?

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.
XVI. Rights and 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.]

<table>
<thead>
<tr>
<th>65. The International Community</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are you aware of any discussions involving representatives of other nations about the hearings you observed?</td>
</tr>
<tr>
<td>Are you aware of any comments, criticisms, or praise by other nations regarding the hearings you observed?</td>
</tr>
<tr>
<td>Are you aware of any comments or criticisms about the Military Commission by states that members of the United Nations?</td>
</tr>
<tr>
<td>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?</td>
</tr>
</tbody>
</table>

---

333 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>Yes</th>
<th>No</th>
<th>Not Applicable</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>
<td></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>
<td></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>
<td></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>
<td></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>
<td></td>
<td></td>
</tr>
</tbody>
</table>
XVII. Rights and 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.]

334 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 – yyy.
For years, NGO Observers were banned from walking tours of Camp X-Ray, which is the site where the very first detainees, in bright orange jumpsuits, were held beginning in January 2002. Those orange jumpsuits are iconic, and are linked with the global consciousness with Guantanamo Bay detainees, torture, and other inhumane treatment. ISIS / ISIL fighters in Syria have clothed Western captives in orange jumpsuits, paraded captives on global media, and beheaded them. This photo of an NGO Observer and a U.S. soldier is from Autumn 2014, on what may be a new policy or practice of permitting NGO Observers to tour Camp X-Ray. The NGO Observer (white shirt) follows a military escort.

### 66. NGO Observers - Participation

<table>
<thead>
<tr>
<th>Presence &amp; Participation of NGO Observers</th>
</tr>
</thead>
<tbody>
<tr>
<td>What other Observers were present during your observation mission?</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>
</tr>
<tr>
<td>Were any of the proceedings closed to Observers?</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>
</tr>
</tbody>
</table>
### 67. NGO Observe Facilities, Internet Access, and Other Aspects of NGO Observers Fulfilling Their Responsibilities

#### U.S. Constitutional Rights of NGOs

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer 1</th>
<th>Answer 2</th>
<th>Answer 3</th>
<th>Answer 4</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>
<td></td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 68. NGO Access to Information, Contact with Other Stakeholders

#### NGO Observer Access to Information

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer 1</th>
<th>Answer 2</th>
<th>Answer 3</th>
<th>Answer 4</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>
<td></td>
<td></td>
<td></td>
<td></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>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### NGO Observer Discussion Opportunities with the Prosecution?

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer 1</th>
<th>Answer 2</th>
<th>Answer 3</th>
<th>Answer 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did the NGO Observers have an official meeting with the Chief Prosecutor or prosecution team members at Guantanamo Bay?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the NGO Observers had an official 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?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the Chief Prosecutor or prosecution team members provide NGO Observers with written information about the hearings?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the Chief Prosecutor or prosecution team members provide NGO Observers with computer disks containing information, or provide electronic links to information?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>NGO Observer Discussion Opportunities with the Defense?</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the NGO Observers have an official meeting with any Defense Counsel or defense team members at Guantanamo Bay?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the NGO Observers had an official meeting any Defense Counsel team members at Guantanamo Bay do you believe that the Defense Counsel members answered your questions candidly and directly?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the Chief Defense Counsel or defense team members provide NGO Observers with written information about the hearings?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the Chief Defense Counsel or defense team members provide NGO Observers with computer disks containing information, or provide electronic links to information?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>NGO Observer Discussion Opportunities with Office of Military Commissions personnel, Joint Task Force Detention personnel, victims &amp; victims’ families, the press, and other stakeholders?</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the NGO Observers have opportunities for substantive discussions with Office of Military Commissions personnel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the NGO Observers have opportunities for substantive discussions with Joint Task Force Detention personnel?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did the NGO Observers have opportunities for substantive discussions with victims and victims’ families?</td>
<td></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>
<td></td>
</tr>
</tbody>
</table>
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?

### 69. NGO Observe Facilities, Internet Access, and Other Aspects of NGO Observers Fulfiling Their Responsibilities

#### NGO Observer Facilities – Guantanamo Bay

At Guantanamo Bay, did NGO Observers have reasonable access to facilities needed to fulfill their observers’ responsibilities?

At Guantanamo Bay, were facilities in the “NGO Internet Lounge” (“Internet Library”) adequate?

At Guantanamo Bay, was a printer with printer supplies made available for NGO Observers to use?

At Guantanamo Bay, were other materials made available to help facilitate NGO Observers to do their jobs?

#### NGO Observer Facilities – Ft. Meade

At Ft. Meade, did NGO Observers have reasonable access to facilities needed to fulfill their observers’ responsibilities?

At Ft. Meade, were facilities in the “NGO Internet Lounge” (“Internet Library”) adequate?

At Ft. Meade, was a printer with printer supplies made available for NGO Observers to use?

At Ft. Meade, were other materials made available to help facilitate NGO Observers to do their jobs?

