

Guantanamo Bay Fair Trial Manual: Excerpts

The *Guantanamo Bay Fair Trial Manual*¹ is a two-volume resource of over 500 pages. It is available in print and online at *The Gitmo Observer* (gitmoobserver.com).²

This excerpted version of the *Manual* is designed to assist you in preparing for Military Commission hearings. It is *not* intended to replace the full version, which you are encouraged to read to help make it easier to fulfill any remit you may have in attending or monitoring hearings.

The following *Manual* chapters and resources are reproduced in these *Manual Excerpts*.

- **Chapter I Preface:** Explains the early roots & purposes of the *Guantanamo Bay Fair Trial Manual*
- **Chapter II:** **How to Use the Guantanamo Bay Fair Trail Manual**
- **Chapter IV:** **Abbreviations** (helpful with alphabet soup of military jargon)
- **Chapter V:** **What is the Right to a Fair Trial?:** (identifies stakeholders; U.S. & international law)
- **Chapter VI:** **Roles & Responsibilities of NGO Observers at GTMO**
- **Chapter VII:** **Background & Brief History of the GTMO U.S. Military Commissions**
- **Chapter VIII:** **General Information About the Case to be Observed** (a checklist use as you prepare)
- **Rights – Selected (Right to be Presumed Innocent (Category A); Right to Trial by Competent, Independent & Impartial Tribunal (Category D); Right to Public Proceedings (Category P))**
 - **Rights & Interests of NGO Observers (Category XVII)**
 - **Rights & Interests of JTF-GTMO (Category XIV)**
 - **Glossary: U.S. and international terms.**
 - **Appendix A:** Schematic of Gitmo Courtroom – 9/11 case
 - **Appendix F:** Table of Contents for full Fair Trial Manual
(Vol. I: pages 1–272; Vol. II: pages 273–540)



An NGO Observer at GTMO's Camp Justice. Flags are half-mast following death of U.S. Supreme Court Associate Justice Antonin Scalia. (February 2016)

14 June 2019 (4:15 p.m.) (Draft)

NB: *NGO Observers may take the Guantanamo Bay Fair Trial Manual and / or this Excerpt into the GTMO courtroom gallery while you observe U.S. Military Commission proceedings, and you may take this material into the Ft. Meade viewing theater. The final pages of each document are lined for Observer note taking.*

¹ The full title of the *Manual* is “*Guantanamo Bay Fair Trial Manual: An Independent & Objective Guide for Assessing Human Rights Protections and Interests of the Prosecution, the Defense, Victims & Victims’ Families, Witnesses, the Press, the Court, JTF-GTMO Detention Personnel, Other Detainees, NGO Observers and Other Military Commission Stakeholders*” (by *The Gitmo Observer – Principal Author George E. Edwards*) © 2019.

² “*The Gitmo Observer*” is the name given to the *U.S. Military Commission Observation Project (MCOP)* of the Program in International Human Rights Law (PIHRL) of Indiana University McKinney School of Law.

"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)).



Camp Delta, Guantanamo Bay, where most detainees remain incarcerated. Sunrise, Sunday, 14 August 2016.
Photo by George Edwards

Table of Contents for *Excerpts of the* Guantanamo Bay Fair Trial Manual

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

Table of Contents for the Excerpts.....3

Preface (of the *Manual*).....5

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

Abbreviations.....19

What is the Right to a Fair Trial?.....25

Role & Responsibilities of NGO Observers.....37

Background & Brief History of U.S. Military Commissions at Guantanamo Bay, Cuba.....41

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

Rights of Different Stakeholder (Selected):

Right to be Presumed Innocent – Category A.....75

Right to Trial by Competent, Independent and Impartial Tribunal – Category D.....65

Right to Public Proceedings – Category P.....79

Right to Equality of Arms; Equality Before the Courts; Equal Protection – Category R.....89

Rights and Interests of NGO Observers – Category XVII.....97

Rights and Interests of Joint Task Force Guantanamo – JTF-GTMO -- Category XIV.....105

Glossary.....113

Appendix A: Schematic of Guantanamo Bay Courtroom – 9/11 case.....145

Appendix B: Table of Contents for Original Fair Trial Manual.....147

Observation / Monitoring Note Pages.....152



[Page Intentionally Blank]

DRAFT



I. Preface

A. Birth of the *Guantanamo Bay Fair Trial Manual*

a. Early Roots of the *Guantanamo Bay Fair Trial Manual*

The roots of *Guantanamo Bay Fair Trial Manual* can be traced back at least as far as the 2003 summer, when the newly appointed Guantanamo Bay Chief Defense Counsel asked if I would assist him and the newly created Military Commission Office of Chief Defense Counsel. My task was to seek to identify fair trial-related rights that under international law should be afforded to the many hundreds of “detainees” then imprisoned at Guantanamo Bay. The detainees had begun arriving at Guantanamo Bay in January 2002, and well over a year later none of them had had any contact with any lawyer to assist with the defense of any possible criminal charges. It was a major task to try to sort out the fair trial rights to which these men were entitled.

My Indiana University McKinney School of Law students and I undertook to research fair trial rights afforded to the defendants at the post-WW II Nuremberg trials, with the idea being that the rights afforded to Nuremberg defendants should, at the very least, be afforded to Guantanamo Bay detainees. We scoured many thousands of Nuremberg and Tokyo Trial transcript pages,¹ extracting references to fair trial rules and procedures, motions, and rulings, and produced a 14-Volume set of research and source materials for the Office of the Chief Defense Counsel (under Colonel Will Gunn, USAF, now retired). At that time no GTMO prisoner had been assigned a lawyer or had been charged. We completed our Gitmo Right to a Fair Trial Nuremberg / Tokyo Project in late 2003.

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

In early 2004, after our Nuremberg / Tokyo Project ended, I received a call from the U.S. military lawyer for Australian detainee David Hicks (Michael Dan Mori, USMC, then Major, now Lieutenant Colonel, retired). Major Mori asked whether I and my Indiana law students would research fair trial issues on the Hicks’ case. We did so from 2004 until March 2007, when Mr. Hicks pleaded guilty in a Guantanamo



Photo of post-WW II Nuremberg Trial Defendants. In 2003, Indiana University McKinney School of Law’s Program in International Human Rights Law was asked by the Guantanamo Bay Military Commission Chief Defense Counsel Colonel Will Gunn to research the rights afforded to the Nuremberg defendants pre-trial, trial, and post-trial. The idea was that defendants at Guantanamo Bay should at least be afforded the same rights that had been afforded to the Nuremberg defendants.

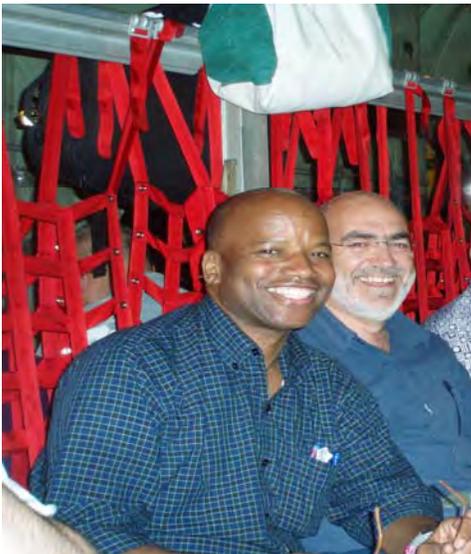
Bay courtroom to “material support for terrorism”, and became the first person convicted by a U.S. Military Commission since post-WW II Nuremberg. (Hicks’ conviction was overturned on 18 February 2015 by the U.S. Court of Military Commissions Review - CMCR.) My Indiana students produced countless memoranda of law on fair trial rights related to the Hicks’ case. We were joined for a period by students from Stetson University School of Law (Gulfport, Florida) when I was Visiting Professor of Law there. The Indiana students, the Stetson students and I engaged in numerous live and video-

¹ Footnote to Nuremberg & Tokyo Transcripts.

conferences with Hicks' counsel.

In 2004 and again in 2005, I was tendered as an expert witness in the Hicks' case, but the Military Judge ruled that I was "not necessary", and neither were any of the other experts who had been tendered.² In lieu of live testimony in those years, I produced affidavits on the right to a fair trial under international humanitarian law (the law of war), international criminal law, and international human rights law.³

In 2007, two years after my affidavits in the David Hicks' Guantanamo Bay case, I became one of the first two law experts permitted to travel to Guantanamo Bay for a Military Commission, and the first expert witness from the U.S (with the other law expert on the same trip being Professor Tim McCormick from the University of Melbourne Faculty of Law, Australia).⁴ I was present in the Guantanamo Bay courtroom, seated next to Professor McCormick, for Hicks' guilty plea and sentencing, which occurred in Courtroom # 1, the yellow building on the hill (AV 34), at that the co point overlooking an asphalt parking lot that had once been an airline landing strip, but now houses "Camp Justice", which is where all NGO observers and media sleep in tents during hearing, and where the new courtroom is, and where some defense / prosecution lawyers and others sleep in "trailers" that are reminiscent of FEMA trailers.⁵



David Hicks' Defense Team returns to Andrews Air Force Base after his conviction in March 2007. Left to right – Professor Tim McCormick (Australian Expert Witness), Professor George Edwards (U.S. Expert Witness), Major Michael "Dan" Mori (now Lt. Col Mori – ret., Hicks' Detailed Military Counsel), (Sarah Finnin, Australian civilian volunteer), Rebecca Snyder (Military Counsel Detailed as Civilian Counsel), Mick Griffith (Australian Civilian Counsel), Sergeant Rios (Team Assistant), Dave McCleod (Australian Civilian Defense Counsel). Hicks' conviction was overturned on 18 February 2015 by the US Court of Military Commission Review.

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

GTMO's First Expert Witnesses

Professor George Edwards (USA) (left) & Professor Tim McCormick (Australia) on a C-17 plane to Guantanamo Bay in March 2007. Edwards & McCormick were the first two expert witnesses permitted to travel to Gitmo for hearings.

² See, e.g., *Expert Witness Affidavit of Professor George E. Edwards on International Human Rights Law, International Humanitarian Law, and International Criminal Law*, tendered in the case of *U.S.A. v. David M. Hicks*, Case # 002, U.S. Military Commissions Guantanamo Bay, Cuba (14 November 2005).

³ Other expert witnesses called, and also not permitted to testify, included Professor Cherif Bassiouni, Judge Antoni Casese, and Professor Tim McCormick.

⁴ See Mori, Michael "Dan", *In the Company of Cowards* (2014 Penguin Press)

⁵ Mori, Michael "Dan", *In the Company of Cowards* (2014 Penguin Press). (Lt. Col. Mori discusses roles of expert witnesses in the Hicks' case.) Hicks' proceedings were held in Courtroom 1, in the yellow building called AV 34 that sits above Camp Justice.

c. Pentagon Grants Indiana University McKinney Program “NGO Observer Status”; Birth of *Guantanamo Bay Fair Trial Manual*

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

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

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

I undertook to create a *Guantanamo Bay Fair Trial Manual* to outline fair trial rights that should be afforded to *all Military Commission stakeholders*, not just the defendants. Other individuals and groups have rights and interests too! The prosecution has rights, as do victims and victims’ families, the media, witnesses, court and detention facility personnel, and many others.

In June and July 2014, Indiana McKinney Law School affiliates and I conducted research and began writing. On 12 August 2014, when I was back at Guantanamo Bay again for further 9-11 case hearings, I launched the *Guantanamo Bay Fair Trial Manual* live online using an internet connect in the NGO Resource Center at Gitmo,⁶ distributing hard copies to NGO Observers on site and to a few others, and disseminating it online via *The Gitmo Observer* (www.GitmoObserver.com), which is hosted by the Indiana McKinney *Military Commission Observation Project* which I founded after the Pentagon granted us NGO Observer status.



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

In September 2016, I conducted two classes by video-conference back to Indiana University McKinney School of Law, perhaps the first live law school classes to be conducted at Gitmo with transmission to the U.S. I tethered my iphone with its hotspot to my laptop, connected to a video-conference platform, and conducted the class live. Guests for that first class included defense counsel for one of the cases, and NGO representatives.



d. What is www.GitmoObserver.com?

B. The *Guantanamo Bay Fair Trial Manual*

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

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

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

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

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

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

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

C. The future

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

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

b. Closure of Guantanamo Bay?

