

Guantanamo Bay Fair Trial Checklist for U.S. Military Commission Participants and Observers: A Guide for Assessing Human Rights Protections for the Prosecution and the Defense, Victims and Victims’ Families, Witnesses, the Press, NGO Observers, and Other Military Commission Stakeholders

Volume I: Rights During Pre-Trial Hearings



by

The Gitmo Observer*

10 September 2014

* *“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 IU McKinney School of Law. Professor Edwards is also Faculty Director (Founding) of the IU McKinney Law School’s Program in International Human Rights Law.

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

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

(Reprinted in **II TRIAL OF THE MAJOR WAR CRIMINAL BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946**, *Second Day, Wednesday, 21 November 1945, Part 04, Morning Session*, at page 101 (published at Nuremberg, 1947)).

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I. Introduction

This ***Guantanamo Fair Trial Checklist*** identifies general categories of internationally-recognized rights associated with fair trials in the Military Commission context. It also lists questions that may guide NGO Observer in fulfilling their mission of ascertaining whether in the NGO Observers’ estimation—based on applying binding law to observed facts on the ground—fair trials are being afforded for all Guantanamo Bay Military Commission stakeholders. The ***Guantanamo Fair Trial Checklist*** recognizes that the long list of stakeholders includes defendants, the prosecution, victims and their families, judges and judicial staff, witnesses, the press, governments with detained citizens, governments whose citizens were injured by the alleged crimes, Guantanamo Bay detention facility staff, and the general international and U.S. publics.

The listed rights are provided for under international human rights law, international humanitarian law (the law of war), and international criminal law, and are also provided for under U.S. domestic law, including the Military Commission Act of 2009. This law binds the U.S. and persons acting on behalf of the U.S. Though the charts in this preliminary draft only identify applicable provisions from the International Covenant on Civil and Political Rights (ICCPR), the final draft will identify applicable provisions of the U.S. Constitution, the Geneva Conventions and other international instruments, U.S. Statutes, and other law (some of which is excerpted at the end of the ***Guantanamo Fair Trial Checklist***). This law, and its applicability, are discussed in the ***Guantanamo Fair Trial Manual*** (forthcoming).

The ***Guantanamo Fair Trial Checklist*** calls on NGO Observers to complete a background information table about the defendant(s) and the case. This section asks about rights pertaining generally to all phases in the criminal justice process. It also asks about rights related to the Military Commission itself when acting as a court tribunal. Finally, it enquires about rights related to the Military Commission judges.

The ***Guantanamo Fair Trial Checklist*** then identifies rights associated with the pre-trial hearing stage specific of the criminal justice process, which is the second of the four below-listed stages:

- a. Pre-Hearing Stage (Capture, Arrest, Early Detention, Pre-Charge);
- b. ***Pre-Trial Hearing Stage (Post-Charge, Pre-Military Commission)***;
- 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).

Checklists for the other stages are forthcoming. This pre-trial stage ***Guantanamo Fair Trial Checklist*** is first to be developed since four Guantanamo Bay Military Commission cases are at the pre-trial hearing stage. The rights in the four stages overlap, making many pre-trial hearing ***Guantanamo Fair Trial Checklist*** questions also applicable during other stages.

The ***Guantanamo Fair Trial Checklist*** also identifies rights associated with multiple stakeholders, including, victims, victims’ families, witnesses, the press, governments of countries whose citizens are or have been imprisoned at Guantanamo Bay, the U.S. and international public, and other stakeholders.

All ***Guantanamo Fair Trial Checklist*** charts will not apply to all Observations. All questions in any ***Guantanamo Fair Trial Checklist*** chart will not apply to all hearings. The ***Guantanamo Fair Trial Checklist*** is deliberately repetitive, given that the rights overlap, and because the ***Guantanamo Fair Trial Checklist*** seeks to trigger 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.

The ***Guantanamo Fair Trial Checklist*** is a general guide as NGO Observers and others seek to identify whether and when the system is operating in accordance with, or contrary to, international and domestic law. It is hoped that NGO Observers and others will determine which charts and questions are

most relevant and helpful to them as they seek to carry out the missions of their sending organizations.²

The ***Guantanamo Fair Trial Checklist*** questions, which are comprehensive yet not exhaustive, are drafted objectively, without favor for or against any stakeholder or stakeholder interests. The ***Guantanamo Fair Trial Checklist*** categories and questions do not presuppose compliance, or noncompliance, with international or domestic law.³ Independent, objective NGO Observers and others may draw their own conclusions. The ***Guantanamo Fair Trial Checklist*** is intended to be a simple tool to assist. It is not intended to list out pre-determined conclusions.

The accused (defendants) are entitled to a fair trial at Guantanamo Bay. The prosecution is entitled to a fair trial at Guantanamo Bay. The victims and the families of the victims are entitled to a fair trial at Guantanamo Bay. The U.S. general public is entitled to a fair trial at Guantanamo Bay. All U.S. Military Commission stakeholders are entitled to a fair trial at Guantanamo Bay. Sections and questions in this ***Guantanamo Fair Trial Checklist*** relates to the wide range of stakeholders in this important process.

It is hoped that the ***Guantanamo Fair Trial Checklist*** will help as the U.S. government seeks to follow its longstanding mandate to respect the rule of law and human rights for all, particularly for the wide-range of stakeholders in the U.S. Military Commissions at Guantanamo Bay, Cuba.

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. Congratulations on undertaking this important mission.

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² These NGO Observer missions, and missions of others who may use the ***Guantanamo Fair Trial Checklist***, 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.

³ 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.

II. What is the Right to a Fair Trial?

In international tribunals and in domestic courts around the globe, the “right to a fair trial” triggers thoughts of rights of defendants, the persons accused of the crimes. For example, we readily think of the right to be presumed innocent until proved guilty, the right of a defendant to be informed of charges against him, the right to confront prosecution witnesses, and the right to due process, generally. International and domestic law require that defendants be afforded all those rights, and many more.

However, international and domestic law also recognize rights-holders other than the defendant in criminal trials. The law requires that other stakeholders in criminal trials also be afforded a wide range of rights.

This section of the *Guantanamo Bay Fair Trial checklist* outlines the sources of some of these rights to be afforded to defendants and other stakeholders, identifies the range of stakeholders in the right to a fair trial (defendant and non-defendant individuals and entities required to be afforded the right to a fair trial in criminal proceedings), and lists some remedies available when stakeholders are denied rights that are guaranteed to them under law.

a. Sources of the right to a fair trial

i. International Law & the Right to a Fair Trial.

International law is an appropriate source of law to consider when determining the scope of the right to a fair trial to be afforded to Guantanamo Bay Military Commission stakeholders. The U.S. Constitution provides that international law is “the Supreme law of the land”,⁴ and even the U.S. Manual for Courts-Martial directs Military Commissions towards international law.⁵

Over the years, the U.S. has become bound to numerous international treaties that obligate the U.S. to honor the right to a fair trial, such as the *Nuremberg Charter*,⁶ the *Tokyo Charter*,⁷ and the International Covenant on Civil and Political Rights (ICCPR).⁸ Furthermore, the U.S. has recognized the binding nature of customary international law generally,⁹ and as related to the right to a fair trial.¹⁰

Customary international law norms related to the right to a fair trial are contained in these instruments:

⁴ U.S. Constitution, article VI, cl. 2.

⁵ The U.S. Manual for Courts-Martial, provides: “The sources of military jurisdiction include the Constitution and international law. International law includes the law of war.” (*Manual for Courts-Martial*, United States, Part I, Preamble, para. 1 (2000)). The Manual’s analysis section for paragraph 1 of Part I, Preamble, notes, *inter alia*: “As to sources in international law, *see e.g.*, . . . Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts 82-84, 6 U.S.T. 3316, 3382, T.I.A.S. No. 3365, 75 U.N.T.S. 287.”

The U.S. Manual also provides: “Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions . . . shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial”. (*Manual for Courts-Martial*, United States, Part I, Preamble, para. 2(b)(2) (2000))

⁶ *Charter of the International Military Tribunal* (<http://avalon.law.yale.edu/imt/imtconst.asp>)

⁷ *Charter of the International Military Tribunal for the Far East*, <<http://www.yale.edu/lawweb/avalon/imtfech.htm>> (last visited 10 September 2014) The *IMT Tokyo Charter* provides for fair trial rights for the accused and lists procedures to be followed “in order to insure a fair trial for the accused”. (article 9)

⁸

⁹ *The Paquete Habana*, 175 U.S. 677, 700 (1900) (find that “international law is part of our law”).

¹⁰ The U.S. has recognized as binding the fair trial norms in Article 75 of Additional Protocol I to the Geneva Conventions of 1949. *See, e.g.*,

the *Universal Declaration of Human Rights*;¹¹ the *American Declaration on the Rights and Duties of Man*;¹² the *Nuremberg Principles of 1950*.¹³

ii. International Humanitarian Law & International Human Rights Law Fair Trial Rights Apply to Military Commissions at Guantanamo Bay

Both international humanitarian law and international human rights law apply to the Guantanamo Bay Military Commissions. The U.S. is obligated to comply with fair trial standards arising under both areas of law, and is obligated to afford all stakeholders rights under both areas of law. Rights under these two areas of law arise under treaties and customary international law.

Regarding Guantanamo Bay, the key international law sources for the right to a fair trial are the Geneva Conventions of 1949, the ICCPR, and the customary international law right to a fair trial under international humanitarian law and international human rights law.

(1) International Humanitarian Law.