#### NGO Observer Internet Access

At Guantanamo Bay, did NGO Observers have internet access by Ethernet in the “Internet Lounge”? 
At Guantanamo Bay, if NGO Observers had internet access via Ethernet in the “Internet Lounge”, 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, was the fee $150.00 U.S. to connect and to use the internet for up to one week (as the connection / usage fee was in October 2014)?

At Guantanamo Bay, if the internet via Ethernet fee was the $150.00 connection and usage fee prorated if the hearings were for less than one week, or was the $150.00 payable whether the internet was connected and used for one minute only 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*?

---

70. Threats, Intimidation, Security Issues, Monitoring the Observers; NGO Hurdles

**Threats, Intimidation, Security Issues, Monitoring the Observers**
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did you feel threatened in any way by personnel or others during your trip to Ft. Meade or Guantanamo Bay?</td>
<td></td>
</tr>
<tr>
<td>Were you aware of any government monitoring of your activities, movements or communications while at Guantanamo Bay?</td>
<td></td>
</tr>
<tr>
<td>Were you aware of any government monitoring of your activities, movements or communications while at Ft. Meade?</td>
<td></td>
</tr>
<tr>
<td>Did any observation, monitoring or other your observation mission limit your ability to carry out your observation objectives?</td>
<td></td>
</tr>
<tr>
<td>Did you encounter any logistical, security or other issues regarding your observation at Guantanamo Bay or Ft. Meade?</td>
<td></td>
</tr>
<tr>
<td><strong>Hurdles to NGO Observers</strong></td>
<td></td>
</tr>
<tr>
<td>Did you encounter any hurdles to your ability to carry out your NGO Observer responsibilities?</td>
<td></td>
</tr>
<tr>
<td>If you encountered any hurdles to your ability to carry out your NGO Observer responsibilities, what were those hurdles?</td>
<td></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>
<td></td>
</tr>
<tr>
<td>Were you as an NGO Observer able to fulfill your remit per your sending organization?</td>
<td></td>
</tr>
</tbody>
</table>

### 71. NGO Observers De-Briefing; Being Eyes and Ears of Outside World;

| NGO Observer Reports / De-Briefing Memos / Blog Posts / Scholarly Articles / Other Publications? |        |
| Did you prepare a NGO Observation Report, De-Briefing Memo, Blog Post, or other publication on your hearing observations? |        |
| Did you publish your NGO Observer Report, De-Briefing Memo, Blog Post, or Scholarly Article? |        |
If you published your NGO Observer Report, De-Briefing Memo, or Blog Post, or Scholarly Article, what is the citation / URL?

| 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).
XVIII. Conclusion [Forthcoming]
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.

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.

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. (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”.

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

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)

**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)**

**Appeal (Interlocutory Appeal)**

**Appellate Exhibit (AE)**

**Armed Forces**

**Arraignment**

**Arrested Article III Court.** A court established under Art. III of the U.S. Constitution. Article III courts include district courts with original jurisdiction, intermediate appellate courts, and the Supreme Court.

**Attorney**

**Attorney-client privilege**

**Authority (Persuasive Authority)**

**Banana Rat.** Hutias, cavy-like rodents, commonly seen at the Guantanamo Bay Naval Base.

**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/gIQAXoQkdM_story.html

**Bean Hole Cover.** 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. 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.**

**Brig**

**Burden of Proof**

**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 and other personnel live when participating in the Military Commissions.

**Capital Case**

**Captured**

**Charge**

**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

Civil Law

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

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

Commanding Officer

Commission

Common Article 2 of the Geneva Conventions

Common Article 3 of the Geneva Conventions

Common Law

Competent (Tribunal)

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

Conviction

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

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)

Crime Against Humanity
Cross-Examine
Cruel, inhuman or degrading treatment or punishment

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
Death Penalty
Death Penalty Mitigation Specialist (See Mitigation Specialist)
Declarant
Defendant
Defense Counsel

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)
Deposition
Derogation
Detail
Detainee
Detention
Discovery
Due Process

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
Escort
Evidence
Examine
Exculpatory evidence
Executive Order

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
Fair Trial

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: http://www.ftmeade.army.mil)

General Principles of Law
Geneva Conventions

Gitmo

GTMO

Guantanamo Bay Naval Station. A U.S. naval base located in Guantanamo Bay, Cuba. Currently, military commission facilities operate at the Guantanamo Bay Naval Station, holding trial proceedings and providing logistical service to military commission participants. (Source: http://www.mc.mil/FACILITIESSERVICES.aspx)

Habeas Corpus

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

Hearsay

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)

In Camera. In private. Refers to proceedings closed to the public and press.

Independent (Tribunal)

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

Interpreter

Interrogation

IRF. See Immediate Reaction Force; Initial Reaction Force.

JAG. See Judge Advocate General

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 the Goldwater-Nichols DOD Reorganization Act of 1986, "The Secretaries of the Military 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)

**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**
- **Judge Advocate**
- **Judge Advocate General (JAG)**
- **Judge, Civilian**
- **Judge, Military**

**Jurisdiction (Personal Jurisdiction)**
- **Jurisdiction (Subject Matter Jurisdiction)**

**Jury**
- **Jus cogens (see peremptory norm)**
- **Learned Counsel**
- **Legal Advisor**
- **Legal bin**

**Legal mail.** Communications between detainees and the defense attorneys related to their case.

**Logistics Memo**
- **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.


**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.

**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 authorizes the Department of Defense to create military commissions with limited jurisdiction. The MCA of 2009 supersedes the MCA of 2006.