- See *Executive Order -- Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities* (22 January 2009) (President Barack Obama) (Appendix H)
- See also President Barack Obama’s *State of the Union Address*, Tuesday, 20 January 2015,



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

- See *President Obama’s Plan to Close Guantanamo Bay* (23 February 2016) (Appendix xyz)
- c. **Torture of Guantanamo Bay prisoners, before and after their transfer to Guantanamo Bay.**
 - See *United Nations Committee Against Torture Concluding Observations on the United States* (20 November 2014) (Appendix E). See *infra* at ...

D. Role of NGO Observers

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

E. Conclusion

The *Guantanamo Bay Fair Trial Manual* is a work in progress. We have greatly appreciated comments and constructive criticisms from stakeholders in different camps, and remain open and willing to receive any suggestions on improving our document to help it better serve its purposes. This *Manual*, coupled with our publication *Know Before You Go To Guantanamo Bay: A Guide For Human Rights NGOs & Others Attending U.S. Military Commissions*, are available for free download at www.GitmoObserver.com.

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

Professor George E. Edwards (Principal Author)
Faculty Director (Founding), Military Commission Observation Project (MCOP) / The Gitmo Observer
Special Assistant to the Dean for Inter-Governmental & Non-Governmental Organizations
Faculty Director (Founding), Program in International Human Rights Law
The C.M. Gray Professor of Law
Indiana University McKinney School of Law
U.S.A.

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

GitmoObserver@yahoo.com

www.GitmoObserver.com

[@GitmoObserver](https://twitter.com/GitmoObserver)



[Page Intentionally Blank]

DRAFT



II. How to Use the Guantanamo Bay Fair Trial Manual

I. Introduction

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

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

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

a. Do your homework!

The *Guantanamo Bay Fair Trial Manual* calls on NGO Observers to do their homework before undertaking a mission to Guantanamo Bay, Ft. Meade or another Military Commission viewing venue. NGOs should learn about of the law of the Military Commission (including the Military Commission Act of 2009 and its corollary instruments), binding international law (including treaties and customary international law), and other domestic law (including U.S. Constitutional provisions, and other federal statutes). Good sources of information include this *Guantanamo Bay Fair Trial Manual* and the website of *The Gitmo Observer* – www.GitmoObserver.com.

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

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

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

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

Be aware that Military Commission hearings are subject to schedule changes or cancellations, triggering forced changes in travel to and from Ft. Meade or to Guantanamo Bay. Things take time within the GTMO system, including waiting 14 or 15 days for unclassified documents to clear review and be posted on the mc.mil website for view by the general public. Rules and regulations regarding travel to



Guantanamo Bay and conditions on GTMO for NGOs change frequently. It has been said that rules for NGOs on the ground at GTMO change virtually every trip, including which government forms have to be completed prior to departure and how those forms are to be completed, how many copies of these completed government forms must be carried with travelers, how many hours in advance of the flight to Guantanamo the NGOs must arrive at Andrews Air Force Base, rules for how many NGO Observers sleep in each tent at Camp Justice at GTMO, what is an appropriate subject for photographs at GTMO, whether NGOs will have access to wifi, when NGOs are permitted to check in for their return flights from GTMO to Andrews Air Force Base, the amount of briefing information provided to NGOs, among other changes. Some say that travel to Guantanamo Bay involves a great deal of “hurry up and wait”, with hours spent sitting in the Andrews or GTMO air terminals waiting to board, or hours spent in holding waiting to know whether court will be in session.

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

c. Working through the *Guantanamo Bay Fair Trial Manual*

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

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

The NGO Observer might then turn to Part III of the *Guantanamo Bay Fair Trial Manual*, which identifies over two dozen rights associated with the various stages of the criminal justice process in the context of the Military Commissions.⁷ Though Volume I of the *Guantanamo Bay Fair Trial Manual* focuses on rights generally associated with the pre-trial hearing stage, many of these same rights apply at one or more of the other stages.

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

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

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

Likewise, not all questions in any given rights chart will apply to all Military Commission proceedings. The *Guantanamo Bay Fair Trial Manual* is deliberately repetitive, given that the rights

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

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

Stakeholder rights in all four stages overlap of GTMO proceedings, making significant portions of the pre-trial hearing analysis applicable during other stages. At the launch date of the *Guantanamo Bay Fair Trial Manual*, the three active GTMO cases were at the pre-trial stage.

and categories of rights overlap, and because the *Guantanamo Bay Fair Trial Manual* seeks to trigger in NGO Observers' minds law they will apply to a wide range of facts that may arise at one or more stages of the Guantanamo Bay criminal justice process in cases in which stakeholders may or may not be similarly situated.

The rights charts recognize that the defendant has the right to a fair trial, and accordingly, rights of the defendant are identified, described and interpreted. Similarly, rights and interests of other Military Commission stakeholders are also identified, described and interpreted. In addition to assessing the right to a fair trial for defendants, NGO Observers may turn to latter parts of the *Guantanamo Bay Fair Trial Manual* that focus on the rights and interests of other stakeholders, in sections that deal with: rights of victims and victims' families (**Part V**); rights of the prosecution (**Part VI**); rights of the press (**Part VII**); rights of expert and fact witnesses (**Part VIII**); rights and interests of Joint Task Force-GTMO (**Part IX**); rights of the U.S. public (**Part X**); rights of the international community (**Part XI**); and NGO Observers "rights" and interests (**Part XII**).

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

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

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

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

IV. An objective, independent, simple yet comprehensive guide

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

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

Gitmo Observer participants are free to exercise their judgment and express their personal opinions when they travel to Guantanamo Bay or Ft. Meade, apply the law as they know it to facts they encounter on the ground, and report their conclusions on the www.GitmoObserver.com blogs and elsewhere.

⁸ I am the principal author of the *Guantanamo Bay Fair Trial Manual*, but significant credit goes to many who have conducted research for, drafted sections of, and otherwise participated in the preparation of this *Manual*. No political, ideological or similar litmus test has been used, or will be used, to determine who participates in the project, who contributes to the *Manual*, or who travels to Guantanamo Bay or Ft. Meade on behalf of the Military Commission Observation project. We encourage objective, independence and impartiality, which permits participants to examine, analyze, critique and arrive at their own conclusions which they are welcome and encouraged freely to share.



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

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



Be sure to check out resources at www.GitmoObserver.com as you prepare for your Guantanamo Bay Observation!

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

It is hoped that NGO Observers and others users will determine which charts and questions in the *Guantanamo Bay Fair Trial Manual* are most relevant and helpful to them as they seek to carry out their own personal missions, the missions of their sending NGO,⁹ or the mission of whatever organization dispatched them to monitor the Guantanamo Bay Military Commissions.¹⁰

The *Guantanamo Bay Fair Trial Manual* questions, which are comprehensive yet not exhaustive, are drafted objectively, without favor for or slant against any stakeholder or stakeholder interests. The *Guantanamo Bay Fair Trial Manual* categories and questions do not presuppose U.S. government compliance, or noncompliance, with international or domestic law.¹¹ Independent, objective NGO Observers and others may draw their own conclusions. The *Guantanamo Bay Fair Trial Manual* is intended to be a simple tool to assist those interested in fair trials at Guantanamo Bay. It is not intended provide pre-determined conclusions.

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

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

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



Another upcoming publication is *The Guantanamo Bay Reader*,¹² which consists of 2 parts: (i) Part I, which consists of 25 essays by people who have lived and shaped, are living and shaping, or will live and shape the Guantanamo Bay U.S. Military Commission experience, including defense counsel, victims and their families, government officials (including from the rank of military judges), media representatives, detainees, Observers, and others; and (Part II), which consists of primary documents related to the Guantanamo Bay and the U.S. Military Commissions, including the instruments issued by the White House and the Pentagon beginning in 2001 that led to the creation of the first Military Commissions established at Guantanamo Bay, U.S. Supreme Court and other cases that spelled out U.S. Constitutional and other rights to be afforded to detainees held without trial by military commission and detainees charged, Presidential Executive Orders, and other documents, including the original lease entered into between the U.S. and Cuba over a hundred years ago under which the U.S. exercises sovereignty over Guantanamo Ba.

V. Conclusion

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



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

¹² G. Edwards, *THE GUANTANAMO BAY READER*, (Indiana University Press, forthcoming) (See www.GitmoReader.com)

[Page Intentionally Blank]

DRAFT



IV. Abbreviations

AA	Appointing Authority	CAAF	Court of Appeal of the Armed Forces
AAA	Ali Abdul-Aziz Ali Ammar al Baluchi	CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
AAR	After Action Report	CCR	Center for Constitutional Rights
ACCM	Alternative Compensatory Control Measure	CCTV	Closed-Circuit Television Feed of Military Commission Proceedings
ACP	Attorney Client Privilege	CDC	Chief Defense Counsel
AD	Assistant Director	CDO	Commander, Detainee Operations
ADX	U.S. Penitentiary, Administrative Maximum Facility in Florence, Colorado	CDR	Commander
AE	Appellate Exhibit (in the U.S. Military Commissions)	CENTCOM	U.S. Central Command
ALEC		CERD	International Convention on the Elimination of All Forms of Racial Discrimination
AHLTA-T	Armed Forces Health Longitudinal Technology Application - Theater	CHS	Confidential Human Source
AO	Area of Operation	CHU	Compartmentalized Housing Unit
AP I	Additional Protocol I of the Geneva Conventions of 1949	CI	Civilian Internee
AP II	Additional Protocol II of the Geneva Conventions of 1949	CIA	Central Intelligence Agency
APACS	Aircraft and Personnel Automated Clearance System	CID	Counterterrorism Division
AQ	al Qaeda	CID	Criminal Investigation Command (Army)
AQAP	al Qaeda of the Arabian Peninsula	CID	Criminal Investigative Division
AQI	al Qaeda Iraq	CIDT	Cruel, inhuman, and degrading treatment
AQIM	al Qaeda in the Islamic Maghreb	CISO	Court Information Security Officer (formerly CSO; pronounced "SeeSo")
AR	Army Regulation	CITF	Criminal Investigative Task Force
ARB	Administrative Review Board	CJCS	Chairmen of the Joint Chiefs of Staff
Army MedCom	Army Medical Command	CJCSI	Chairman of the Joint Chiefs of Staff Instruction
ASD(HA)	Assistant Secretary of Defense for Health Affairs	CJDG	Joint Detention Group Commander
ASD(PA)	Assistant Secretary of Defense for Public Affairs	CJTF	Combined Joint Task Force
ASD(RA)	Assistant Secretary of Defense for Reserve Affairs	CJTF	Joint Task Force Commander
ASJ-	Assistant Staff Judge Advocate	CLO	Commissions Liaison Office
ATF	Analytic Task Force	CLO	Commissions Logistics Office
ATF	U.S. Anti-Taliban Forces	CMCR	Court of Military Commissions Review
AUEB	Alien Unprivileged Enemy Belligerent	CMU	Communications Management Units
AUMF	Authorization for the use of Military Force	CO	Commanding Officer
BAU	Behavioral Analysis Unit (FBI)	COA	Course of Action. COB Close of Business
BDU	Battle Dress Uniform	Col	Colonel
BEEF	Base Emergency Engineering Force	COM	Abbreviation for command (as in SOUTHCOM – Southern Command)
BG or BGen-	Brigadier General	COM	Abbreviation for communication
BHU	Behavioral Health Unit	Comm	Abbreviation for communication
BII	Biometric Identification Information	CONUS	Continental United States
BOSS	Body Orifice Scanner	CREDO	Chaplains Religious Enrichment Development Operation
Brig	Brigadier	CRT	Compliance Review Team
BRONET	Brothers Network	CSIS	Canadian Security Intelligence Service
BSCT	Behavioral Science and Consultation Team	CSO	Court Security Officer (pronounced "SeeSo"; renamed CISO)
BSS	British Security Service	CSRT	Combat Status Review Tribunal
C2	Command and Control	CTC	CIA's Counterterrorism Center
CA	Convening Authority of the U.S. Military Commissions	CTD	Counterterrorism Division (FBI)
CAC	Common Access Card	CVSA	Computer Voice Stress Analyzer