The applicable international humanitarian law fair trial rights can be found in Common Article 3 of the Geneva Conventions (*see Appendix*), miscellaneous other articles of the Geneva Conventions, Article 75 of Protocol Additional I of the Geneva Conventions, Article 6 of Protocol Additional II of the Geneva Conventions, and customary international humanitarian law.

(2) International Human Rights Law.

The applicable international human rights law fair trial rights can be found in article 14 of the ICCPR. 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".

(3) ICCPR rights as minimum guarantees.

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. For fair trial rights to be provided fully, the principle of "equality of arms" must be respected. Equality of arms demands that both the defense and the prosecution be treated such that they have procedurally equal positions during all phases of all criminal proceedings. Examples of violations of equality of arms might include not allowing defendants to obtain witnesses under the same conditions as the prosecutor, denying the defense adequate facilities or adequate

¹¹ <<http://www.unhcr.ch/udhr/lang/eng.htm>> (last visited 10 September 2014) The *Universal Declaration of Human Rights* provides that "everyone is entitled in full equality to a fair and public hearing". (article 10)

¹² <<http://www.cidh.org/Basicos/basic2.htm>> (last visited 10 September 2014) The *American Declaration on the Rights and Duties of Man*, in a section entitled "right to a fair trial", provides that "every person may resort to the courts to ensure respect for his legal rights". (Article 18)

¹³ *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* <http://www.un.org/law/ilc/texts/nurnberg.htm> (last visited 10 November 2005). The text of this international instrument was adopted by the Commission at its second session, in 1950, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The *Nuremberg Principles* provides that "any person charged with a crime under international law has the right to a fair trial on the facts and law". (adopted by the International Law Commission in 1950) (Article V).

time to prepare a defense, excluding the accused from a portion of the trial but not excluding the prosecutor, etc.

(4) U.S. history of honoring international law obligations.

The U.S. has a longstanding commitment to honoring its international law obligations regarding the right to a fair trial in courts within the U.S. For example.....

The U.S. also has a long tradition of insisting that international criminal tribunals incorporate internationally-recognized fair trial rules. For example...

iii. Domestic U.S. Law & the Right to a Fair Trial.

U.S. Constitution and other domestic U.S. sources are consistent with international law sources, it is appropriate to look to fair trial in international law first, and then to the right to a fair trial as expressly incorporate into domestic U.S. sources of law.

- (1) **U.S. Constitution.** Contains fair trial provisions.....
- (2) **Military Commission Act of 2009.** Contains fair trial provisions¹⁴
- (3) **Older U.S. provisions, e.g., the *Lieber Code of 1863***¹⁵

b. Stakeholders in the right to a fair trial

Stakeholders in the U.S. Military Commissions at Guantanamo Bay include a range of individuals and groups each of whom has the right to a fair trial. These stakeholders include (a) the prosecution; (b) the defendant and the defense; (c) victims; (d) victims' families; (e) witnesses; (f) the press; (g) NGO Observers; and (h).

This *Guantanamo Bay Fair Trial Checklist, infra*, identifies many of the interests of the various stakeholders, and rights to which different stakeholders are entitled.

c. Remedies available when the right to a fair trial has not been afforded to stakeholders

This *Guantanamo Bay Fair Trial Checklist, infra*, identifies remedies available when rights are denied to stakeholders, or when interests are not satisfied.

¹⁴ Other Military Commission operative documents also contain fair trial provisions, including: 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).

¹⁵ *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*. 24 April 1863. <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> (last visited 10 September 2014) *The Lieber Code of 1863*, article 148 provides that “[t]he law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage.”)

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III. General Information & Rights Charts

1. General Information about the case

Before NGO Observers travel to Guantanamo Bay or Ft. Meade for hearings, they are expected research the case(s) they will monitor. Many official and unofficial sources provide relevant, useful and accurate information. Among those sources are [The Gitmo Observer website](#), that 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.

1. General Information	
What is the name of the NGO Observer?	
What is the NGO Observer’s affiliation?	
What are the NGO Observer’s objectives (or terms of reference) in carrying out this observation?	
What are the NGO Observer’s observation dates?	
Did the NGO Observer observe at Guantanamo Bay, Cuba?	
Did the NGO Observer observe at Ft. Meade, Maryland?	
How many other NGO Observers were present at Ft. Meade or Guantanamo Bay?	

2. Defendant & Case Information (Much of this information is readily available at www.GitmoObserver.com or from U.S. government websites identified on the Gitmo Observer website.)	
What is the defendant's name (or the name he is commonly known as)?	
If there are co-defendants, who are they?	
What is the defendant's nationality?	
Does the defendant have more than one nationality?	
What is the defendant's date of birth?	
What are the primary allegations against the defendant?	
Is the defendant an alleged member of al Qaeda?	
Is the defendant an alleged member of the Taliban?	
When was the defendant taken into custody?	
Where has the defendant been detained?	
Was the defendant a juvenile when taken into custody?	
Was the defendant a juvenile when he allegedly engaged in the alleged criminal behavior?	
Is mental capacity an issue with regard to the defendant?	
Is the defendant considered to be a High Valued Detainee (HVD)?	

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2. General Rights

This section lists several rights that reflect universally-recognized principles, incorporated into international and domestic U.S. law, that apply either at all phases of the criminal process, or that would trigger dismissal of a case against a defendant. All international and domestic courts and tribunals are bound by these rights, which are contained in numerous international treaties, many of which the U.S. has ratified and has thus become bound, are contained in customary international law, and are contained in specific sources of U.S. military and civilian law.

The “general rights” include the following:

- (a) the right to be presumed innocent;
- (b) the right to have the burden of proof on the prosecution;
- (c) the right to freedom from retroactive application of criminal laws (no ex post facto laws); and
- (d) the right freedom from double jeopardy.¹⁶

[This introductory General Rights section is being developed further.]

3. Right to be Presumed Innocent until proved guilty according to law (Military Commission Act of 2009, § ___; ICCPR, art 14(2)) ¹⁷				
	Yes	No	Don't Know	Comm
Comments About the Defendant's Guilt				
Has the prosecution made comments about the guilt of the defendant?				
Has the judge made comments about the guilt of the defendant?				
Did the judge make any statements that suggested the defendant's guilt?				

¹⁶ 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.”

¹⁷ The right to be presumed innocent is found in the following international instruments: *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.”); *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”.); *European Convention*, article 6(2) (“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”); Article 48(1) of the *EU Charter of Fundamental Rights* (“everyone who has been charged shall be presumed innocent until proven guilty according to law”); *Additional Protocol I*, article 75(4)(d) (“Anyone charged with an offence is presumed innocent until proved guilty according to law”); *ICC Statute*, article 66(1) (“Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.”); article 21(3) of the *ICTY Statute* (“The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute”); *ICTR Statute*, article 20(3) (“The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute”); *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”); Principle 36(1) of the *Body of Principles on Detention or Imprisonment*; African Charter, Article 7(1)(b); and *African Commission Resolution*, Paragraph 2(D).

Have members of the press made comments about the guilt of the defendant?				
Has defense counsel made comments about the guilt of the defendant?				
Have family members of victims made comments about the guilt of the defendant?				
Has the U.S. President made comments about the guilt of the defendant?				
Has the U.S. Secretary of Defense made comments about the guilt of the defendant?				
Have any government leaders of other countries made comments about the guilt of the defendant?				
Have other stakeholders of the Military Commissions made comments about the guilt of the defendant?				
The Appearance of the Defendant				
Was there anything about the defendant's appearance that might suggest to the press or others that the defendant might be guilty?				
Was the defendant wearing a prison uniform in court, or was the defendant permitted to wear non-prison clothing of his choice?				
Was the defendant wearing shackles on his legs?				
If the defendant was wearing shackles on his legs, could any member of the jury see the shackles?				
Could any person in the NGO Observer Gallery see the shackles?				
Could NGO Observers or members of the public viewing the proceedings by secure-video-link at Ft. Meade or elsewhere see the shackles?				
Was the defendant wearing handcuffs?				

How many uniformed security officers were present in the courtroom guarding each defendant?				
Presumption of Innocence – Generally				
Did the defendant exercise his right to remain silent during the course of the pre-trial hearings you observed?				
Was there anything to suggest that the judge inferred guilt from the silence of the defendant?				
Was the defendant required to testify under oath?				

4. Burden of Proof on Prosecution				
	Yes	No	Don't Know	Comment
Does the burden of proof lie wholly on the prosecution throughout the process?				
Are the procedural rules such that the burden of proof remains with the prosecution?				

5. Freedom from retroactive application of criminal laws (ICCPR, art 15(2)).¹⁸				
	Yes	No	Don't Know	Comment
Was the law applied or to be applied in this case in force at the time of the alleged commission of the crime?				

¹⁸ 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).

Was the alleged act punishable by law at the time it was committed?				
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6. Freedom from Double Jeopardy				
	Yes	No	Don't Know	Comment
Was the defendant previously tried in a court of law on similar or identical criminal charges?				
If the defendant was previously tried on similar or identical criminal charges, what court was it and what was the outcome of the trial?				
Was the defendant previously tried in a court of law for the same behavior for which he is now charged?				
If so, what court, and what was the outcome of the trial?				

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3. The Court (The Military Commission)

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 impartial, independent, 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.

The right to trial by a competent, impartial and independent tribunal established at law can be found in the Military Commission Act of 2009, § 949b,¹⁹ in ICCPR, art 14(1), and in many other international and domestic instruments and sources of law.²⁰

[This introductory Court / Military Commission section is being developed further.]