**Member (Jury Member)**
- **Memorandum of Understanding (see MOU)**

**Military Commission**
- **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 Commission Act of 2009 (MCA. or MCA of 2009).** Congressionally enacted legislation that authorizes the Department of Defense to create military commissions with limited jurisdiction. The MCA of 2009 supersedes the MCA of 2006.

**Military Commission Order**
- **Military Commission Regulation**
- **Military Commission Rules of Evidence (Mil. Comm. R. Evid.)**
- **The Military Commissions Rules of Evidence (MCRE)**

**Military Commissions Trial Judiciary Rules of Court (24 April 2012, as amended 4 June 2014)**
Military Judge

Military Objectives

Military Working Dogs (MWD)

Mission

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)

Motility

Motion

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 Council (NSC)

NDA. (See Non-disclosure Agreement)

News Media Representatives (NMR)

Non-disclosure Agreement (NDA)

Non-legal mail

Objection

Observer (Trial Observer)

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 Special Security (OSS)

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

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
Pardon
Party (Party to a Criminal Case)
Party (Party to a Treaty)
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.

Persuasive Authority
Precedent
Preferred
Pre-Trial Hearing
Prisoner
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
Program.
Protected Information
Protected Person
Protected Property
Protective Order
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
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)

Secretary of Defense
Secretary of State
Security Classification Review Team (of the DoD)
Security Declassification Review Team (of the DoD)
Security Officer
Self-Executing

Sensitive Compartmented Information (SCI)

Sensitive Compartmented Information facility (SCIF)

Shackles. Metal devices used to constrain the detainees’ ankles or wrists.

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

Sua Sponte. Literally, "On its own." Refers to judges taking action without request from the parties.

Subpoena

Supreme Court (U.S.)

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 signer’s 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

Top Secret-Sensitive Compartmented Information (see TS/SCI- TS/SCI)

Torture

Translator

Treaty

Trial

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

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/oe12958.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. 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.

Victim

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 their Families

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.

Victims’ Families

Video Tele Conference. (See VTC)

Vienna Convention on the Law of Treaties

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
Withdrawn Charge(s)
Withdrawn Plea
Without Prejudice
Witness
Work Product
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
Constitution Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment


(www.unhchr.ch/Huridoca/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81?OpenDocu ment)

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
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 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 (ICTY 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)
Doswald-Beck, Louise, HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM (Oxford University Press, 2011)
Hale, Christopher “Kip” & Bair, James P. (eds), INTERNATIONAL DUE PROCESS AND FAIR TRIAL MANUAL (ABA Center for Human Rights) (2014)
Harris, O’Boyle, and Warbrick (1995) 252
International Commission of Jurists, TRIAL OBSERVATION MANUAL FOR CRIMINAL PROCEEDINGS: PRACTITIONERS GUIDE NO. %
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
Trechsel, Stefan, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 242-290 (Oxford Univ. Press 2006)
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,


Steytler, Constitutional Procedure at 234

Thayer, James Bradley, The Presumption of Innocence in Criminal Cases, 6 Yale L.J. 185, 188–89 (1897)


University of Minnesota Human Rights Library, Chapter Six: Right to a Fair Trial  


Cases


Allan v. United Kingdom


Argeringer v. Hamlin, 407 U.S. 367 (1979)),
Barbera, Messegue and Jabardo v. Spain, 11 ECHR 360 (1994)
Bell v. Wolfish, 441 U.S. 520, 582 n.11 (1979)
Brewer v. Williams, 430 U.S. 387 (1977)
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)


Communication No. 219/1986

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.
Dimitri 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
Huliki 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.)
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 EHR 1 (1983)
Paqueta Habana, 175 U.S. 677, 700 (1900)
Poiirimol v. France, 18 EHR 130
Prosecutor v. Casimir Bizimungu, ICTR-99-50-I.
Prosecutor v. Maroslay and ors IT-98-30/1-A.
Prosecutor v. Tadić, 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)
CCPR/C/45/D/349/1982 (1992). This comment goes into great detail on the scope and guarantees of
Article 14.
X and Y v. Austria (1978), 15 DR 160, Ecomm HR.
X v. Austria, 2 DR 68, ECommHR (1975).

Government Documents (U.S.)

Joint Protocol of the Department of Justice and Department of Defense, Determination of Guantanamo Cases
White House Fact Sheet: New Actions on Guantanamo and Detainee Policy (Mar. 7, 2011)
(http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-
detainee-policy)

Websites

http://www.vcf.gov/
http://www.vcf.gov/faq.html#eli1
www.GitmoObserver.com

Twitter Feeds

@CarolRosenberg
@GitmoObserver
@GitmoWatch
@TheGitmoReport
Index
Observation / Monitoring Note Page