CYD	Cyber Division	EMR	Emergency Medical Response
D/NCS	Director, CIA National Clandestine Service	EPW	Enemy Prisoner of War
DAB	Detainee Assessment Briefs	ERF	ERF – Emergency Response Force (also IRF - Immediate Reaction Force or Initial Reaction Force)
DAESH	al-Dawla al-Islamiya fi al-Iraq wa al-Sham	ERT	Evidence Retrieval Team (FBI)
DC CA	Court of Appeals for the Washington, DC Circuit	ESRI	Environmental Systems Research Institute, Inc.
DCP	Detainee Collection Point	FBI	Federal Bureau of Investigation
DDC	U.S. District Court for the District of Columbia	FCE	Forced Cell Extraction.
DEE	Defense Enterprise E-mail	FISA	Foreign Intelligence Surveillance Act
DEPSECDEF	Deputy Secretary of Defense	FISA	Foreign Intelligence Surveillance Court
DH	Detention Hospital	FM 34-52	Army Field Manual on Intelligence Interrogation
DHA	Detainee Holding Area	FM	Field Manual (Army)
DHE-M	Defense Human intelligence Enterprise-manual	FO	Field Officer
DHS	Department of Homeland Security	FOIA	Freedom of Information Act.
DI	Directorate of Intelligence	FOUO	For Official Use Only
DIA	US Defense Intelligence Agency	FRE	Federal Rules of Evidence.
DIMS	Detainee Information Management System	FSB	Federal Security Service
DIMS-F	Detainee Information Management System-Fusion	GC DoD	General Counsel of the Department of Defense
DISO	Defense Information Security Officer (formerly DSO)	GC	Geneva Convention I of 1949
DIVO	Defense-Initiated Victim Outreach	GC I	Geneva Convention I of 1949
DMO	Detainee Movement Operations	GC II	Geneva Convention II of 1949
DMPC	Detainee Mail Processing Center	GC III	Geneva Convention III of 1949
DNI	Director of National Intelligence	GC IV	Geneva Convention IV of 1949
DoD EA	DoD Executive Agent	GC	Geneva Conventions of 1949
DoD	U.S. Department of Defense	GCC	Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV)
DoDD	Department of Defense Directive	GFE	Government-Furnished Equipment
DoDI	Department of Defense Instruction	GITMO	U.S. Naval Station at Guantanamo Bay, Cuba
DOJ	Department of Justice	GO	General Officer; Governmental Organization
DOJ/BOP	Bureau of Prisons in U.S. Department of Justice	GPW	Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III)
DOJ/CRT	Civil Rights Division in U.S. Department of Justice	GTMO	U.S. Naval Station at Guantanamo Bay, Cuba
DOJ/HRSP	Human Rights and Special Prosecutions Section, U.S. Department of Justice, Criminal Division	GWOT	Global War on Terror / Global War on Terrorism
DOJ/OIG	Office of Inspector General in U.S. Department of Justice	GWS	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva)
DOJ/OVC	Office of Victims of Crime in U.S. Department of Justice	HASC	House Armed Services Committee
DoS	U.S. Department of State	HCR	Human Collection Requirement
DR	Discovery Request	HIG	High-Value Detainee Interrogation Group (FBI, CIA, DoD)
DRS	Detainee Reporting System	Hizb-i-Islami	Gulbuddin / Hezb-i-Islami Gulbuddin
DSN	Defense Switched Network	HUMINT	Human Intelligence
DSO	Defense Security Officer (currently DISO)	HVD	High-Value Detainee
DTA 2005	Detainee Treatment Act of 2005	HVTD	High-Value Terrorist Detainee
ECHR	European Convention on Human Rights and Fundamental Freedom	IA	Information Assurance
ECtHR	European Court of Human Rights	IACHR	Inter-American Commission of Human Rights
E-FEED	Enteral Feeding	IACtHR	Inter-American Court of Human Rights
EIT	Enhanced Interrogation Technique		
EITSD	Enterprise Information Technology Services Directorate		
ELC	Expeditionary Legal Complex		

IAW	In Accordance With	JIDCC	Joint Interrogation and Debriefing Center
IC	Intelligence Community		Commander
ICC	International Criminal Court	JIG	Joint Intelligence Group
ICCPR	International Covenant on Civil and Political Rights	JMG	Joint Medical Group
ICE	U.S. Immigration and Customs Enforcement in U.S. Department of Homeland Security	JOA	Joint Operations Area
ICE	Intelligence Control Element	JPRA	Joint Personnel Recovery Agency
ICE	Interrogation Control Element	JSMART	Joint Stress Mitigation and Restoration Team
ICO	In Case Of	JSP	Joint Service Provider
ICRC	International Committee of the Red Cross	JTF	Joint Task Force
ICTR	United Nations International Criminal Tribunal for the former Yugoslavia	JTF-160	Joint Task Force – Guantanamo Bay - Detention
ICTY	United Nations International Criminal Tribunal for the former Yugoslavia	JTF-170	Joint Task Force – Guantanamo Bay - Interrogations
IDA	Initial Denial Authority	JTF-GTMO	Joint Task Force-Guantanamo Bay
IED	Improvised Explosive Device	JTTF	Joint Terrorism Task Force
IGO	Inter-Governmental Organization	JVB	Joint Visitors Bureau (of Gitmo?)
IHL	International Humanitarian Law	JWICS	Joint Worldwide Intelligence Communications System
IHRL	International Human Rights Law-	KENBOM	1998 Bombing of U.S. Embassy in Kenya
IIR	Intelligence Information Report	KIA	Killed in Action
IMFR		KSM	Khalid Shaik Mohammad
IO	Information Operations	LEA	
IP	Interrogation Plan	LET	Lashkar-e-Tayyiba
IPF	Interrogation Plan Form	LPR	Lawful Permanent Resident of the U.S.
IRC	Information-Related Capability	LTC	Lieutenant Colonel
IRF	Immediate Reaction Force; Initial Reaction Force (also “ERF – Emergency Response Force)	LVD	Low-value detainee
IRT	In Regard To or In Relation To	M.C.A.	Military Commission Act of 2009
IS	Islamic State	M.C.M.	Manual for Courts-Martial
ISAF	International Security Assistance Force (Afghanistan)	M.M.C.	Manual for Military Commissions
ISIL	Islamic State of Iraq and the Levant	M16	United Kingdom Secret Intelligence Service (SIS)
ISIS	Islamic State in Iraq and Syria	MAH	Mustafa al Hawsawi
ISN	Internment Serial Number	Maj	Major
ISR	Investigative Search Request	MCA 2006	Military Commission Act of 2006
ITN	Identification, Tasking, and Networking	MCA 2009	Military Commission act of 2009
ITO	Invitational Travel Order	MCDO	Military Commissions Defense Office (replaced the ODCD)
ITOS	International Terrorist Organizations Section	MCRE	Military Commissions Rules of Evidence
IV	Intravenous	MCTJ	Rules Military Commissions Trial Judiciary Rules of Court
JA	Judge Advocate – military attorney	MEDEVAC	Medical Evacuation
JA	Judge Advocate	MFR	Memorandum for the Record
JAG	Judge Advocate General –	MFL	Motion for Leave
JAG	Judge Advocate General	MISO	Military Information Support Operations
JAGC	Judge Advocate General Corps	MIT	Mobile Interrogation Team
JCS	Joint Chiefs of Staff	MJ	Military Judge
JDG	Joint Detention Group	MMC	Manual for Military Commissions
JDIMS	Joint Detainee Information Management System	MOC	Media Operations Center
JDOG	Joint Detention Operation Group	MOH	Khalid Shaikh Mohammad.
JEC	Juvenile Enemy Combatant	MOU	Memorandum of Understanding
JFC	Joint Force Commander	MOP	(Marine Observation Post)
JIDC	Joint Interrogation and Debriefing Center	MP	Military Police (Army and Marine)
		MPI	JDG Military Police Investigators
		MPO	Medical Plans Officer
		MRE	Meals Ready to Eat
		MRE	Military Rules of Evidence

MS	Mitigation Specialist	OIF	Operation Iraqi Freedom
MTC	Motion to Compel	OIG	Office of the Inspector General
MTD	Motion to Dismiss	OLC	Office of Legal Counsel (of the Department of Justice)
MWD	Military Working Dogs	OLC	U.S. Office of Legal Counsel
MWR	Morale, Welfare & Recreation	OMC	Office of Military Commissions
NATO	North Atlantic Treaty Organization	OMC-CA	Office of Convening Authority
NAVBase	Naval Base	OMC-CA	Office of the U.S. Military Commission Convening Authority
NAVSTA	Naval Station	OMC-D	Office of Military Commissions Defense
NCIS	Naval Criminal Investigative Service	OMC-North	Office of Military Commissions Office Headquarters in Washington, DC
NCIS	Naval Criminal Investigative Service	OMC-P	Office of Military Commissions Prosecution
NCO	Non-Commissioned Officer	OMC-South	Office of Military Commissions Office at Guantanamo Bay, Cuba
NCOIC	Non-Commissioned Officer in Charge	OMS	CIA Office of Medical Services
NCS	CIA National Clandestine Service	OPCES	Operational Security
NDA	Nondisclosure Agreement	OPNAVINST	Chief of Naval Operations Instruction
NDAA	National Defense Authorization Act	ORCON	Originator controls dissemination and/or release of the document
NEX	Naval Exchange	OSD	Office of Secretary of Defense
NGO	Non-Governmental Organization	OSD (PA)	Office of Secretary of Defense Public Affairs
NGOR	Non-Governmental Organization Representative	OSI	Office of Special Investigations
NIMJ	National Institute of Military Justice	OSS	Office of Special Security
NIPRNet	Non-classified Internet Protocol (IP) Router Network	PAO	Public Affairs Officer
NIU	National Intelligence University	PBT	Post Blast Training
NJP	Non-Judicial Punishment	PCS	Permanent Change of Station
NJTTF	National Joint Terrorism Task Force	PENTBOM	Pentagon Bomb
NLEC	No Longer Enemy Combatant	POW	Prisoner of War
NMR	News Media Representatives	PPD	Purified Protein Derivative
NOC	Non-Official Cover	PRB	Period Review Board
NOFORN	No Foreign Nationals	PRS	Periodic Review Secretariat
NS	Naval Station	PRT	Privilege Review Team
NSA	National Security Agency	PSYOPS	Psychological Operations
NSA- National Security Agency		PTSD	Post-Traumatic Stress Disorder
NSB	National Security Branch	R.M.C.	Rules for Military Commissions
NSC	National Security Council	RBS	Ramzi bin al Shibh
NSGB	Naval Station Guantanamo Bay	RCM	Red Cross Message
OARDEC	Office for the Administrative Review of the Detention of Enemy Combatant	RDI	Rendition, Detention, and Interrogation CIA Program
OASD(PA)	Office of the Assistant Secretary of Defense for Public Affairs	RMC	Rules for Military Commissions
OBE	Overtaken by events	ROE	Rules of Engagement
OC	Oleoresin Capiscum (pepper spray)	ROI	
OCA	Original Classification Authority	RP	Retained Personnel
OCA	Office of Convening Authority	RTB	Reason to Believe
OCDC	Office of Chief Defense Counsel	RTMC	Regulations for Trial by Military Commissions (2011 Edition)
OCDC	Office of the Chief Defense Counsel of the Military Commissions (obsolete – replaced by MCDO)	S2	Intelligence Officer
O-Club	Officers' Club	S/NF	Secret / No Foreign Nationals
OCONUS	Outside Continental United States	SAC	Special Agent in Charge
OCP	Office of the Chief Prosecutor of the Military Commissions	SAEDA	
OCRM	Other Case Related Materials	SAP	Special Access Program
OEF/Afghanistan	Operation Enduring Freedom	SARP	Substance Abuse and Rehabilitation Program
OGA	Other Government Agency	SASC	Senate Armed Services Committee
OGC	Office of General Counsel (of DoD)	SCI	Sensitive Compartmented Information
OGM	Operation Git-Meow		
OIC	Officer in Charge		