7. Right to Trial by a Competent, Impartial, and Independent Tribunal Established by Law (Military Commission Act of 2009, § 949b; ICCPR, art 14(1))				
	Yes	No	Don't Know	Comment
Competent Judge & Tribunal				
Did the prosecution, defense, or other stakeholders challenge the competence of the judge?				
If the prosecution, defense, or other stakeholder challenged the competence of the judge, what was the outcome of the challenge?				
Did the prosecution, defense, or other stakeholders challenge the competence of other judicial officers or staff?				
If the prosecution, defense, or other stakeholder challenged the				

¹⁹ § 949b is titled “Unlawfully Influencing Action of Military Commission and United States Court of Military Commission”.

²⁰ The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is also provided for in the following international instruments: *UDHR*, Article 10; *Principles on the Independence of the Judiciary*, Principle 2 (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”); *American Convention*, Article 8(1); and *European Convention*, Article 6(1). See *Karttunen v. Finland*, (387/1989), 23 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 120; *Fey v. Austria*, 24 February 1993, 255 Ser. A 13, para. 34; *Collins v. Jamaica*, (240/1987), 1 November 1991, Report of the HRC, (A/47/40), 1992, at 236 para. 8.4; See also *American Convention*, article 27(2) (the right to a competent, independent, impartial judiciary, may not be suspended even in states of emergency); *Inter-American Court*, Advisory Opinion OC-8/87, 30 January 1987, *Habeas Corpus in Emergency Situations*; *Inter-American Court*, Advisory Opinion OC-9/87, 6 October 1987, *Judicial Guarantees in States of Emergency*, OAS/Ser.L/V/III.19 doc.13, 1988; Article 67(1) of the ICC Statute (guaranteeing a fair hearing conducted impartially).

competence of other judicial officers or staff, what was the outcome of the challenge?				
Did you witness any signs of incompetence on the part of the judge?				
Did the judge when presiding over the courtroom appear to be competent?				
Were the judge's comments clear?				
Did the judge exercise proper control over the courtroom and proceedings?				
Did the judge appear to be knowledgeable?				
Did the judge appear to act rationally?				
Did the judge explain all to the defendant matters in a manner calculated for the defendant to understand?				
Is it your impression that the Military Commission is deciding motions or has decided motions in a timely fashion?				
Are you aware of any complaints that the Military Commission is slow in deciding motions?				
Are the rulings of the court clear, firm, direct and / or unambiguous?				
Impartial Judge & Tribunal				
Did any party challenge the judge or any judicial officer on the ground of lack of impartiality? If so, what was the outcome of the challenge?				
Did the judge appear to be even-handed, as between the prosecution, defense and other actors?				
Did the judge offer all relevant stakeholders an opportunity to be heard on motions and other matters before the court?				

Did it appear as though the judge considered the law carefully, and ruled on motions without bias or favor towards any side?				
Did the judge make discriminatory comments about any party as to race, color, language, religion, political or other opinion, national or social origin, property, birth or other status?				
Were you made aware of any suggestion that the judge or any judicial officer had an interest in the case beyond their traditional role of presiding over the case?				
Was there any suggestion that the judge or any judicial officer was motivated by financial gain, political aspirations, or other improper motives in presiding over the case or in any rulings in the case?				
Did the judge make any statements or take any actions that might suggest that the judge was biased <i>in favor of</i> the defendant(s)?				
Did the judge make any statements or take any actions that might suggest that the judge was biased <i>against</i> the defendant(s)?				
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?				
Does the judge have any extraordinary relationship with the Convening Authority, the Secretary of Defense, the White House or other relevant officials?				
Did the judge act towards the defendant, defense counsel, prosecution, witnesses, the press, Observers, victims or family members of victims, aggressively or in an intimidating or otherwise inappropriate manner?				
Independent Judge and Court				
Did it appear as though any non-judicial governmental actor, from any department or agency within the U.S. government or otherwise, had any influence or authority over the judge or court?				
The GTMO courtroom has a 40-second delay in transmitting courtroom				

audio to NGO Observers sitting behind a glass wall. If a trial participant mentions classified information, the judge may flash a red light to signal that the audio will be cut to the Observers. Did the court appear to be in control of the 40-second audio delay and red light? Did it appear as though individuals aside from the judge or the court security officer caused the red light to flash and the audio to stop transmitting to the NGO Observers?				
General Powers of the Judge and Court				
Did the judge threaten to issue any contempt orders?				
Did the judge exercise any subpoena power?				
Did the judge exercise appropriate authority over Guantanamo Bay detention facility staff regarding conditions of detention or other matters?				
Did the judge appear to pressure the prosecution, defense, or defendant into speeding up the case for scheduling purposes?				
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?				

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4. Rights During the Pre-Trial Hearing Stage (Post-Charges)

After arraignment and before trial, the Military Commission will hold pre-trial hearings, offering the prosecution and defense opportunities to present arguments on legal matters that must be resolved before the trial begins. The pre-trial hearing period could last for many months or years.

During your observation period—which could last for a day, a few days, a week or two, or longer—you may not (will not!) be exposed to facts (and law) necessary to answer many of the questions contained in the following charts. Do not panic!

The charts' questions, which in some instances are repetitive, are intended to trigger thoughts about rights protections of many stakeholders in many areas during possibly protracted hearings. The issues presented during your observation period may differ from issues presented during another NGO Observer's observation period. Become familiar with the questions in these charts, and focus on the charts and questions most relevant to the issue presented during your specific observation period.

Again, do not worry if you cannot answer all the questions presented in these charts!

[This Rights During the Pre-Trial Hearing Stage introductory section is being developed further.]

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A. Right to Counsel

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:

- (a) the general right to effective assistance of counsel (U.S. Constitution, Sixth Amendment),²¹ including the right to counsel without payment if he does not have sufficient means to pay for it (ICCPR, art 14(3)(d));²²
- (b) the right to death penalty counsel (“learned counsel”) if a death penalty case;
- (c) the right to communicate with counsel of his own choosing (ICCPR, Article 14(3)(b));²³; and
- (d) the right to attorney client privilege.

[This Right to Counsel introductory section is being developed further.]

8. Right to Counsel – Pre-Trial Hearing Stage				
	Yes	No	Don’t Know	Comment
Was the defendant informed of the right to assistance of counsel?				
Was the defendant provided counsel at no cost to the defendant?				
Was counsel provided at a time and in a manner such that the counsel could effectively assist the defendant?				
Does counsel have access to all the resources necessary to properly advise and provide a defense for the defendant?				
Was the defendant provided a choice of counsel?				

²¹ The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense”.

²² 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).

²³ The right to communicate with counsel of his own choosing is also provided for in the following international instruments: *Body of Principles on Detention* or 2)(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.

Does it appear as though defendant is receiving “effective” assistance of counsel?				
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9. Right to Death Penalty Counsel (“Learned Counsel”) if a Death Penalty Case – Pre-Trial Hearing Stage				
	Yes	No	Don’t Know	Comment
Does the defendant have representation by special death penalty-qualified “Learned Counsel” if it is a death penalty case?				
Does it appear as though the “Learned Counsel” have access to all the resources necessary to provide a defense to the death penalty charges?				
Does it appear as though “Learned Counsel” is actively involved in the defense?				

10. Right to Communicate with Counsel of His Own Choosing – Pre-Trial Hearing Stage (ICCPR, art 14(3)(b))				
	Yes	No	Don’t Know	Comment
Does the defendant have the ability to consult with his counsel in confidence?				
Were you aware of any allegations of improper hurdles in place that prevented full and frank communications between the defendant and his counsel?				
Are you aware of any improper hurdles currently in place that prevent full and frank communications between the defendant and his counsel?				
Does the defendant have the ability to communicate with his counsel via e-mail?				

Does the defendant have the ability to communicate with his counsel via telephone?				
Has the defense alleged that the prosecution has interfered with defense counsel ability to communicate with their client?				
Does the defendant have the ability to communicate with his counsel via skype or other video-conference mechanism?				
Does the defendant have the ability to communicate with his counsel via letters (mail, post)?				
Must defendant wait until counsel travels to Guantanamo Bay, Cuba for the defendant to communicate counsel?				
Are all means through which defendants can communicate with counsel protected interception, screening, or improper review by detention staff or other governmental authorities?				
Do all communications between defendant and counsel have the required level of confidentiality?				

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11. Right to Attorney Client Privilege - Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
Does it appear as though the right to attorney client privilege has been and is being respected?				
Does it appear as though the defendant has been given all appropriate resources to be able to consult with counsel?				
Does it appear as though the prosecution, the court, the detention facility staff have interfered with or are interfering with the attorney / client relationship?				

Have the attorneys been free to meet with clients to facilitate the exchange of information?				
Have communications between the defendant and his counsel been monitored?				
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?				
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?				
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?				
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?				

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B. Right to Information & Access to Information

International and domestic law require criminal defendants to be afforded certain information and access to certain information at different stages of the criminal proceedings. Defendants are entitled to be informed about certain rights that 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.

[This Right to Information / Access to Information introductory section is being developed further.]

12. Right to Information – Pre-Trial Hearing Stage				
1.1.1. 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 (ICCPR, art 14(3)(a)); ²⁴				
	Yes	No	Don't Know	Comment
Was the defendant informed of a right to remain silent?				
Was the defendant informed of a right to counsel?				
Was the defendant informed of his right to communication with consular representatives from his country?				
Was the defendant informed of his rights under international humanitarian law?				
Was the defendant informed of rights under the Geneva Conventions?				
Was the defendant informed of his right to challenge the lawfulness of his detention?				
Was the defendant informed of his right to bring habeas corpus claims in U.S. federal courts?				

²⁴ 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>).