SCIF	Sensitive Compartmented Information Facility	USCA	United States Court of Appeals
SCt	United States Supreme Court	USCA-DC	United States Court of Appeals for the D.C. Circuit
SDR	Source Directed Requirement	USCENTCOM	U.S. Central Command
SECDEF	Secretary of Defense	USCMCR	United States Court of Military Commission Review
SERE	Survival, Evasion, Resistance, Escape	USD(AT&L)	Under Secretary of Defense for Acquisition, Technology, and Logistics
SHU	Special Housing Unit	USD(I)	Under Secretary of Defense for Intelligence
SIGINT	Signals Intelligence	USD(P&R)	Under Secretary of Defense for Personnel and Readiness
SIOC	Strategic Information and Operations Center	USD(P)	Under Secretary of Defense for Policy
SIPRNet	Secret Internet Protocol Router Network	USDC	United States District Court
SIR	Summary Interrogation Report	USG	United States Government
SIS	United Kingdom Secret Intelligence Service (or M16)	USIC	United States Intelligence Community / Intelligence Community
SJA	Staff Judge Advocate	USMC	United States Marine Corps
SME	Subject Matter Expert	USN	United States Navy
SMO	Senior Medical Officer	VOCA	Victims of Crime Act 1984
SMU	Special Missions Unit	VCF	9/11 Victims Compensation Fund
SOCOM	Special Operations Command	VEO	Violent Extremist Organization
SOLIC	Special Operations and Low-Intensity Conflict	VFM	Victim Family Member
SOP	Standing Operating Procedure	VOS	Victim Outreach Specialist
SOUTHCOM	Southern Command	VTC	Video Tele Conference
SSCI	Senate Select Committee on Intelligence	VWAP	Victim/Witness Assistance Program of Office of Military Commissions
STC	Special Trial Counsel	Warno	Warning Order
SVTC	Secure Video Teleconference	WBA	Walid bin 'Atash
TANBOM	1998 Bombing of U.S. Embassy in Tanzania	WHS	Washington Headquarters Service
TB	Tuberculosis	WHS	Washington Headquarters Service
TDF	Theater Detention Facility	WMA	World Medical Association
TDY	Temporary Duty	WMD	Weapons of Mass Destruction
TFD		WMDD	Weapons of Mass Destruction Directorate
TFP	Task Force Platinum	WMDP	Weapons of Mass Destruction Program
TJ	Trial Judiciary	WTC	World Trade Center
TJag	The Judge Advocate General of a U.S. Military Branch	WTC 1	World Trade Center Building 1
TNR	Trap Neuter Release	WTC 2	World Trade Center Building 2
TNVR	Trap Neuter Vaccinate Release	ZD30	Zero Dark Thirty
TRP	Threat Review and Prioritization		
TS	Top Secret		
TS/SCI	Top Secret / Sensitive Compartmented Information		
TSA	Transportation Security Administration		
TSCM	Technical Surveillance Counter-Measures		
TSO	Temporary Standing Order		
TTIC	Terrorist Threat Integration Center		
TTP	Tactics, Techniques and Procedures		
TTP	Tehrik-e Taliban Pakistan		
U.S.C.	United States Code		
UBL	Usama bin Laden (Osama bin Laden)		
UCMJ	Uniform Code of Military Justice		
UFI			
UI	Unlawful Influence		
UNAMA	United States Mission to Afghanistan		
UN	United Nations		
US Dis. Ct.	United States District Court		
US or USA	United States of America		
US Sct	United States Supreme Court		

[Page Intentionally Blank]

DRAFT



V. What is the Right to a Fair Trial?

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

International and U.S. domestic law require not only that the entire criminal justice system be fair, but also that each component of the criminal justice system be fair. Accordingly, criminal trials, as a component of the criminal justice system, must be fair. **[(Enhancement of rights in death penalty cases?)]¹³**

A. “Rights” v. “Interests”

The concept of a “fair trial” may on its face seem to some to be amorphous. But, precise and definable international and domestic law rules exist that comprehensively provide internationally accepted guidelines for fair criminal trials. Typically, one thinks of criminal defendants as the primary stakeholders who have the right to a fair trial. And indeed, many international and domestic law instruments speak very directly to defendants’ rights, for example, the right to be tried by an independent tribunal, the right to counsel, the right to remain silent, and the right to be free from arbitrary deprivation of liberty, among many other rights. But, the prosecution, as a party to all criminal proceedings, also have very clear rights to a fair trial. Indeed, the prosecution and defense both have the right to equality of arms, which as applied means that the prosecution and defense must be allotted an equal opportunity to prepare their arguments, and have equal access to the courts and all other resources needed for their case.¹⁴

Do all Guantanamo Bay stakeholders have “rights”? Or do some Guantanamo Bay stakeholders only have “interests”, but not “rights”?

Criminal trials have stakeholders other than the prosecution and the defense. It has been debated whether these other stakeholders have the “right to a fair trial”, whether they have other “rights” aside from the “right to a fair trial”, or whether they have no “rights”, and if they have no “rights” whether they have “interests” or some other stake.¹⁵ The *Guantanamo Bay Fair Trial Manual* recognizes this debate, and addresses it as the *Manual* uses “rights” and “interests” language in identifying, interpreting, or applying existing international and domestic law in the context of stakes of the identified stakeholders.¹⁶ For example, the press has clear rights related to the Guantanamo Bay Military Commissions, such as the right to access to the proceedings to facilitate disseminating information about the proceedings, and consumers of news have a corollary right to receive information from the press about Guantanamo proceedings.¹⁷ The *Guantanamo Bay Fair Trial Manual* discusses rights and interests of a wide range of stakeholders in the Guantanamo Bay, Cuba Military Commissions, and seeks to point to relevant, binding sources of international and domestic law that governs these stakeholders rights and interests.

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

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

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

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

¹⁵

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

¹⁷ See *infra*, pages abc – xyz (Section on Rights of the Press; Section on Right of the U.S. public). Free expression rights have many domestic U.S. law and international law sources, including the U.S. Constitution (the First Amendment), the ICCPR, and under customary international law as incorporated into the UDHR.



that binds the US and binds the Military Commission (Section d), including an introduction of treaties and customary international as general sources. Next is an introduction of specific bodies of international law that bind the U.S.— international humanitarian law and international human rights law (section e). Then fair trial rights arising under treaties and customary international law in the area of international humanitarian law are discussed (section f) followed by fair trial rights arising under treaties and customary international law in the area of international human rights law (section g). This chapter concludes with a discussion of domestic law that governs the Military Commissions (section h) and a brief mention of some fair trial rights that are not covered in the *Guantanamo Bay Fair Trial Manual* (section h).

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

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

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

Who has Guantanamo Bay rights and interests?

- Prosecution
- Defense
- Victims & Victims’ Families
- Witnesses
- the Press
- the Court
- JTF-GTMO Detention Personnel,
- Other Detainees
- NGO Observers
- Others?

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

The U.S. Constitution confirms the role of the Constitution itself and of the role of international law as being “the supreme law of the land”.¹⁸ The Executive Branch of the U.S., Congress, and the U.S. Supreme Court have all acknowledge that the U.S. is bound to follow its international law obligations that arise by treaty law and by customary international law. International law binds the U.S. and should be consulted and followed when determining the scope of the right to a fair trial to be afforded to Military Commission stakeholders.

i. The *Executive Branch* of the U.S. recognizes that international law is the law of the land and must be followed by the U.S. government. For example, President Obama has stated that not only does the U.S. recognize treaties and customary international law as binding on the U.S., but also the U.S. complies with its treaty and customary international law obligations.¹⁹ Former U.S. Presidents have also recognized the U.S. recognition of and compliance with international law.²⁰

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

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

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

¹⁹

²⁰



Martial, provides that “The sources of military jurisdiction include the Constitution and international law. International law includes the law of war.”

iii. The *U.S. Supreme Court* has also reaffirmed that international law is the law of the land in the U.S. and should be followed by the U.S. government.²¹

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

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

- *Treaties* that bind the U.S. when the U.S. ratifies or accedes to the treaties²³ (in the areas of international humanitarian law and international human rights law treaties);²⁴ and
- *Customary international law* that binds the U.S. upon creation by operation of state practice and opinion juris²⁵(in the areas of international humanitarian law and international human rights law)

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

The two principal substantive international law areas that bind the U.S. and that are relevant to the Guantanamo Bay Military Commissions are: (a) international humanitarian law (IHL); and (b)

Defendants’ Rights at Guantanamo Bay, Cuba, Military Commission

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

²¹ *Paqueta Habana*, US (1901); *see also*

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

²³ *See* Vienna Convention on the Law of Treaties, arts. xyz; Restatement (Third) on the Foreign Relations Law of the United States.

²⁴ *See infra*, note xyz.

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

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

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

The U.S. Supreme Court has concluded that an armed conflict exists at least as between the U.S. and al Qaeda, which triggers the applicability of IHL,²⁹ and the Executive Branch has also recognized this.³⁰

IHL and IHRL are closely related to each other, in that they both call for the protection of a wide range rights of a range of stakeholders in criminal proceedings such as those in the U.S. Military Commissions, with these rights including many of the stakeholder rights discussed in this *Guantanamo Bay Fair Trial Manual*. The treaties and customary international law sources that provide for IHL and IHRL rights overlap substantively, though.

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

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

The U.S. view on the definition of “international humanitarian law” or the “law of armed conflict” is in accord with a universally recognized definition. The U.S. has stated:³¹

²⁶ 548 U.S. 557 (2006), *rev'g* 415 F.3rd 33 (D.C. Cir. 2005)

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

²⁸ For example, IHL protects civilians, combatants who have set aside their arms, medics, and others not participating in hostilities.

²⁹

³⁰

³¹ Department of Defense Directive 2311.01E (9 May 2006) (certified as current as of 22 February 2011). Further, this DoD Directive identifies the policy of the U.S. in complying with international humanitarian law:

4. POLICY It is DoD policy that:

4.1. Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.

4.2. The law of war obligations of the United States are observed and enforced by the DoD Components and



3. Definitions

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

3.2. **Reportable Incident.** A possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.

i. Treaty Law – International Humanitarian Law – Common Article 3 of the Geneva Conventions

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

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

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

DoD contractors assigned to or accompanying deployed Armed Forces.

4.3. An effective program to prevent violations of the law of war is implemented by the DoD Components.

4.4. All reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.

4.5. All reportable incidents are reported through command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities. Once it has been determined that U.S. persons are not involved in a reportable incident, an additional U.S. investigation shall be continued only at the direction of the appropriate Combatant Commander. The on-scene commanders shall ensure that measures are taken to preserve evidence of reportable incidents pending transfer to U.S., allied, or other appropriate authorities.

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

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

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

³⁶ General Martins stated:

[A]ll three branches of government in the United States now regard military commissions as being bound to comply with the requirement of Common Article 3 of the Geneva Conventions of 1949. The pertinent provision



The U.S. Supreme Court in *Hamdan v. Rumsfeld* ruled that Common Article 3 applies to the Military Commissions,³⁷ and Congress has also recognized this.³⁸

Thus, pursuant to Common Article 3, the Military Commissions must provide judicial guarantees that are “recognized as indispensable by civilized peoples.”³⁹ The Military Commissions must afford all stakeholders at least the rights provided for under Common Article 3.

ii. Customary International Law – International Humanitarian Law.

In addition to being bound by international humanitarian law treaty provisions, such as Common Article 3 of the Geneva Conventions, the U.S. is also bound by customary international law norms in the international humanitarian law area. Among the customary international law norms that bind the U.S. is that the U.S. Military Commissions, like any other criminal trial systems, must provide for the right to a “fair trial affording all essential judicial guarantees.”⁴⁰

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

requires that an accused detainee be tried by a “regularly constituted court affording all of the judicial guarantees . . . recognized as indispensable by civilized peoples.” The protections incorporated into the Military Commissions Act of 2009 clearly far exceed this international standard

Brigadier General Mark Martins, Chief Prosecutor of the U.S. Military Commissions, Reformed Military Commissions, International Perceptions, and the Cycle of Terrorism, Remarks at Chatham House (28 September 2012) *available at* <http://www.lawfareblog.com/2012/09/brig-gen-mark-martins-address-at-chatham-house/>.

³⁸

³⁹ Though Common Article 3 does not define “recognized as indispensable by civilized peoples”, the Military Commissions, in seeking to ascertain the scope of these judicial guarantees, may look to *Hamdan*, which in turn looked to Article 75 of Additional Protocol I to the Geneva Conventions, the ICCPR, and customary international law. (See *Hamdan*, 548 U.S. 557, xyz at n. 66 (2006), *rev’g* 415 F.3rd 33 (D.C. Cir. 2005) (Stevens, J., concurring) (discussing appropriateness of considering ICCPR rights).)

⁴⁰ See, e.g., Henckaerts, Jean-Marie & Doswald-Beck, Louise, eds., *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (International

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

I. International Law

a) International Humanitarian Law – a/k/a “Law of War” or “Law of Armed Conflict”

1. Geneva Conventions of 1949 (including Common Article 3)
2. Rules contained in Article 75 of Protocol I of the Geneva Conventions of 1949 (as Customary International Law)
3. Rules contained in Article 6 of Protocol II of the Geneva Conventions of 1949 (as Customary International Law)
4. United Nations Charter

b) International Human Rights Law

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

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

9. U.S. Constitution (including Amendments)
10. Military Commissions Act of 2009 (with provisions incorporated from the Military Commissions Act of 2006)
11. Rules of the Military Commission (U.S.) (14 August 1012)
12. Military Commission Rules of Evidence (MCRE)
13. Military Commissions Trial Judiciary Rules of Court (24 April 2012, as amended 4 June 2013)
14. Regulations for Trial by Military Commissions (2011)
15. Uniform Code of Military Justice (UCMJ) (not binding)
16. Other Federal Statutes
17. Executive Orders of the U.S. President E.g., The Presidential Military Order of 13 November 2001 issued by George W. Bush that called for creation of the first post-9-11 Guantanamo Bay Military Commissions that the Supreme Court ultimately ruled violated the law.
18. U.S. Supreme Court & other U.S. Federal Court Decisions (that interpret & apply international law & U.S. domestic law)



As stated, the fair trial rules incorporated into Article 75 of Protocol Additional I have risen to the level of customary international law, and thus bind the U.S.⁴¹ Article 75 of Additional Protocol I provides in part that:⁴²

“[n]o sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.”

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

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

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

Additional Protocol II, which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts, was originally submitted to the Senate for approval by

Committee of the Red Cross) (2005).

⁴¹ Per the U.S., article 75 of Additional Protocol I to Geneva Conventions has risen to the status of customary international law, and the norms contained in article 75 thus bind the U.S. A 1986 Pentagon memorandum reflects that several high-ranking military officers concluded that “[w]e view the following provisions as already part of customary international law”, and then listed numerous Protocol I provisions, including “Fundamental guarantees: Article 75”. Military officials who signed the memorandum are (i) W. Hays Parks, Chief, International Law Branch, DAJA-IA; (ii) LCDR Michael F. Lohr, JAGC, USN; NJAG, Code 10; (iii) Dennis Yoder, Lt. Colonel, USAF, AF/JACI; and (iv) William Anderson, HQ, USMA/JAR. Others who participated in the preparation of the memo included (i) Lt. Col. Burrus M. Carnahan, USAF; and (ii) CDR John C. W. Bennet, JAGC, USN. (*Memorandum to Mr. John H. McNeill, Assistant General Counsel (International), OSD*, responding to 26 March 1986 memorandum from Mr. McNeill asking “our views on which articles of the Protocol are currently recognized as customary international law”).

Other U.S. Government legal experts, leading human rights and humanitarian law experts, and military manuals of the United States have noted that the norms contained in article 75 of Additional Protocol I reflect customary international law. (See Douglas Cassell & Bridget Arimond, *Violations of International Human Rights and Humanitarian Law Arising From Proposed Trials before United States Military Commissions* 13, n. 85 and text accompanying note (unpublished paper) (17 June 2004) (citing T. Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64-65 (1989), citing Panel, *Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the US Decision Not to Ratify* (1987) 81 *American Society of International Law Proceedings* 26, 37. Also cited in Cassell & Arimond, n. 85 are: *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law* (1987) 2 *American University Journal of International Law and Policy*, 415, 427; and David Scheffer, ‘Remarks’ (2002) 96 *American Society of International Law Proceedings*, 404, 406.). For further discussion, see *Expert Witness Affidavit of Professor George E. Edwards on International Human Rights Law, International Humanitarian Law, and International Criminal Law*, Tendered in the case of *U.S.A. v. David M. Hicks*, Case # 002, U.S. Military Commissions Guantanamo Bay, Cuba (14 November 2005).

⁴² The White House Fact Sheet of March 2011 provides:

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

Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.

White House Fact Sheet: New Actions on Guantanamo and Detainee Policy (7 March 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>

⁴³ The Article 75 list of fair trial rights for defendants includes: the right to be informed without delay of the particulars of the offence alleged against the defendant; the right before and during trial to all necessary rights and means of defence; the right to be free from ex post facto crimes (ne bis in idem) or punishments; the right to be presumed innocent until proved guilty according to law; the right to trial in his presence; the right to be free from being compelled to testify against himself or to confess guilt; the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; the right to be free from double jeopardy; the right to a publicly pronounced judgment. Furthermore, it provides for the right of a detained person to be informed promptly in a language he understands why he was detained.

⁴⁴ <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>



President Reagan in 1987. The Administration urges the Senate to act as soon as practicable on this Protocol, to which 165 States are a party. An extensive interagency review concluded that United States military practice is already consistent with the Protocol's provisions. Joining the treaty would not only assist us in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also allow us to reaffirm our commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.

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

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

Other international instruments that incorporate the customary international law norms on the right to a fair trial include the *Nuremberg Principles of 1950*.⁴⁷

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

i. Treaty Law – International Human Rights Law.

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

The International Covenant on Civil and Political Rights (ICCPR)⁴⁸ is the principal international human rights law treaty ratified by and binding upon the U.S. that provides for the right to a fair trial treaty.⁴⁹ The ICCPR, like other treaties that bind the U.S.,⁵⁰ enumerates a large number of rights to be

⁴⁵ White House Fact Sheet: New Actions on Guantanamo and Detainee Policy (7 March 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>. The Press Report notes:

⁴⁶ General Martins stated:

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

Brigadier General Mark Martins, Chief Prosecutor of the U.S. Military. Commissions, Reformed Military Commissions, International Perceptions, and the Cycle of Terrorism, Remarks at Chatham House (28 September 2012) available at <http://www.lawfareblog.com/2012/09/brig-gen-mark-martins-address-at-chatham-house/>.

⁴⁷ *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (<http://www.un.org/law/ilc/texts/numberg.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).

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

⁴⁹ See Restatement (Third) of the Foreign Relations Law, Vienna Convention on the Law of Treaties, arts 1(g), 26.

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

⁵⁰ Other treaties that the U.S. has become bound to have obligated the U.S. to honor the right to a fair trial include the *Nuremberg Charter (Charter of the International Military Tribunal)* (<http://avalon.law.yale.edu/imt/imtconst.asp>) and the *Tokyo Charter (Charter of the International Military Tribunal for the Far East)*, <<http://www.yale.edu/lawweb/avalon/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)



afforded to criminal trial stakeholders, and that are to be afforded to stakeholders in any criminal proceedings in the U.S. or run by the U.S. anywhere,⁵¹ and to be afforded to stakeholders in the Guantanamo Bay Military Commission setting.⁵² Many of these ICCPR rights are discussed in this *Guantanamo Bay Fair Trial Manual*.⁵³

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

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

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

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

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

- **The UN Convention Against Torture (CAT)**

Another treaty that binds the U.S. (by signature and ratification) is the Convention Against Torture

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

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

⁵² See 548 U.S. 557 (2006), *rev'g* 415 F.3rd 33 (D.C. Cir. 2005), *supra* note xyz. (is this ICCPR reference in the concurrence?)

⁵³ The ICCPR list of fair trial rights includes:

⁵⁴ Guantanamo Bay Military Commission stakeholders have other trial-related rights that may not generally be considered to be "fair trial rights". For example, stakeholders have the ICCPR Article 19 right to freedom of expression, which includes right to impart and receive communications. If a defendant is stifled from speaking during proceedings or is prohibited from communicating with the outside world, article 19 rights may be implicated since the defendant's right to express himself may be curtailed. If a defendant's speech is curtailed, the government may be breaching the article 19 free expression right of the intended speech recipients (e.g., the defendant's family with whom the defendant may be banned from contacting, or the press to whom the defendant may not be permitted to send messages). Bear in mind that pursuant to international and domestic U.S. law, reasonable restrictions may lawfully be placed on speech. But, an analysis will need to be conducted to determine whether a breach has occurred or is occurring.

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

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

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

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

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

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

These instruments that have incorporated into them binding customary international law norms that call for a fair trial include: the *Universal Declaration of Human Rights*,⁵⁷ the *American Declaration on the Rights and Duties of Man*,⁵⁸ the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,⁵⁹ *The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)*,⁶⁰ the *United Nations Basic Principles on the Independence of the Judiciary*,⁶¹ the *United Nations Guidelines on the Role of Prosecutors*,⁶² and the *United Nations Basic Principles on the Role of Lawyers, and the Standard Minimum Rules for the Treatment of Prisoners*.⁶³ Additional non-binding international instruments that incorporate binding customary international law norms related to the right to a fair trial can be found in Appendix XYZ.

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

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

- a. **U.S. Constitution.** The 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution provide for fair trial rights,⁶⁴ as do other portions of the U.S. Constitution, such as Article 1, § 9, clause 3

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

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

⁵⁹ This document is reproduced in Appendix ABC.

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

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

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

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

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

(prohibiting ex post facto laws). These U.S. Constitution fair trial rights must be afforded to all stakeholders in the Military Commissions.

- b. Military Commission Act of 2009.** The Military Commission Act of 2009, which is the principal domestic U.S. instrument under which the U.S. Military Commissions at Guantanamo Bay were created and currently operate, contains provisions to protect fair trial rights.⁶⁵ Other Military Commission Contains documents that contain fair trial provisions include the *Manual for Military Commissions* (United States) (14 August 1012), the *Military Commissions Trial Judiciary Rules of Court* (24 April 2012, as amended 4 June 2014); and the *Regulations for Trial by Military Commissions* (2011 Edition).⁶⁶ The Court of Military Commissions Review also is relevant.
- c. Uniform Code of Military Justice.** The Uniform Code of Military Justice (UCMJ) contains fair trial provision to be provided in U.S. courts martial. Though the Military Commissions follow rules of the Military Commission Act of 2009 and other Military Commission instruments, the UCMJ is looked to for guidance.⁶⁷
- d. U.S. Federal Case Law (U.S. Supreme Court; U.S. Courts of Appeal; U.S. Federal District Courts).** Landmark U.S. Supreme Court cases applicable to rights of Guantanamo Bay stakeholders include *Miranda v. Arizona*, 384 U.S. 436 (1966) (freedom from self-incrimination; right to remain silent) and *Gideon v. Wainwright* 372 U.S. 335 (1963) (right to counsel). A series of U.S. Supreme Court cases expressly address Guantanamo Bay proceedings, and rights to be afforded to detainees. See, e.g., *Hamdan Rasul, Hamdi, Boumediene*. U.S. federal courts in Washington, DC have also addressed Guantanamo Bay U.S. Military Commission issues, as have other federal courts.
- e. Presidential Executive Orders.** These would include, for example, the Presidential Military Order of November 2001 that called for the creation of the first U.S. Military Commission at Guantanamo Bay, Cuba. A draft Executive Order circulated in January / February 2017 that addressed issues related to Guantanamo Bay, including, for example, the U.S. Military Commissions. If an official Executive Order is issued on this topic, it will be incorporated into the Appendix to the *Guantanamo Bay Fair Trial Manual*.

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

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

⁶⁵

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

⁶⁷ See, e.g.,

⁶⁸ For a discussion of these and related issues, see *General Comment No. 32, supra*, note xyz, para abc, citing, *inter alia*, *UN Human Rights Committee Communication No. 963/2001, Uebergang v. Australia*, para. 4.2; *UN Human Rights Committee Communication No. 880/1999, Irving v. Australia*, paras. 8.3, 8.4; *UN Human Rights Committee Communication No. 408/1990, W.J.H. v. Netherlands*, para. 6.3.; *Human Rights Committee Communication No. 868/1999, Wilson v. Philippines*, para. 6.6.