Does the defense have access to court records?				
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13. Right to Discovery – Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
Does the defense have equal access to the court?				
Is the defense given timely access to these records?				
Has the prosecution provided all the discovery required?				
Has the prosecution refused to provide discovery?				
Has discovery been provided to defense in a timely manner?				
Has the court made appropriate discovery orders?				
Has the defense turned over any discovery it is required to?				

14. Right to Receive Exculpatory Information - Pre-Trial Hearing Stage (Military Commission Act of 2009, section xxx; ICCPR art. 14)				
	Yes	No	Don't Know	Comment
Has the prosecution withheld exculpatory information? ²⁵				
Are you aware of any complaints that the prosecution has withheld any exculpatory information?				

²⁵ 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 Fair Trial Checklist* 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 Fair Trial Checklist* 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.

C. Rights to Adequate Time & Facilities to Prepare a Defense

Defendants have the right to a put on a defense in a criminal trial. Fairness requires that defendants be afforded adequate time to prepare their defense, and that defendants be provided adequate facilities to prepare their defense. This right is 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.²⁶

The concepts of “adequate time” and “adequate facilities” are frequently considered together, in the call for the right to “adequate time and facilities to prepare a defense”. One can have an infinite amount of time, but that time would be meaningless if the facilities were inadequate. The opposite may also be true, adequate facilities would be of negligible use if the defendant does not have adequate time.

How much time is “adequate”? What “facilities” are adequate? These questions are not easily answered. Consideration must be given to the circumstances of the case.

[This Right to Adequate Time & Facilities to Prepare Defense introductory section is being developed further.]

15. Right to Adequate Time to Prepare Defense – Pre-Trial Hearing Stage (ICCPR, art 14(3)(b))				
	Yes	No	Don't Know	Comment
Does it appear as though the defendant has had adequate time to prepare for his defense?				
Are defense counsel and defendant given enough time to meet to prepare for defense?				
What level of access does the defendant have to his counsel?				
Does it appear as though time constraints of meetings may unreasonably limit the preparation of the defense?				

²⁶ The right to have adequate time and facilities for the preparation of his defense is also provided for in the following international instruments: *European Convention*, Article 6(3)(b); *American Convention*, Article 8(2)(c); *African Commission Resolution*, Article 2(e)(1); *ICC Statute*, Article 67(1)(b); *ICTY Statute*, Article 21(4)(b); and *ICTR Statute*, Article 20(4)(b). See also Report on the Mission of the Special Rapporteur [on the Independence of Judges and Lawyers, Dato Param Cumaraswamy] to the United Kingdom of Great Britain and Northern Ireland, UN Doc E/CN.4/1998/39/Add.4, March 5, 1998, para 46. <<http://daccessdds.un.org/doc/UNDOC/GEN/G98/107/16/PDF/G9810716.pdf?OpenElement>> (last visited 11 November 2005)

The term “facilities” is defined to include, *inter alia*, that the accused and counsel for the accused must be granted access to appropriate information, documents, files, etc. that are necessary to prepare a defense and that the accused is entitled to be provided with physical facilities that will permit confidential communication with counsel for the accused. See *General Comment 13*, para 9; Basic Principles on Lawyers, Principles 8, 21. As regards this right, the accused must be permitted to communicate with counsel of his own choosing for the preparation of a defense.

16. Right to Adequate Facilities to Prepare Defense – Pre-Trial Hearing Stage (ICCPR, art 14(3)(b))				
	Yes	No	Don't Know	Comment
Does the defendant have access to his lawyers and other materials needed to prepare his defense?				
Does the defendant have adequate facilities to prepare for his defense?				
Does the defendant have adequate access to his lawyers to prepare for his defense?				
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?				
Are facilities such that the defense counsel can communicate with counsel in confidence, preserving attorney client privilege, without monitoring?				
Does the defendant have access to a physical space where he can review documents and other materials?				
Does the defendant have access to electronic databases needed for his defense?				
Does the defendant's counsel have access to the information and documents needed to prepare for the defense?				
Have there been any complaints regarding whether defendant's defense related printed material are free from unreasonable searches or monitoring?				

D. Right to Prompt Judicial Proceedings

International and domestic U.S. law require that defendants be brought promptly before a judge in court.²⁷ Pre-trial hearings in military commissions involve defendants appearing in a court before a military judge. The question is whether the defendant was brought promptly before the judge or court.

[This Right to Prompt Judicial Proceedings introductory section is being developed further.]

17. Right to be Brought Promptly Before a Judge or Other Judicial Officer – Pre-Trial Hearing Stage (ICCPR, art 9(3) & (4))				
	Yes	No	Don't Know	Comment
Was the defendant brought before a court promptly?				
When was the defendant first brought before a court?				
Was the court in which the defendant first appeared competent, objective and impartial?				
Did the court in which the defendant first appeared possess jurisdiction to hear the claims against the defendant?				
Were any alternative courts or tribunals considered?				
Could the defendant have been brought before a federal district court in the U.S., instead of a Military Commission at Guantanamo Bay, Cuba?				
Would a U.S. federal district court have had jurisdiction over the alleged criminal behavior of the defendant?				
Was the defendant brought before any other type of Guantanamo Bay non-judicial tribunal or process (e.g., Combat Status Review Tribunal–CSRT)?				

²⁷ 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).

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E. Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release

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.²⁸

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.²⁹

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

18. Right to Trial Without Undue Delay - Pre-Trial Hearing Stage (ICCPR, art 14(3)(c), art 9(3) & (4))				
	Yes	No	Don't Know	Comment
Has the prosecution contributed to trial delay?				
Has the defense contributed to trial delay?				
<i>Have any co-defendants contributed to trial delay?</i>				
Have logistical issues contributed to trial delay?				
Have any habeas corpus proceedings or other U.S. federal court proceedings contributed to trial delay?				
Does it appear as though 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?				

²⁸ 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.

²⁹ The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury".

<p>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?</p>				
<p>Have any other factors contributed to any trial delay? If so, what were they?</p>				
<p>When is the defendant’s trial scheduled?</p>				
<p>Is the length of time between arrest / capture / detention and the proposed trial date reasonable?</p>				

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F. Right to Liberty and Security of Person, including Freedom from Arbitrary Detention and Right to Review of Lawfulness of Detention

International and domestic law require the defendant to be afforded the right to liberty and security of person which includes the right to freedom from arbitrary detention (ICCPR, art 9(1)).³⁰

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))³¹

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”.

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

19. Right to Liberty and Security of Person, including Freedom from Arbitrary Detention (ICCPR, art 9(1))				
	Yes	No	Don't Know	Comment
Does it appear that the defendant's right to liberty and security of person has been afforded to him?				
Does it appear that the defendant's right to freedom from arbitrary detention has been afforded to him?				
Has the defendant complained about any alleged denial of his right to liberty and security of his person?				
Has the defendant complained about any alleged denial of his right to freedom from arbitrary detention?				

³⁰ 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).

³¹ 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.

20. Right to Challenge the Lawfulness of Detention – Pre-Trial Hearing Stage (ICCPR, art 9(4))				
	Yes	No	Don't Know	Comment
Was the defendant provided access to proceedings to determine the lawfulness of his detention?				
Was the defendant permitted to bring habeas corpus or similar proceedings in the U.S.?				
Was the defendant informed that his right to challenge the lawfulness of his detention is continuing?				
Has the defendant had the opportunity to challenge the lawfulness of his detention in non-judicial, administrative proceedings at Guantanamo Bay?				

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G. Right to Humane Treatment & Humane Conditions of Detention

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)),³² and that all defendants have the right to humane conditions of detention.³³

[This Right to Humane Treatment & Humane Conditions of Detention introductory section is being developed further.]

21. Right to be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, arts 7, 9(1); 10(1))				
	Yes	No	Don't Know	Comment
Has the defendant been treated with the respect for the inherent dignity of the human person?				
Has the defendant been treated with humanity?				

22. Right to Humane Conditions of Detention – Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
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?				

³² 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.

³³ 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.

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?				

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H. Rights to Freedom from Torture, and Cruel and Inhuman Treatment or Punishment

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)),³⁴ and this prohibition applies to all Guantanamo Bay defendants.

This prohibition extends to all forms of water boarding,³⁵ certain methods of “enhanced interrogation”,³⁶ and to some forms of force-feeding.³⁷ Recall that the charts below may trigger questions that you might ask about facts on the ground at Guantanamo Bay, but only after you apply the current, binding international and domestic law to the facts will you be able reasonably to ascertain whether that law is or is not complied with. This section of the *Guantanamo Bay Fair Trial Checklist* does not purport to interpret the law in the area, only to point towards that law.

[This Right to Freedom from Torture and Cruel & Inhuman Treatment or Punishment introductory section is being developed further.]

23. Right to be Free From Torture – Pre-Trial Hearing Stage (ICCPR, arts 7, 9(1); 10(1))				
	Yes	No	Don't Know	Comment
Did the defendant allege torture during pre-pre-trial detention?				
What was the nature of any alleged torture during the Pre-Charges (Pre-Pre-Trial) stage?				
Has it ceased?				
What remedy, if any, did the court order?				
Was the remedy effective?				

³⁴ 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.”)

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³⁷

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?				
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?				
Have defense counsel sought to raise torture-related claims on behalf of the defendant before non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?				
Does a protective order or classified information restriction prohibit defense counsel from raising torture-related claims on behalf of the defendant before non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?				
Has the defendant been granted access to persons other than defense counsel who may raise torture-related claims on the defendant's behalf in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?				
Has the defendant been directly or effectively prohibited from raising torture-related claims in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?				

24. Right to be Free From cruel, inhuman or degrading treatment or punishment – Pre-Trial Hearing Stage (ICCPR, arts 7, 9(1); 10(1))				
	Yes	No	Don't Know	Comment
Did the defendant allege cruel, inhuman or degrading treatment during the Pre-Charges stage?				

What was the nature of any alleged cruel, inhuman or degrading treatment during the Pre-Charges stage?				
Has it ceased?				
What remedy, if any, did the court order?				
Was the remedy effective?				
Has the defendant raised cruel, inhuman or degrading treatment or punishment-related claims in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?				
If the defendant has not raised cruel, inhuman or degrading treatment or punishment-related claims in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies, why not?				
Have defense counsel sought to raise cruel, inhuman or degrading treatment or punishment-related claims on behalf of the defendant before non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?				
Does a protective order or classified information restriction prohibit defense counsel from raising cruel, inhuman or degrading treatment or punishment-related claims on behalf of the defendant before non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?				
Has the defendant been granted access to persons other than defense counsel who may raise cruel, inhuman or degrading treatment or punishment-related claims on the defendant's behalf in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?				

Has the defendant been directly or effectively prohibited from raising cruel, inhuman or degrading treatment or punishment-related claims in non-U.S. tribunals and other inter-intergovernmental bodies such as the European Court of Human Rights, the Inter-American Commission of Human Rights, or United Nations Treaty Bodies?				
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25. Right to be Free from Water Boarding – Pre-Trial Hearing Stage

	Yes	No	Don't Know	Comment
Was the defendant water-boarded at any stage, up to and including the pre-trial hearing stage?				
If so, was this fact communicated to the judge, prosecution, or jury?				

26. Right to be Free from Enhanced Interrogation – Pre-Trial Hearing Stage

	Yes	No	Don't Know	Comment
Did the defendant undergo enhanced interrogation technique, up to and including at the pre-trial hearing stage?				
If so, was this fact communicated to the judge, prosecution, or jury?				
If so, are you aware of the nature of the enhanced interrogation that the defendant underwent?				

27. Rights Regarding Enteral Feeding (“Forced Feeding” – through tube in the nose to the stomach) – Pre-Trial Hearing Stage

	Yes	No	Don't Know	Comment
Is there evidence of current or past “Forced Feeding” of the defendant?				

If so, was this fact communicated to the judge, prosecution, or jury?				
Is the defendant now on a hunger strike or has the defendant ever been on a hunger strike?				
If so, was this fact communicated to the judge, prosecution, or jury?				
Are you aware of the length of time the defendant is or was on a hunger strike?				
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?				

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I. Right to Freedom from Incommunicado & Solitary Confinement; Right to Access to the Outside World

Defendants for 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.]

28. Prohibition on Incommunicado Detention - Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
Can the defendant communicate with family?				
Can the defendant interact with other detainees?				
Can the defendant communicate with consular representatives of his home country?				
Can the defendant communicate with the ICRC (Red Cross)?				
Can the defendant communicate with habeas counsel?				
Can the defendant communicate with lawyers about bringing a claim before non-U.S. tribunals or other inter-governmental organizations?				

29. Solitary Confinement – Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
Can the defendant communicate with other prisoners?				
Can the defendant communicate with detention facility staff?				

How many hours per day is defendant locked in his cell without?				
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30. Right to Access to the Outside World – Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
Does the defendant have access to the outside world?				
Can the defendant access a telephone?				
Can the defendant's family visit? Access via Skype?				
Is counsel permitted to the defendant information about the outside world?				

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J. Rights to an Interpreter / Translator

International and domestic U.S. law require Guantanamo Bay defendants to have the right to free assistance of an interpreter if the defendant does not speak the language used in court, and the right to free assistance of a translator for documents used in court if the defendant cannot understand or read them.³⁸

[This Right to an Interpreter / Translator introductory section is being developed further.]

31. Right to Interpreter - Pre-Trial Hearing Stage (ICCPR, art 14(3)(f))				
	Yes	No	Don't Know	Comment
Does the defendant have access to an interpreter to help facilitate communication with his counsel?				
Is the interpreter competent in the defendant's language / dialect?				
Did the judge explain to the interpreter the interpreter's rights?				
Did the judge warn the interpreter that it was a crime to knowingly interpret falsely?				
Did the judge explain the right to challenge interpreters?				
Were there any challenges to the interpreter?				
Were there any challenges to any interpretation?				
Did the judge explain to the interpreter the interpreter's rights?				
In your view, was the interpretation of good quality?				

³⁸ 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).

32. Right to Translation - Pre-Trial Hearing Stage (Translation of Documents) (ICCPR, art 14(3)(f))				
	Yes	No	Don't Know	Comment
Was the defendant provided with translations of judicial documents needed for his defense?				
Are defendant's requests for translated documents timely honored?				
Does the defendant have access to a translator to help facilitate communication with his counsel?				
Is the translator competent in the written language of the defendant?				
Did the judge explain to the translator the translator's rights?				
Did the judge warn the translator that it was a crime to knowingly interpret falsely?				
Did the judge explain the right to challenge translators?				
Were there any challenges to the translator or to any translation?				
In your view, was any translation of good quality?				

K. Right to Public Proceedings

International and domestic law provide that defendants, and all other stakeholders, are entitled to public hearings and public trials.³⁹

For example, the Sixth Amendment to the U.S. Constitution provides that “the accused shall enjoy the right to a . . . public trial,

[This Right to Public Proceedings introductory section is being developed further.]

33. Right to Public Proceedings- Pre-Trial Hearing Stage (Military Commission Act of 2009, § xx; ICCPR, art 14(1))				
	Yes	No	Don't Know	Comment
Does the public have access to pre-trial proceedings?				
Is the public access reasonable under the circumstances?				
Were improper hurdles in place that prevented the level of public hearing required by law?				
Are improper hurdles currently in place that prevent the level of public hearing required by law?				
Was any member of the public denied access to the viewing theater? If so, please explain.				
Where did the public view the proceedings?				

³⁹ The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is also provided for in the following international instruments: UDHR, Article 10; Principles on the Independence of the Judiciary, Principle 2 (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”); American Convention, Article 8(1); and European Convention, Article 6(1). See *Karttunen v. Finland*, (387/1989), 23 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 120; *Fey v. Austria*, 24 February 1993, 255 Ser. A 13, para. 34; *Collins v. Jamaica*, (240/1987), 1 November 1991, Report of the HRC, (A/47/40), 1992, at 236 para. 8.4; See also American Convention, article 27(2) (the right to a competent, independent, impartial judiciary, may not be suspended even in states of emergency); *Inter-American Court, Advisory Opinion OC-8/87*, 30 January 1987, *Habeas Corpus in Emergency Situations*; *Inter-American Court, Advisory Opinion OC-9/87*, 6 October 1987, *Judicial Guarantees in States of Emergency*, OAS/Ser.L/V/III.19 doc.13, 1988; Article 67(1) of the ICC Statute (guaranteeing a fair hearing conducted impartially).

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L. Right to Freedom from Self-Incrimination

International and domestic U.S. law provide that all defendants have the right not to be compelled to testify against himself or to confess guilt. (Military Commission Act of 2009 § xxx; ICCPR, art 14(3)(g))⁴⁰

The Fifth Amendment to the U.S. Constitution provides that no accused “shall be compelled in any criminal case to be a witness against himself”.

[This right to Freedom from Self-Incrimination introductory section is being developed further.]

34. Right not to be Compelled to Testify Against Oneself - Pre-Trial Hearing Stage, (Military Commission Act of 2009 § xxx; ICCPR, art 14(3)(g))				
	Yes	No	Don't Know	Comment
Was defendant compelled to testify?				
Was defendant compelled to incriminate himself?				
Was there any mention during the proceedings of the defendant's failure to testify or provide other evidence on his behalf?				
Was there any mention during the proceedings of the defendant's choice to remain silent?				

35. Right not to be Compelled to Confess Guilt - Pre-Trial Hearing Stage (ICCPR, art 14(3)(g))				
	Yes	No	Don't Know	Comment
Is there evidence that the defendant was compelled to confess guilt?				

⁴⁰ The right not to be compelled to testify against himself or to confess guilt is also provided for in the following international instruments: *American Convention*, Articles 8(2)(g) and 8(3); *ICC Statute*, Articles 55(1)(a) (pre-trial) and 67(1)(g); *ICTY Statute*, Article 21(4)(g); and *ICTR Statute*, Article 20(4)(g).

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M. Rights Related to Classified Information

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.

[This Rights Related to Classified Information introductory section is being developed further.]

36. Right to Access to Classified information - Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
Have any stakeholders complained about inadequate access to classified information?				
Have classified information issues been adequately addressed?				
Have there been complaints that information has been withheld from any stakeholder due to arbitrary classification?				

37. Right not to have Classified Information Used Against defendant - Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
Has the prosecution used classified information against the defendant without informing the defendant of the content of the classified information?				

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N. Right to Equality of Arms

The prosecution and defense have the right to equality before the court and the right to equality of arms during criminal prosecutions.⁴¹

[This Rights to Equality of Arms introductory section is being developed further.]

38. Equality of Arms – Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
Prosecution Staff & Resources				
How many prosecutors are officially assigned to the case?				
How many prosecutors were present in the courtroom?				
Were any changes made to the prosecutor's staff during the proceeding?				
Did all prosecutors act professionally throughout the proceeding?				
Was the Chief Prosecutor in the courtroom?				
Are prosecution resources substantially greater than, equal to, or less than those of the defense?				
How many paralegals are assigned to the prosecution?				
How many analysts are assigned to the prosecution?				
How many interpreters are assigned to the prosecution?				
How many translators are assigned to the prosecution?				
How many investigators are assigned to the prosecution?				