[Page Intentionally Blank]

DRAFT



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

a. The Why and How of NGO Observers

The U.S. government⁶⁹ invites non-governmental organizations to nominate representatives to observe / monitor (NGO Observers) U.S. Military Commission hearings presumably to demonstrate to the U.S. and international community that the rules under which the Commissions operate are legal under U.S. law⁷⁰ and international law,⁷¹ and that these rules are being applied in compliance with U.S. and international law. The Pentagon seeks to have NGOs travel on site presumably to examine whether the rights of all Military Commission stakeholders are being fully afforded to them, under U.S. and international law, and to confirm that these rights are being so fully afforded. The Pentagon has a process in place to select NGO Observers that they presumably believe will be able to monitor the hearings, analyze and critique the hearings and the process, and report their findings.⁷²

The Pentagon has indicated a desire for the Military Commissions to be transparent.⁷³ A goal is that any Guantanamo Bay justice the U.S. seeks to mete out or actually does mete out is seen as being fair and pursuant to the rule of law. This is consistent with the military commission statutory requirement that “military commissions shall be publicly held”.⁷⁴

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

NGO Observers are the eyes and ears of the outside world as to what happens at Guantanamo Bay. NGO Observers have a unique responsibility to share their experiences, insights and conclusions with the outside world. NGOs should not bow to pressure.

What happens at Guantanamo Bay ***should not*** stay at Guantanamo Bay.

⁶⁹ Pentagon / Department of Defense / Office of Military Commissions

⁷⁰ E.g., in compliance with the U.S. Constitution and federal statutes.

⁷¹ The Pentagon argues that the Military Commissions operate wholly in compliance with treaties and customary international law in the areas of international human rights law, international humanitarian law, and international criminal law.

⁷² The Pentagon’s stated criteria in selecting NGO Observers include:

- (a) the reach of the applicant (e.g., audience size, readership, subscriptions, circulation, viewers, listeners, website hits, writings, broadcasts, professional standing, diversity of audiences, etc.);
- (b) the nexus of the applicant’s organizational mission to military commissions, wartime detention or prosecution, international law, and/or human rights; and
- (c) the extent to which applicant has provided longstanding and frequent coverage of issues relating to military commissions, wartime detention or prosecution, international law, and/or human rights.

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

⁷³

⁷⁴ Rule 806 provides:

- (a) In general. Except as otherwise provided in chapter 47A of title 10, United States Code, and this Manual, military commissions shall be publicly held. For purposes of this rule, “public” includes representatives of the press, representatives of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities. Access to military commissions may be constrained by location, the size of the facility, physical security requirements, and national security concerns.



to monitor the hearings via secure, live videolink at the McGill Training Center, which is located at the Ft. Meade military base in Maryland.⁷⁵ (The videolink for NGOs at Ft. Meade originally was into the Post Theater on the base, but changed to the McGill Training Center in the 2016 summer.)

NGOs may have varied reasons for seeking to send NGO Observers to Guantanamo Bay. But, thus far, I (or “we” at *The Gitmo Observer*) have encountered no NGO that has expressed a motive other than to seek to ascertain whether U.S. and / or international law are being complied with. Some NGOs may have substantive, ideological, functional or other differences that give rise to different perspectives, but no NGO has expressed a desire other than seeking to ascertain for themselves -- based on their own and their representatives’ understanding of the law and their witnessing of facts on the ground – whether the rules governing the Military Commission proceedings are fair or whether the rules are carried out fairly— or, that is, whether the rules are geared towards a fair trial and whether a fair trial is currently being had, has been had, or can be had.⁷⁶

b. Responsibilities of an NGO Observer

When an NGO nominates a person to be an NGO Observer, and certainly when or after the Pentagon clears the NGO Observer for travel to Ft. Meade or to Guantanamo Bay, the NGO may provide the selected NGO Observer with a set of objectives – a *Terms of Reference* – to inform the NGO Observer of

what they are expected to do or accomplish with their mission to Guantanamo Bay (or Ft. Meade or other viewing site). If the NGO does not inform the Observer what is expected of the Observer, how will the Observer know what to do before, during and after their mission? How will the Observer know what is expected of them? Standard *Terms of Reference* for Guantanamo Bay missions might include a requirement that the NGO Observer: (1) Attend; (2) Observe; (3) Analyze; (4) Critique; and (5) Report on the proceedings, as follows:



NGO Observers at Ft. Meade, Maryland for Military Commission pre-trial hearings in the case against Khalid Shaik Mohammad and 4 other defendants who are the alleged masterminds of the 9-11 attacks on the World Trade Center and Pentagon. The hearing was broadcast via secure video-link live to Ft. Meade from Guantanamo Bay, Cuba. These NGO Observers are affiliates of The Gitmo Observer (Military Commission Observation Project) of Indiana University McKinney School of Law.

Attend Hearings and Trials – NGO Observers must organize logistics of their travel to viewing site, which involves, *inter alia*, filling out multiple forms and submitting them to the Office of

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

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

Furthermore, several sites are available for members of the press, including the Media Operations Center at the Guantanamo Bay Naval Station.

⁷⁶ If an NGO has a remit other than as described, we would be grateful if you would let us know what the NGO’s remit is. Will you please send us an e-mail at GitmoObserver.yahoo? Thank you!



Military Commissions, and making multiple photo copies of documents NGO Observers are required to carry to Guantanamo Bay. Develop an observation plan based on the objectives of the NGO regarding the Military Commissions generally, and regarding the specific hearings of the specific Military Commission case the NGO Observer is scheduled to observe. Learn about the law of the Military Commission generally, and specifically about the law related to the case being observed. Transcripts, motion papers, and other court filings related to the case at bar can be found on the Office of Military Commission website (www.mc.mil). Learn about U.S. and international law that governs rights of all stakeholders. Do your homework! Conduct sound, comprehensive research! Visit websites such as www.GitmoObserver.com that contain GTMO Observation Briefing Binders and other useful materials. Read this *Guantanamo Bay Fair Trial Manual!* Read *Know Before You Go To Guantanamo Bay: A Guide For Human Rights NGOs & Others Attending U.S. Military Commissions*. Both the *Manual* and *Know Before You Go* can be downloaded free of charge from www.GitmoObserver.com. Read posting on websites of multiple NGOs that keep abreast of Guantanamo Bay matters. There is no need to recreate the wheel, as many resources are available for NGO Observers.

1. Observe Hearings and Trials; Be Observed by Stakeholders –

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

You will need to refer back to your notes as you are analyzing the proceedings and reporting on them later.⁷⁷ Talk with stakeholders (prosecutors, defense counsel, press, other NGOs) and learn of their headaches, their challenges, their joys, and their positive accomplishments. Have your own copy of the *Guantanamo Bay Fair Trial Manual* in hand, along with the *Manual's* charts of questions and checklists, to trigger in your mind process-oriented and substantive issues you might look out for, or that you might inquire about. Ask questions about anything you do not understand.

There are many resources available for answering questions. Keep an open mind, refrain from pre-judgments, and do not be easily

Five Primary Responsibilities of NGO Observers

1. **Attend** – Organize travel logistics. Research Commission law, and U.S. and international law. Read the *Guantanamo Bay Fair Trial Manual!* Check out www.GitmoObserver.com.
2. **Observe & Be Observed** – Be independent, objective & open-minded as you observe. Experience what is happening on the ground. Also, be visible, so stakeholders know you are present and are monitoring them. It is important that you observe what is going on, and that stakeholders observe you. You are an extension of / stand-in for the public, and are helping to keep other stakeholders honest.
3. **Analyze** -- Apply the law to the facts. Do Military Commissions offer a fair trial for all stakeholders?
4. **Critique** – Identify positive or negative aspects of the Military Commission process itself and the process in practice.
5. **Report** – NGO Observers are the eyes and ears of the outside world into Guantanamo Bay. Publish your observations. Ensure that what happens at Guantanamo Bay does not stay at Guantanamo Bay. Do not bow to pressure to shape your views, one way or another.

⁷⁷ Though transcripts of Guantanamo Bay proceedings are typically available within 24 hours after a hearing day is concluded, NGO Observers, particularly at Guantanamo Bay, will not have easy access electronic or hard copy transcripts.

swayed by rhetoric of any stakeholder. And, do not feel pressured to form judgments or to report from any particular perspective. You are an individual and though your experiences and observations will be similar to those of other observers or monitors, your experiences and observations will be unique to you.

Be Observed – The right to a fair trial requires that hearings / trials be public. The defendant has the right to not be tried in a secret proceeding, and has the right to the public being able to witness what is occurring during court proceedings. Other stakeholders involved in the proceedings – such as the judge, prosecutors, defense counsel, interpreters, guard force, and others – have an interest in the public being able to observe proceedings, to help protect these stakeholders from claims of improper / illegal behavior. The more open and transparent the proceedings are, and the more outsiders are able to see what is happening, the less likely that stakeholders will act inconsistent with the right to a fair trial. NGO Observers are an extension of / stand-in for the public, and when NGOs are physically in the courtroom during hearings, stakeholders know that the public is watching, and this helps keep stakeholders “honest”, and on their toes.

2. **Analyze Hearings and Trials** – Recall the specific law governing the right to a fair trial (as found in the *Guantanamo Bay Fair Trial Manual* and elsewhere), and recall the range of rights and interests of stakeholders, and what is required under law for rights and interests to be realized for all the stakeholders. Focus on the procedure and process required in the administration of justice, on how the system is meant to function, and how it actually does function. Recall the facts you witnessed on the ground. Apply the law to the facts. Draw a conclusion as to whether you believe, based on your legal analysis, whether the right to a fair trial is being or can be had at Guantanamo Bay.

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

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

3. **Critique Hearings and Trials** – Based on your application of the law to the facts (your analysis), and on based on your conclusions as to whether a fair trial is being had or can be had by stakeholders, use your critical eye and your expertise (newly-found or otherwise) to identify positive or negative aspects of the process itself, and of the process in practice. If you have concluded that some aspects of the proceedings are fair, identify how and why those aspects of the proceedings are fair. If you have concluded that some aspects of the proceedings are not fair, explain how and why those aspects of the proceedings are not fair. “Critiques” can be positive or negative or both!
4. **Report on Hearings and Trials** – NGO Observers should submit a *Final Observation Report* to your sending NGO. You are encouraged to publish widely about your Guantanamo Bay experiences on blogs, in law reviews or newspapers, as op eds, or otherwise. Help ensure that what happens at Guantanamo Bay does not stay at Guantanamo Bay.





Many outlets exist for publishing your Guantanamo Bay Observation Report. E.g., Indiana University McKinney School of Law NGO Observers publishes on www.GitmoObserver.com. Feel free to send posts for linking.!

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

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

Be particularly careful to ensure that your concluding reports, articles, blog posts and other publications reflect your honest

assessment of what you observed at Guantanamo Bay. NGO Observers should be free and independent thinkers, capable of formulating sound and reasoned judgments, free from pressure from any individual or group. Some NGO Observers may agree with arguments made by the defense regarding deprivation of certain rights of the defendants, and some NGO Observers may agree with arguments by the prosecution regarding fulfillment of those same rights. Some NGO Observers may agree with neither, or with components of both. That’s fine!

But, ensure that your thoughts are your own.

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

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

c. NGOs should be true to yourselves!

Each NGO representative who observes or monitors Guantanamo Bay proceedings is an individual person. Each NGO representative who observes or monitors has been able to form sound judgments based on his or her own research, observations, and ability to digest and analyze law and facts and apply the law to those facts.

Your viewpoint and observations as an NGO monitor may differ from the viewpoint and observations of the NGO monitor sleeping in the next bed over in your Guantanamo Bay tent, and may differ from that of the NGO monitor who observed at Ft. Meade. After completing your observation, you may find that your views do not align with views of your NGO sending organization, with your professor, with members of the press you encounter on mission, with either the defense or the prosecution, or with any of the other stakeholders with interests in the Guantanamo Bay Military Commissions. You are



encouraged to own your views, and to report them as you see them. Be honest and truthful to yourself, and to those to whom you report. Your perspectives and sound judgment are valuable. Honor yourself by reporting without fear.

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

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



NGO Observers with Brigadier General Mark Martins, Chief Prosecutor of the U.S. Military Commissions at Guantanamo Bay. Summer 2014.

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



NGO photo with Chief Defense Counsel and Deputy Chief Defense Counsel – Fall 2016

NGO Resource Center

For years, the military allocated space for an NGO Resource Center, which has been located in different places in Camp Justice, which sits on a deserted air field, and is the area of Guantanamo Bay where NGO Observers live. Initially the Center was in a room inside a hangar and was somewhat spacious, and contained multiple desks and chairs and couches, a printer, a large TV, a whiteboard, internet connectors, a refrigerator (with a freezer that constantly needed defrosting but was never defrosted), and space for NGOs to store Commission-related documents, food and drinks, a coffee maker, cups and dishes, cutlery, bug spray, board and other games, and sports equipment. It was a real room in a real building with real floors, walls and ceiling, and a lock on the doors. That initial Center in the hangar was condemned after the room’s ceiling caved in during Hurricane Matthew. The Center was moved to a “residential tent”, along the row of tents where NGO Observers sleep, but had no desks, printer, TV, or refrigerator, and was not a suitable environment in which NGOs could work. The Center was moved to the tent in Camp Justice that troops had used as a Morale, Welfare and Recreation (MWR) tent. This newest Center has desks, chairs, 2 TVs, a refrigerator, and storage space. It has no printer, whiteboard or couches. Unfortunately, virtually all the board and other games, and all the sporting equipment previously in the original NGO Resource Center disappeared, and is not in the newest Center. Gone are the Jenga game, Taboo, playing cards, Frisbees, water guns. What is left behind are a bunch of kids’ jigsaw puzzles.



NGO photo with Learned Counsel & Detailed Military Counsel for al Nashiri – Fall 2016



VII. Background & Brief History of the U.S. Military Commissions at Guantanamo Bay, Cuba

a. The 9-11 attacks and the immediate aftermath

On 14 September 2001, three days after the 9-11 attacks on the World Trade Center and the Pentagon, Congress passed the Authorization to Use Military Force (AUMF), which authorized the President “to use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks” against the United States.”. On 13 November 2001, G.W. Bush issued an Executive Order, titled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”.⁷⁷ That Presidential Military Order called for the creation of U.S. Military Commissions to try persons suspected of being members of al Qaeda, persons suspected of being involved with international terrorism harmful to the U.S., or persons who harbored members of al Qaeda or persons involved with international terrorism harmful to the U.S.

In furtherance of an unprecedented “war on terrorism”, the U.S. began arresting or capturing men and boys in Afghanistan and elsewhere around the globe, and in January 2002 began delivering these men and boys to Guantanamo Bay, Cuba, and holding them in Camp X-Ray, an outdoor pen constructed of wire and tin.⁷⁸

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

Military Commission Act of 2009 Crimes that are Traditional War Crimes

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

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

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

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

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

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

interrogation, which included enhanced interrogation, which included water-boarding, which the U.S. government now concedes constituted torture.

Between the 13 November 2001 Presidential Military Order and the Military Commission Act of 2009 that currently governs the Guantanamo Bay proceedings, multiple attempts were had to create a viable Military Commission system, but the U.S. Supreme Court and other authorities intervened, with multiple iterations of the Military Commissions being ruled violative of international and / or domestic U.S. law. The proceedings commenced numerous times, only to be halted when a new authority deemed the proceedings either contrary to the U.S. Constitution, contrary to the Geneva Conventions, or otherwise illegal. The Congressional, Executive Branch and Supreme Court history leading to the MCA of 2009 is well documented, and will not be examined in this *Manual* in detail.⁷⁹ The MCA of 2009 has limited jurisdiction⁸⁰



NGO Observer with JTF-GTMO escort visiting Camp X-Ray where detainees in orange jumpsuits were held in 2002. Photo taken November 2014 during Hadi al Iraqi hearings. NGOs were again prohibited from touring Camp X-Ray during hearings the next month, December 2014, in the case against the five 9-11 defendants.

Much has been written about the failures of these earlier Military Commission iterations,⁸¹ and will

Military Commission Act of 2009 and persons subject to trial pursuant to the Authorization for the Use of Military Force of 2001.

⁷⁹ See, e.g., Elsea, Jennifer K., *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues* (Congressional Research Service, 7 March 2014).

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

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

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

In 2006 the United States Supreme Court ruled in *Hamdan v. Rumsfeld* that the Military Commissions in place at that time were in violation of law because, *inter alia*, they failed to satisfy the requirement in Common Article 3 of the Geneva Convention that such Military Commissions be a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” 548 U.S. 557 (2006), *rev’g* 415 F.3rd 33 (D.C. Cir. 2005) Congress responded to the Supreme Court by enacting the Military Commission Act of 2006. In 2008, the U.S. Supreme Court, in *Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2229 (2008) deemed the MCA of 2006 unconstitutional because it suspended the writ of habeas corpus of prisoners held at Guantanamo Bay, and ruled that those prisoners had the right to challenge their detention in U.S. federal courts. By invalidating the Military Commissions created pursuant to the Presidential Military Order of 2001, the Supreme Court in *Hamdan* made clear that the attempts of the Bush administration to strip federal courts of jurisdiction were of not avail. The Supreme Court ruled that Military Commission created through Congressional action must follow rules like those in the Uniform Code of Military Justice (UCMJ).

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

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

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

not be repeated here in this *Manual*.

b. Law governing U.S. Military Commissions

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

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

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

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

- (a) Any “alien unprivileged enemy belligerent,”⁸³ which excludes any “privileged belligerent” who,⁸⁴
 - (1) Has engaged in hostilities against the United States or its coalition partners; or
 - (2) Has purposefully and materially supported hostilities against the United States or its coalition partners; or

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

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

- i. the *al Nashiri case* (a/k/a the *U.S.S. Cole case*) (against *Abd al Rahim al Nashiri*, an alleged mastermind of the attack on the U.S. naval ship docked in Yemen, killing 17 sailors and wounding over 35);
- ii. the *9-11 case* (against *Khalid Shaik Mohammad* and four other alleged masterminds of the World Trade Center and Pentagon attacks of September 2001). The four other defendants in this case are *Walid bin Attash*, *Ramzi bin al Shibh*, *Ammar al Baluchi*, and *Mustafa al Hawsawi*. Originally 6 defendants were to be prosecuted, which is why there are 6 defense tables in the GTMO courtroom. One defendant was dropped.
- iii. the *Hadi al Iraqi / Nashwan al Tamir* -- an alleged high level al Qaeda liaison with the Taliban)

In June 2017, Riduan Isamuddin (“Hambali”) was charged with offenses related to the 2002 Bali, Indonesia, nightclub bombings and the 2003 Jakarta, Indonesia, Marriott Hotel bombing. However, those charges were not accepted by the Convening Authority and no GTMO military commission has been convened in that case.

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

⁸² See *infra* at xxx – yyy.

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

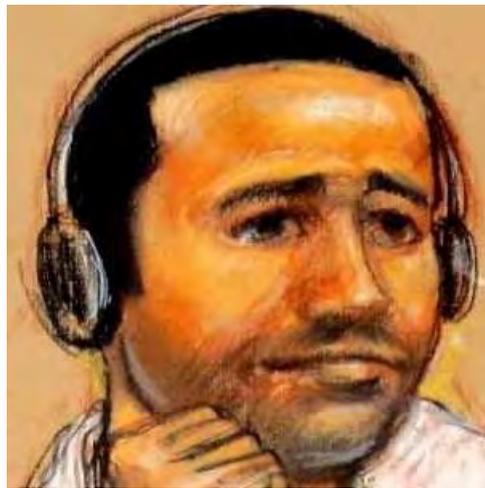
⁸⁴ A privileged belligerent would include “an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War,” 10 U.S.C. § 948a(6).

(3) Was a part of Al Qaeda at the time of the alleged offense.⁸⁵

d. Active Guantanamo Bay Military Cases

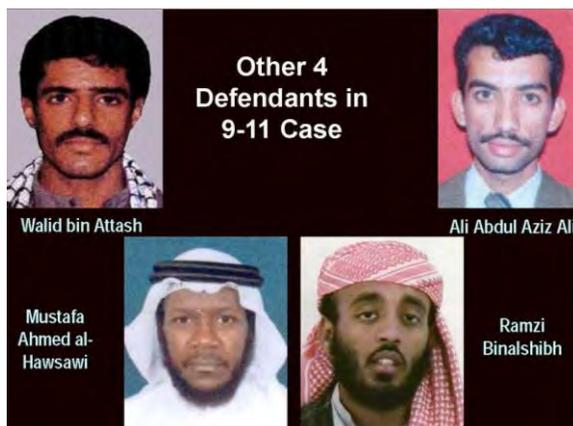
When the *Guantanamo Bay Fair Trial Manual* was launched at Guantanamo Bay, Cuba in August 2014, there were three “active” Guantanamo Bay cases convened under the Military Commission Act of 2009 in which pre-trial hearings were ongoing or were scheduled, with these hearings being at varying stages. The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

- i. the *al Nashiri case* (a/k/a the *U.S.S. Cole case*) (against an alleged mastermind of the attack on the U.S. naval ship docked in Yemen, killing 17 sailors and wounding over 35). Abd al Rahim al Nashiri, a native of Saudi Arabia, was captured in 20xx, and taken to Guantanamo Bay in xxx. He was arraigned on 9 November 2011 on charges relating to the bombing of the USS Cole (a U.S. warship) on 12 October 2000, the French vessel MV Limburg on 6 October 2002, and the attempted bombing of the USS The Sullivans (a U.S. warship) on 3 January 2000. The nine referred charges, conviction of which could attract the death penalty, are: **Charge I** — using treachery or perfidy (10 U.S.C. § 950t(17)); **Charge II** — murder in violation of the law of war(10 U.S.C. § 950t(15)); **Charge III** — attempted murder in violation of the law of war (two specifications) (10 U.S.C. § 950t(28)); **Charge IV** — terrorism (two specifications) (10 U.S.C. § 950t(24)); **Charge V** — conspiracy to commit terrorism and murder in violation of the law of war(10 U.S.C. § 950t(29)); **Charge VI** — intentionally causing serious bodily injury(10 U.S.C. § 950t(13)); **Charge VII** — attacking civilians(10 U.S.C. § 950t(2)); **Charge VIII** — attacking civilian objects (10 U.S.C. § 950t(3)); and **Charge IX** — hijacking or hazarding a vessel or aircraft(10 U.S.C. § 950t(23)).⁸⁶



Abd Al-Rahim Al-Nashiri (By Janet Hamlin) (reprint permission being requested)

- ii. the *9-11 case* (against Khalid Shaikh



Mohammad and four other alleged masterminds of the World Trade Center and Pentagon attacks of September 2001)⁸⁷. The five defendants are charged

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

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

⁸⁷ During the 2014 summer, the judge in the 9-11 case *sua sponte* severed one of the defendants, who was ordered to stand trial separate from the other defendants in the case. However, the judge reconsidered and then reversed his ruling, with the case proceeding against all 5 defendants. In the same 9-11 case, a different defendant has sought to be severed.

with: conspiracy, attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or hazarding a vessel or aircraft, terrorism. The other four defendants are *Walid bin Attash*, *Ramzi bin al Shibh*, *Ammar al Baluchi*, and *Mustafa al Hawsawi*. In mid-2014 the military judge ordered the case of defendant bin Attash severed from the other four defendants, but following objections by the prosecution the judge ordered the case rejoined for trial against all five defendants. Defendant al Hawsawi requested that the court sever his case from the other four. All five 9-11 defendants are currently scheduled to be tried in one joint trial despite calls for severance.

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



Hadi al Iraqi / Nashwan al Tamir
(Sketch by Janet Hamlin, reprint permission being requested)

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

The MCA of 2009 makes it clear that the U.S. Military Commissions are “war crimes courts”, not “terrorism courts”. The MCA of 2009 permits prosecutions for many crimes against the laws and customs

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

- (1) **David Hicks**. Australian. Guilty plea in 2007. First military commission conviction since WW II. Now free in Australia. Case **overturned** by the Court of Military Commission Review (CMCR) on 18 February 2015.
- (2) **Salim Hamdan**. Sudanese. Osama bin Laden's driver. Convicted at trial. Federal court **overturned** his material support for terrorism conviction as not being a “war crime”. (2012)
- (3) **Ali Hamza al Bahlul**. Yemeni. Media aid to bin Laden. Convicted at trial. Serving life in at GTMO. (2008). Conspiracy conviction overturned June 2015 reinstated in 2016; material support for terrorism conviction already overturned.
- (4) **Ibrahim al Qosi**, Sudanese. Guilty plea -- material support to terrorism & conspiracy. Now free. **Lawyers seeking to have his conviction overturned**, but snarled because his location is unknown and it is not clear if lawyers can represent him in this challenge without his express consent. (2010)
- (5) **Omar Khadr**. Canadian. Guilty plea. Teen when captured. Repatriated to Canada to serve sentence remainder. Now free.
- (6) **Noor Uthman Mohammed**. Sudanese. Guilty plea to material support for terrorism and conspiracy. Camp small-arms instructor. Free in Sudan as of 2013. **Convening authority dismissed charges / sentence 9 January 2015.**
- (7) **Majid Shoukat Khan**. Pakistani. Guilty plea. Sentence only after his testimony against other captives. (29 February 2012) (modified guilty plea 13 September 2016 - dropped material support for terrorism charge)
- (8) **Ahmad al Darbi**. Saudi. Guilty plea. October 2002 attack on the Limburg, a French oil tanker. (2014). Sentenced in 2017. In May 2018 transferred to Saudi Arabia to serve remainder of sentence.