⁴¹ The right of all persons to equality before the courts and tribunals is also provided for in many different international instruments.

Defense Counsel & Defense Resources				
How many military defense lawyers are officially assigned to the case?				
How many civilian defense lawyers are officially assigned to the case?				
How many defense lawyers were present in the courtroom?				
Were any changes made to the defense staff during the proceeding?				
Did all defense counsel act professionally throughout the proceeding?				
Was the Chief Defense Counsel in the courtroom?				
Are defense counsel resources substantially greater than, equal to, or less than those of the prosecution?				
How many paralegals are assigned to the defense?				
How many analysts are assigned to the defense?				
How many interpreters are assigned to the defense?				
How many translators are assigned to the defense?				
How many investigators are assigned to the defense?				
How many mitigation specialists are assigned to the defense?				
Equal Before the Courts -- Prosecution & Defense				
Has the prosecution complained that it has been impermissibly discriminated against and not treated equal to the defense before the courts?				
Has the defense complained that it has been impermissibly discriminated against and not treated equal to the prosecution before the courts?				

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O. Right to be Present at Pre-Trial Hearings

The defendant has the right to be present at pre-trial hearings. (Military Commission Act of 2009, § xx; ICCPR, art 14(3)(d))⁴²

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

39. Right to be Present - Pre-Trial Hearing Stage (Military Commission Act of 2009, § xx; ICCPR, art 14(3)(d))				
	Yes	No	Don't Know	Comment
Is the defendant afforded the right to be present for all proceedings?				
Has the defendant been improperly prohibited from being present from any proceedings?				
Has the defendant been present for every court appearance that he wished to be present for?				
Has the defendant exercised his prerogative to be absent from any proceedings?				
Was the defendant present?				
Was the defendant explained his rights?				
Did the defendant testify?				
Was the defendant removed from the courtroom during the proceeding while it was ongoing?				
If the defendant was removed, what was the court's reason?				

⁴² The defendant's right to be present at pre-trial hearings is provided for in many international instruments, including:

Did the court remove the defendant because classified information was going to be discussed?				
Did the court remove the defendant because of behavior of the defendant?				
If the defendant was removed, did the court give the defendant warning that his behavior might lead to exclusion?				
If the defendant was removed, did the defendant return to the courtroom?				
If the defendant was removed, during his absence, was testimony given by any witnesses?				
If the defendant was removed and testimony was given in his absence, was the defendant given an opportunity to be read a transcript of the testimony or to watch a video-recording of the testimony?				
If the defendant was removed and testimony was given in his absence, was the defendant given an opportunity to examine the witness or have the witness examined?				

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P. Right to be Defend Oneself in Person or Through Counsel of His Own Choosing

International and domestic law provide that the defendant has the right to defend himself in person or through counsel of his own choosing.

[This Right to be Defend Oneself in Person or Through Counsel of His Own Choosing introductory section is being developed further.]

40. Right to Defend Oneself in Person – Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
Was the defendant given the opportunity to defend himself in person?				
Has the defendant expressed a desire to fire or replace any counsel?				
Has the defendant sought to represent himself?				

41. Right to Defend Oneself Through Counsel of His Own Choosing – Pre-Trial Hearing Stage (ICCPR, art 14(3)(b) & (d))				
	Yes	No	Don't Know	Comment
Does defendant have military defense counsel? How many?				
Does the defendant have civilian defense counsel? How many?				
Did you observe any obstacles that prejudiced the defendant's opportunity to fully present his defense?				
Was the suspect represented by defense counsel throughout entire pre-trial stage and all investigative proceedings?				

Was defense counsel present? Was s/he appointed or contracted?				
In the case of contracted counsel, was the defendant able to choose her/him independently?				
Was the defense counsel replaced during the proceeding?				
Did the defendant and the defense counsel appear to have an amicable working relationship?				
Did the judge prohibit the defendant from communicating with his counsel?				
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?				
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?				
Did the court limit the amount of time or the number of meetings that could be had between the defendant and his client?				
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?				
Was the defense/defendant given adequate advance notification of the witnesses or experts that the prosecution intended to call at trial?				
Was counsel provided with appropriate information and resources to be used to mitigate any sentence if convicted?				
Did the defense have the opportunity to obtain and comment on the observations filed or evidence adduced by the other party?				
Were there any obstacles that limited the defendant's right to access to competent and effective defense through counsel?				

Q. Right to Examine and Cross-Examine 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 (U.S. Constitution, Sixth Amendment; Military Commission Act of 2009, § xx; ICCPR, art 14(3)(e));⁴³ and
- (b) the 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))⁴⁴

The Sixth Amendment to the U.S. Constitution provides that defendants have the right "to be confronted by the witnesses against him". A defendant has the right to cross-examine witnesses that the prosecution offers against the defendant. Generally, the Sixth Amendment would prohibit a court from introduction "hearsay statements" (out-of-court statements admitted for the truth contained therein) because the defendant would not have the opportunity to cross-examine the person who made the original statement.

The Sixth Amendment further requires that defendants shall the right "to have compulsory process for obtaining witnesses in his favor".

[This Right to Examine and Cross-Examine Witnesses introductory section is being developed further.]

42. Right to Obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him – Pre-Trial Hearing Stage (Military Commission Act of 2009, § xx; ICCPR, art 14(3)(e))

	Yes	No	Don't Know	Comment
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⁴³ 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(1)(e) (accused is entitled "to examine, or have examined, the witnesses against him or her"); *Statute of the Special Court for Sierra Leone*, article 17(4)(e) (accused has the right "in full equality . . . to examine, or have examined, the witnesses against him or her"); *ICTY Statute*, article 21(4)(e) (right "to examine, or have examined, the witnesses against him"); *ICTR Statute*, article 20(4)(e) (accused shall have the right "to examine, or have examined, the witnesses against him or her"). See also 1996 *ILC Draft Code of Crimes Against the Peace and Security of Mankind*, Article 11(1)(f); *IMT Charter of Tokyo*, article 9(d); *Convention on the Rights of the Child*, article 40(2)(b)(iv); and *African Commission Resolution*, Paragraph 2(e)(iii).

⁴⁴ The right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him is also provided for in the following international instruments: *ICTY Statute*, Article 21(4)(e); *ICTR Statute*, Article 20(4)(e).

Did the defendant seek to call witnesses on his behalf?				
Did the defendant seek to call co-defendant as witnesses on his behalf?				
Did the defendant seek to call other Guantanamo Bay detainees as witnesses on his behalf				
Did the judge impose improper constraints on the defendant’s ability to examine witnesses against him?				
Did the defendant seek to call as witnesses on his behalf individuals who the U.S. government would not permit to be called?				

43. Right to Examine Witnesses Against Him – Pre-Trial Hearing Stage (U.S. Constitution, Sixth Amendment; Military Commission Act of 2009, § xx; ICCPR, art 14(3)(e))

	Yes	No	Don’t Know	Comment
Has the defendant sought to examine any witnesses against him?				
Did the court permit the defendant to examine any witnesses against him?				
Were these examinations by the defendant himself? Were these examinations through counsel for the defendant?				
Did the judge impose improper constraints on the defendant’s ability to examine witnesses against him?				
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?				
Did the defendant’s lawyers have an opportunity to interview or depose the witness against the defendant before the testimony?				

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?				
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?				
Did any party object to the admission of any hearsay?				
Did the court admit the hearsay or exclude the hearsay that was objected to?				

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5. Rights of Victims & Victims’ Families

Under international and 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 recognizing that victims and victims’ families are entitled to access to the criminal proceedings, 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 are entitled to a fair hearing, and entitled to other rights associated with the criminal proceedings.

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),⁴⁵ the *Rome Statute of the International Criminal Court (ICC)* (see Appendix), *ICC Rules of Procedure & Evidence* (see Appendix), and the *ICCPR* (see Appendix).

[This Rights of Victims & Victim’s Families introductory section is being developed further.]

44. Rights of the Victims – Pre-Trial Hearing Stage				
	Yes	No	Don’t Know	Comment
Were any victims present during your observation period?				
If any victims were present during your observation period, how many attended the proceeding?				
Were victims allowed to speak at any time during the proceeding in person or through counsel?				
Where victims notified of the particulars of the hearings?				

⁴⁵ Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

Were victims unreasonably excluded from the proceedings?				
Did it appear as though the victims treated with fairness, and respect for their dignity and privacy?				
At this point in the pre-trial stage, have victims received any sort of restitution?				
If there was a conviction, did the victims receive restitution?				
If there was a conviction, did the victims exercise a right to present a victim’s impact statement?				
Does it appear as though the victims had the right to a fair proceeding (hearing or trial)?				
Are you aware of whether the prosecution effectively helped ensure protection of the rights of victims’?				
Were there any Defense Initiated Victims’ Outreach liaisons present?				
Are you aware of any contact between any Defense Initiated Victims’ Outreach liaisons and any victims?				
45. Rights of the Victims’ Families – Pre-Trial Hearing Stage				
	Yes	No	Don’t Know	Comment
Were any members of the victims’ families present during your observation period?				
If any victims’ families were present during your observation period, how many attended the proceeding?				
Were victims’ families allowed to speak at any time during the proceeding in person or through counsel?				

Where victims' families notified of the particulars of the hearings?				
Were any victims' families unreasonably excluded from the proceedings?				
Did it appear as though the victims' families treated with fairness, and respect for their dignity and privacy?				
At this point in the pre-trial stage, have victims' families received any sort of restitution?				
If there was a conviction, did the victims' families receive restitution?				
If there was a conviction, did the victims' families exercise a right to present a victim's impact statement?				
Does it appear as though the victims' families had the right to a fair proceeding (hearing or trial)?				
Are you aware of whether the prosecution effectively helped ensure protection of the rights of victims' families?				
Were there any Defense Initiated Victims' Outreach liaisons present?				
Are you aware of any contact between any Defense Initiated Victims' Outreach liaisons and any victims' families?				

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6. Rights of the Prosecution

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.]

46. Rights of the Prosecution – Pre-Trial Hearing Stage				
	Yes	No	Don’t Know	Comment
Did it appear as though the prosecution received a fair trial?				
Did the judge treat the prosecution fairly?				
Did the prosecution have the resources it needed to attempt to prove guilt beyond reasonable doubt?				
Did the prosecution complain about any prejudice or unfairness to the prosecution by the judge?				

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7. Rights of the Press

Under international and domestic law, the press has rights associated with the Guantanamo Bay military commissions. Under international and domestic law, the press has freedom of expression – the right to gather information and disseminate it. This right is found in international treaties that bind the U.S., and in domestic U.S. law, such as the First Amendment to the U.S. Constitution. Those who seek to receive information that the press seeks to impart also have these rights. To be able to exercise these rights, the press requires reasonable access to the criminal proceedings, access to documents associated with the criminal proceedings, and access to personnel associated with the criminal proceedings.

[This rights of the Press introductory section is being developed further.]

47. Right of the Press to Access to Information – Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
Does the press have reasonable access to the proceedings?				
Did the press have reasonable access to stakeholders in the proceedings?				
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?				
Had the press filed Freedom of Information Act (FOIA) requests for information related to any of the defendants?				
Did the press have a walking tour of Camp X-Ray or other detention facilities at which prisoners are no longer held?				
Did the press have a walking tour of detention facilities at GTMO at which prisoners are currently held?				
Did the press have tours of the GTMO courtroom?				
Has the press complained about inadequate access depriving them of the ability to carry out their press responsibilities?				

48. Rights of the Press				
	Yes	No	Don't Know	Comment
Did it appear as though rights of the press were afforded to them?				
Was the press attending the proceedings national, local, or international?				
Were there adequate facilities for the press inside the courtroom?				
Were there adequate facilities for the press outside the courtroom?				
Has the press complained about inadequate access depriving them of the ability to carry out their press responsibilities?				

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8. Rights of Witnesses

Witnesses at criminal proceedings have rights under international and domestic U.S. law.

[This Rights of Witnesses introductory section is being developed further.]

49. Rights of the Witnesses – Pre-Trial Hearing Stage				
	Yes	No	Don't Know	Comment
Did any party tender any witnesses?				
Were there any objections to any witnesses?				
Did any witnesses testify?				
Were the witnesses fact witnesses?				
Were the witnesses expert witnesses?				
Did any witnesses seek to have their identities protected?				
Did any witnesses testify anonymously?				
Did any witnesses testify by affidavit?				
Were all witnesses subject to cross-examination?				
Did the court mention provisions to help prevent retaliation against witnesses?				

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9. Non-Governmental (NGO) Observers

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 Interests of NGO Observers introductory section is being developed further.]

50. NGO Observers – Pre-Trial Hearing Stage				
	Yes	No	Don’t Know	Comment
What other Observers were present during your observation period?				
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?				
Were any of the proceedings closed to Observers? If so, what was the legal basis for closing the proceedings to Observers?				
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?				
Did the NGO Observers have an official meeting with the Chief Prosecutor or prosecution team members at Guantanamo Bay?				

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?				
Did the NGO Observers have an official meeting with any Defense Counsel or defense team members at Guantanamo Bay?				
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?				
Did NGO Observers have reasonable access to facilities needed to fulfill their observers’ responsibilities (e.g., internet, office space)?				
Did any government monitoring during your observation period limit your ability to carry out your observation objectives?				
Did you feel threatened in any way by personnel or others during your trip to Ft. Meade or Guantanamo Bay?				
Were the Guantanamo Bay housing accommodations adequate?				
Did you encounter any logistical, security or other issues regarding your observation at Guantanamo Bay or Ft. Meade?				
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 detention facilities at GTMO at which prisoners are currently held?				
Did the NGO Observers have a drive-by tour of detention facilities at GTMO at which prisoners are currently held?				
Did the NGO Observers tour the GTMO courtroom?				

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Did the NGO Observers have substantive discussions with any participants in the process?				
Were there any hurdles to your ability to carry out your NGO Observer responsibilities? If so, what were those hurdles?				
If there were any hurdles to your ability to carry out your NGO Observer responsibilities, were those hurdles overcome? How? In what manner? Who facilitated the removal of the hurdles?				
Were you as an NGO Observer able to fulfill your remit per your sending organization?				
Did you prepare a NGO Observation de-briefing memo on your observation? Did you submit the memo to your sending NGO?				
As an NGO Observer did you 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? Did you share your impressions with the outside world by blog, media interview, social media, scholarly or other publication, or otherwise?				

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III. Sources of International Law

[Additional Sources of International Law Will Be Added.]

Geneva Conventions of 1949, Common Article 3.....	84
Protocol Additional I to the Geneva Conventions of 1949, article 75.....	86
Protocol Additional II to the Geneva Conventions of 1949, article 6.....	88
Third Geneva Convention (Prisoners of War) (Excerpt)	90
International Covenant on Civil & Political Rights, Article 14.....	92
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.....	94
Rome Statute of the International Criminal Court (ICC) (1998).....	98
International Criminal Court (ICC) Rules of Procedure & Evidence.....	100
United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (excerpts) (forthcoming).....	xxx

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Common Article 3 of the Geneva Conventions of 1949⁴⁶

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b) taking of hostages;
 - c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

⁴⁶ Each of the four Geneva Conventions of 1949 has an identical Article 3 that is commonly referred to as “Common Article 3” of the Geneva Conventions. Common article 3 deals with conflicts not of an international character, as distinguished international conflicts.

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Protocol Additional I to the Geneva Conventions of 1949⁴⁷

Article 75 -- Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
 - a) violence to the life, health, or physical or mental well-being of persons, in particular:
 - i) murder;
 - ii) torture of all kinds, whether physical or mental;
 - iii) corporal punishment; and
 - iv) mutilation;
 - b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
 - c) the taking of hostages;
 - d) collective punishments; and
 - e) threats to commit any of the foregoing acts.
3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
4. 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:

⁴⁷ Though the U.S. has not ratified Protocol Additional I of the Geneva Conventions, the U.S. has concluded that article 75 of Protocol Additional I has risen to the status of customary international law, and thus binds the U.S.

In a 1986 memorandum to Mr. John H. McNeill, Assistant General Counsel (International), OSD, several high-ranking military officers concluded that article 75, entitled “Fundamental guarantees”, has risen to the level of customary international law. They noted that “[w]e view the following provisions as already part of customary international law”, and then listed numerous Protocol provisions, including “Fundamental guarantees: Article 75”. (*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”).

- a) 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;
 - b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
 - c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
 - d) anyone charged with an offence is presumed innocent until proved guilty according to law;
 - e) anyone charged with an offence shall have the right to be tried in his presence;
 - f) no one shall be compelled to testify against himself or to confess guilt;
 - g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
 - i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
 - j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.
6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until final release, repatriation or re-establishment, even after the end of the armed conflict.
7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
- a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
 - b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

Protocol Additional II to the Geneva Conventions of 1949⁴⁸

Article 6 — Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.
2. 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. In particular:
 - a. 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;
 - b. no one shall be convicted of an offence except on the basis of individual penal responsibility;
 - c. no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
 - d. anyone charged with an offence is presumed innocent until proved guilty according to law;
 - e. anyone charged with an offence shall have the right to be tried in his presence;
 - f. no one shall be compelled to testify against himself or to confess guilt.
3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.
5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

⁴⁸ The U.S. has not ratified Protocol Additional 2 of the Geneva Conventions.

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Third Geneva Convention (Prisoners of War) (Excerpt)⁴⁹

ART. 99. — No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

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.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

ART. 100. — Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend.

The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.

ART. 101. — If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107.

ART. 102. — A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

ART. 103. — Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.

The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

....

ART. 105. — The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

⁴⁹ The U.S. signed and ratified the Third Geneva Convention and is bound to comply with its terms. Articles 99 – 108 appear in Section III (“Judicial Protections”) of the Third Geneva Convention.

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held *in camera* in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

ART. 106. — Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

ART. 107. — Any judgment and sentence pronounced upon a prisoner of war shall be immediately reported to the Protecting Power in the form of a summary communication, which shall also indicate whether he has the right of appeal with a view to the quashing of the sentence or the reopening of the trial. This communication shall likewise be sent to the prisoners' representative concerned. It shall also be sent to the accused prisoner of war in a language he understands, if the sentence was not pronounced in his presence. The Detaining Power shall also immediately communicate to the Protecting Power the decision of the prisoner of war to use or to waive his right of appeal.

Furthermore, if a prisoner of war is finally convicted or if a sentence pronounced on a prisoner of war in the first instance is a death sentence, the Detaining Power shall as soon as possible address to the Protecting Power a detailed communication containing:

- 1) the precise wording of the finding and sentence;
- 2) a summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and the defence;
- 3) notification, where applicable, of the establishment where the sentence will be served.

The communications provided for in the foregoing sub-paragraphs shall be sent to the Protecting Power at the address previously made known to the Detaining Power.

ART. 108. — Sentence pronounced on prisoners of war after a conviction has become duly enforceable shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

...

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. Furthermore, they shall be entitled to receive and despatch correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the medical care required by their state of health, and the spiritual assistance they may desire. Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph.

International Covenant on Civil and Political Rights (ICCPR)⁵⁰

Article 14

1. 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. 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; but 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.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

⁵⁰ The United States signed and ratified the ICCPR.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. 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.

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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

(Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005)⁵¹

Preamble

The General Assembly,

... .

Adopts the following Basic Principles and Guidelines:

I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

- (a) Treaties to which a State is a party;
- (b) Customary international law;
- (c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations... .

II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

- (a) ...;
- (b) ...
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described below.

... .

V. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

⁵¹ Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

- (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
- (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
- (c) Provide proper assistance to victims seeking access to justice;
- (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation

to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

X. Access to relevant information concerning violations and reparation mechanisms

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

...

XII. Non-derogation

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

XIII. Rights of others

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

Rome Statute of the International Criminal Court (ICC) (1998)

Article 15: The Prosecutor

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. *Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.*

Article 19: Challenges to the jurisdiction of the Court or the admissibility of a case

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility . . . victims [may] submit observations to the Court.

Article 43: The Registry

1. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. ...

Article 57: Functions and powers of the Pre-Trial Chamber

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
 - (a) ...;
 - (b) ...;
 - (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

Article 64: Functions and powers of the Trial Chamber

1. ...;
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Article 68: Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime... . The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings 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. ...
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate

by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.
5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Article 75: Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

Article 79 Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

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International Criminal Court (ICC) Rules of Procedure & Evidence

Sections Related to Victims (Selected)

Rule 16: Responsibilities of the Registrar relating to victims and witnesses

1. In relation to victims, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:
 - (a) Providing notice or notification to victims or their legal representatives;
 - (b) Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91;
 - (c) Assisting them in participating in the different phases of the proceedings in accordance with rules 89 to 91;
 - (d) Taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.
2. In relation to victims, witnesses and others who are at risk on account of testimony given by such witnesses, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:
 - (a) Informing them of their rights under the Statute and the Rules, and of the existence, functions and availability of the Victims and Witnesses Unit;
 - (b) Ensuring that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests, subject to provisions on confidentiality.
3. For the fulfilment of his or her functions, the Registrar may keep a special register for victims who have expressed their intention to participate in relation to a specific case.
4. ...

Rule 17: Functions of the Unit

1. The Victims and Witnesses Unit shall exercise its functions in accordance with article 43, paragraph 6.
2. The Victims and Witnesses Unit shall, inter alia, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defence, as appropriate:
 - (a) With respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:
 - (i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection;
 - (ii) Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;
 - (iii) Assisting them in obtaining medical, psychological and other appropriate assistance;
 - (iv) Making available to the Court and the parties training in issues of trauma, sexual violence, security

- and confidentiality;
- (v) Recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct, emphasizing the vital nature of security and confidentiality for investigators of the Court and of the defence and all intergovernmental and non-governmental organizations acting at the request of the Court, as appropriate;
 - (vi) Cooperating with States, where necessary, in providing any of the measures stipulated in this rule;
- (b) With respect to witnesses:
- (i) Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;
 - (ii) Assisting them when they are called to testify before the Court;
 - (iii) Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings.
3. In performing its functions, the Unit shall give due regard to the particular needs of children, elderly persons and persons with disabilities. In order to facilitate the participation and protection of children as witnesses, the Unit may assign, as appropriate, and with the agreement of the parents or the legal guardian, a child- support person to assist a child through all stages of the proceedings.

Rule 18: Responsibilities of the Unit

For the efficient and effective performance of its work, the Victims and Witnesses Unit shall:

- (a) Ensure that the staff in the Unit maintain confidentiality at all times;
- (b) While recognizing the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defence witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers;
- (c) Have administrative and technical assistance available for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, during all stages of the proceedings and thereafter, as reasonably appropriate;
- (d) Ensure training of its staff with respect to victims' and witnesses' security, integrity and dignity, including matters related to gender and cultural sensitivity;
- (e) Where appropriate, cooperate with intergovernmental and non- governmental organizations.

Rule 50: Procedure for authorization by the Pre-Trial Chamber of the commencement of the investigation

1. When the Prosecutor intends to seek authorization from the Pre-Trial Chamber to initiate an investigation . . . the Prosecutor shall inform victims, known to him or her or to the Victims and Witnesses Unit, or their legal representatives, unless the Prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses... ..
2.
3. Following information given in accordance with sub-rule 1, victims may make representations in writing to the Pre-Trial Chamber within such time limit as set forth in the Regulations.
4. The Pre-Trial Chamber, in deciding on the procedure to be followed, may request additional information from . . . any of the victims who have made representations, and, if it considers it appropriate, may hold a hearing.
5. The Pre-Trial Chamber shall issue its decision, including its reasons, as to whether to authorize the commencement of the investigation... . The Chamber shall give notice of the decision to victims who

have made representations.

6. . . .

Rule 59: Participation in proceedings under article 19, paragraph 3

1. [T]he Registrar shall inform the following of any question or challenge of jurisdiction or admissibility . . . :
 - (a) . . . ;
 - (b) The victims who have already communicated with the Court in relation to that case or their legal representatives.
2. . . .
3. Those receiving the information, as provided for in sub-rule 1, may make representation in writing to the competent Chamber within such time limit as it considers appropriate.

Section III. Victims and witnesses

Rule 85: Definition of victims

For the purposes of the Statute and the Rules of Procedure and Evidence:

- (a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Rule 86: General principle

A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.

Rule 87: Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.
2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:
 - (a) Such a motion or request shall not be submitted ex parte;
 - (b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;
 - (c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;
 - (d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and

- (e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.
3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia:
 - (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
 - (b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
 - (c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;
 - (d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or
 - (e) That a Chamber conducts part of its proceedings in camera.

Rule 88: Special measures

1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.
2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.
3. For inter partes motions or requests filed under this rule, the provisions of rule 87, sub-rules 2 (b) to (d), shall apply mutatis mutandis.
4. A motion or request filed under this rule may be filed under seal, and if so filed shall remain sealed until otherwise ordered by a Chamber. Any responses to inter partes motions or requests filed under seal shall also be filed under seal.
5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.

Rule 89: Application for participation of victims in the proceedings

1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. [T]he Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. [T]he Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

Rule 90: Legal representatives of victims

1. A victim shall be free to choose a legal representative.
2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.
3. . . .
4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims . . . are represented and that any conflict of interest is avoided.
5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.

Rule 91: Participation of legal representatives in the proceedings

1. . . .
2. A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.
 - (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.
 - (b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.
3. For a hearing limited to reparations under article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply. In that case, the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.

Rule 92: Notification to victims and their legal representatives

1. This rule on notification to victims and their legal representatives shall apply to all proceedings before the Court, except in proceedings provided for in Part 2.
2. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who

have communicated with the Court in respect of the situation or case in question. The Chamber may order the measures outlined in sub-rule 8 if it considers it appropriate in the particular circumstances.

3. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the case in question.
4. When a notification for participation as provided for in sub-rules 2 and 3 has been given, any subsequent notification as referred to in sub-rules 5 and 6 shall only be provided to victims or their legal representatives who may participate in the proceedings in accordance with a ruling of the Chamber pursuant to rule 89 and any modification thereof.
5. In a manner consistent with the ruling made under rules 89 to 91, victims or their legal representatives participating in proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of:
 - (a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision;
 - (b) Requests, submissions, motions and other documents relating to such requests, submissions or motions.
6. Where victims or their legal representatives have participated in a certain stage of the proceedings, the Registrar shall notify them as soon as possible of the decisions of the Court in those proceedings.
7. Notifications as referred to in sub-rules 5 and 6 shall be in writing or, where written notification is not possible, in any other form as appropriate. The Registry shall keep a record of all notifications. Where necessary, the Registrar may seek the cooperation of States Parties in accordance with article 93, paragraph 1 (d) and (l).
8. For notification as referred to in sub-rule 3 and otherwise at the request of a Chamber, the Registrar shall take necessary measures to give adequate publicity to the proceedings. In doing so, the Registrar may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations.

Rule 93: Views of victims or their legal representatives

A Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, inter alia, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.

Rule 94: Procedure upon request

1. A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar... .

IV. Sources of Domestic U.S. Law

[Additional Sources of Domestic U.S. Law Will Be Added.]

United States Constitution (excerpts) (forthcoming).....105

Military Commissions Act of 2009 (excerpts) (forthcoming).....107

**Manual for Military Commissions (United States) (14 August 1012)
(excerpts)(forthcoming).....xxx**

**Military Commissions Trial Judiciary Rules of Court (24 April 2012, as amended 4
June 2014) (excerpts)(forthcoming).....xxx**

**Regulations for Trial by Military Commissions (2011 Edition)
(excerpts)(forthcoming).....xxx**

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U.S. Constitution (Excerpts)

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,* or property, *without due process of law*; nor shall private property be taken for public use, without just compensation. [Emphasis added]

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and *to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.* [Emphasis added]

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Military Commission Act of 2009

§ 948r. Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment; prohibition of self-incrimination; admission of other statements of the accused

“(a) EXCLUSION OF STATEMENTS OBTAIN BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

“(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself or herself at a proceeding of a military commission under this chapter.

“(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds—

“(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

“(2) that—

“(A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or

“(B) the statement was voluntarily given.

“(d) DETERMINATION OF VOLUNTARINESS.—In determining for purposes of subsection (c)(2)(B) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:

“(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.

“(2) The characteristics of the accused, such as military training, age, and education level.

“(3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

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