*Figures from Pentagon, NGO website & press (including the Miami Herald) (4 of 8 convictions overturned or disapproved)

of war, as codified in the Geneva Conventions and other international humanitarian law treaties. Most of the MCA of 2009 crimes are squarely violations of conventional and customary international humanitarian law, and are thus war crimes.⁸⁸ The U.S. considers the remaining crimes to violate the law of war given that the acts underlying the crimes would be perpetrated during hostilities (armed conflict).⁸⁹

f. Torture

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

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

In November 2014, the United Nations Committee Against Torture issued *Concluding Observations* on the U.S. report to that Committee and the U.S. appearance before that Committee. The *Concluding Observations* are reproduced in *Appendix XYZ*.

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

g. Period Review Boards (PRBs)

On 7 March 2011 President Obama issued an

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

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

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

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

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

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

Executive Order that he noted would help ensure that military detention of individuals held at Guantanamo Bay “continues to be carefully evaluated and justified, consistent with the national security and foreign policy interests of the United States and the interests of justice”.⁹⁰

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

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

The Executive Order, pursuant to section 1(a) (scope and purpose), provided that [t]he periodic review described in section 3 of this order applies only to those detainees held at Guantánamo on the date of this order, whom the interagency review established by Executive Order 13492 has (i) designated for continued law of war



Judge Aline Fagundes, then an LL.M. student at Indiana University McKinney School of Law, traveled to the Pentagon for a Periodic Review Board (PRB). Photos are permitted in the Visitors’ Area, but not in the conference room where PRBs are broadcast live from Guantanamo Bay. February 2017.



Professor George Edwards from Indiana University McKinney School of Law and his three students from Chulalongkorn University Faculty of Law (Bangkok, Thailand))

detention; or

(ii) referred for prosecution, except for those detainees against whom charges are pending or a judgment of conviction has been entered.”

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

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

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

⁹⁰ Executive Order 13567--Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force (<https://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba>). For the complete text of the Executive Order, please check Appendix XYZ.

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

⁹² *Id.*

⁹³ *Id.*

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

[More on PRBs can be found at the *Periodic Review Board (PRB) Project of Gitmo Observer* -- <https://gitmoobserver.com/2016/07/04/periodic-review-board-prb-project-of-the-gitmo-observer/>. More on PRBs is forthcoming in this Manual. See also Appendix XYZ, which provides additional PRB information.] [Since 14 July 2016, Professor George Edwards and an Indiana law student have attended multiple PRBs held at the Pentagon.]

h. Closing Guantanamo Bay – From 2009 - 2016

On 22 January 2009, just after President Obama took office, he signed an Executive Order calling for the closure of the Guantanamo Bay Detention Facilities.⁹⁴ In his 2015 State of the Union Address, President Barack Obama stated:

“As Americans, we have a profound commitment to justice – so it makes no sense to spend three million dollars per prisoner to keep open a prison that the world condemns and terrorists use to recruit. Since I’ve been President, we’ve worked responsibly to cut the population of GTMO in half. Now it’s time to finish the job. And I will not relent in my determination to shut it down. It’s not who we are.”⁹⁵

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

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

On closing Guantanamo Bay . . .

“For many years, it has been clear that the detention facility at Guantanamo Bay does not advance our national security—it undermines it. It’s counterproductive to our fight against terrorists, who use it as propaganda in their efforts to recruit. It drains military resources, with nearly \$450 million spent last year alone to keep it running and more than \$200 million in additional costs needed to keep it open going forward. Guantanamo harms our partnerships with allies and other countries whose cooperation we need against terrorism.”

President Barack Obama
23 February 2016

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

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

⁹⁴ Executive Order –Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities (22 January 2009) (www.whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities) (See Appendix XYZ0)

⁹⁵ www.WhiteHouse.gov, Tuesday, 20 January 2015.

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

4. "We're going to work with Congress to find a secure location in the United States to hold remaining detainees. These are detainees who are subject to military commissions, as well as those who cannot yet be transferred to other countries or who we've determined must continue to be detained because they pose a continuing significant threat. We are not identifying a specific facility today." [Emphasis in the original]

[More discussion about closing Guantanamo forthcoming.]

On 30 January 2018, President Trump issued an Executive Order that stated “detention operations at the U.S. Naval Station Guantánamo Bay are legal, safe, humane, and conducted consistent with United States and international law”. The Order revoked President Obama’s Executive Order on closing Guantanamo (Section 3 of Executive Order 13492 of January 22, 2009). The Order further stated that Guantanamo detention operations “shall continue to be conducted”. The Order provided, in part:

Section 1. Findings.

(a) Consistent with long-standing law of war principles and applicable law, the United States may detain certain persons captured in connection with an armed conflict for the duration of the conflict.

(b) Following the terrorist attacks of September 11, 2001, the 2001 Authorization for Use of Military Force (AUMF) and other authorities authorized the United States to detain certain persons who were a part of or substantially supported al-Qa’ida, the Taliban, or associated forces engaged in hostilities against the United States or its coalition partners. Today, the United States remains engaged in an armed conflict with al-Qa’ida, the Taliban, and associated forces, including with the Islamic State of Iraq and Syria.

(c) The detention operations at the U.S. Naval Station Guantánamo Bay are legal, safe, humane, and conducted consistent with United States and international law.

(d) Those operations are continuing given that a number of the remaining individuals at the detention facility are being prosecuted in military commissions, while others must be detained to protect against continuing, significant threats to the security of the United States, as determined by periodic reviews.

(e) Given that some of the current detainee population represent the most difficult and dangerous cases from among those historically detained at the facility, there is significant reason for concern regarding their reengagement in hostilities should they have the opportunity.

Sec. 2. Status of Detention Facilities at U.S. Naval Station Guantánamo Bay.

(a) Section 3 of Executive Order 13492 of January 22, 2009 (Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities), ordering the closure of detention facilities at U.S. Naval Station Guantánamo Bay, is hereby revoked.

On repopulating Guantanamo Bay . . .

President Obama’s Executive Order to close Guantanamo “is hereby revoked”.

“Detention operations at U.S. Naval Station Guantánamo Bay shall continue to be conducted”

The “United States may transport additional detainees to U.S. Naval Station Guantánamo Bay when lawful and necessary to protect the Nation”.

**President Trump
30 January 2018**



(b) Detention operations at U.S. Naval Station Guantánamo Bay shall continue to be conducted consistent with all applicable United States and international law, including the Detainee Treatment Act of 2005.

(c) In addition, the United States may transport additional detainees to U.S. Naval Station Guantánamo Bay when lawful and necessary to protect the Nation.

(d) Within 90 days of the date of this order, the Secretary of Defense shall, in consultation with the Secretary of State, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the heads of any other appropriate executive departments and agencies as determined by the Secretary of Defense, recommend policies to the President regarding the disposition of individuals captured in connection with an armed conflict, including policies governing transfer of individuals to U.S. Naval Station Guantánamo Bay.

(e) Unless charged in or subject to a judgment of conviction by a military commission, any detainees transferred to U.S. Naval Station Guantánamo Bay after the date of this order shall be subject to the procedures for periodic review established in Executive Order 13567 of March 7, 2011 (Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force), to determine whether continued law of war detention is necessary to protect against a significant threat to the security of the United States.

DRAFT



VIII. General Information About the Case to Be Observed

1. General information about the case

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

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

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

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

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

1. General Information	
What is the name of the NGO Observer?	
What is the NGO Observer’s affiliation?	
What are the NGO Observer’s observation dates?	
Will the NGO Observer observe in the courtroom at Guantanamo Bay, Cuba?	
Will the NGO Observer observe at a remote viewing location (CCTV) at Ft. Meade (Maryland), Ft. Devins (Massachusetts), or Camp Bulkeley (Guantanamo Bay Naval Station), or elsewhere?	
How many other NGO Observers were present at Ft. Meade or Guantanamo Bay?	



Were there fewer than 13 or 14 NGOs present at GTMO (the maximum number traditionally permitted to travel to GTMO to observe)?	
Understanding Your NGO Observer Mission	
Did the NGO that is sponsoring your NGO Observer provide you with a Terms of Reference to outline your goals and responsibilities during your Military Commission observation mission?	
If you are an NGO Observer, are your objectives (per your Terms of Reference) to attend, observe, analyze, critique and report on the U.S. Military Commissions at Guantanamo Bay, Cuba?	
If you are an NGO Observer and your objectives (per your Terms of Reference) are not to attend, observe, analyze, critique and report on the U.S. Military Commissions at Guantanamo Bay, Cuba, then what are the NGO Observer’s objectives (or Terms of Reference) regarding the Military Commissions?	
Do you understand your NGO Observer mission to require you to focus primarily on the criminal justice system process, rather than on the substantive crimes?	
Do you understand your NGO Observer mission to require you not to seek to intervene in the proceedings, but to observe or monitor?	
Do you understand your NGO Observer mission to permit you to express views publicly (to the press or otherwise) on substantive aspects of the case, on procedural aspects of the case, or on both substantive and procedural aspects of the case?	
Do you understand your NGO Observer mission to permit you to evaluate evidence proffered by the government and the defense, or to weigh the evidence and draw conclusions as to whether the prosecution has met its burden of proof on the question of guilt?	
Does your NGO Observer mission require you to focus on the procedural aspects of the case, that is, whether the binding international and domestic law is being applied properly, in accordance with rules governing the right to a fair trial?	
Have you learned what material you will be permitted to take into the Guantanamo Bay courtroom or alternative viewing site so that you can take copious notes of the proceedings?	
What reporting obligations do you as an NGO Observer have pursuant to your Terms of Reference ?	



Have you figured out how you will be able to post blog entries or send reports or updates to your sending NGO or disseminate this information electronically or otherwise?	
Will your host NGO Organization reimburse you any costs associated with connecting to the internet in the GTMO NGO Resource Center or connecting using any other GTMO mechanism?	
Preparation for NGO Observer Mission	
How did you prepare for your NGO Observer mission?	
Did you review the <i>Guantanamo Bay Fair Trial Manual</i> ?	
Did your visit websites of NGOs that have sent NGO Observers to Guantanamo Bay, Ft. Meade or other Military Commission viewing sites, such as www.GitmoObserver.com and mc.mil?	
Did your sending NGO provide you with a Briefing Book or other sent of substantive materials to help you prepare for your NGO Observer mission?	
If you will be observing at Guantanamo Bay, did the Office of Military Commissions send you a copy of the APACS so you could learn the identifies of other NGO Observers on your mission, permitting you to contact other NGO Observers before you travel?	
If the Office of Military Commissions did not send you a copy of the APACS, did that office otherwise send you a list of the names, organizations, and contact information for the other NGO Observers on your mission?	
Did you contact other NGO Observers before your departure for Guantanamo Bay, to coordinate travel arrangements, to discuss substantive issues, or for other purposes	
If you are an NGO Observer, did you blog or otherwise publish any articles or other items related to your NGO mission before the mission commenced?	
Before your departed for your Observation mission, did you feel that you were prepared?	
Did your NGO Observation meet your expectations?	



<p>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, including mc.mil.)</p>	
<p>Identity and Personal Details of the Defendant</p>	
<p>What is the defendant’s name (or the name he is commonly known as)?</p>	
<p>If there are co-defendants, who are they?</p>	
<p>What is the defendant’s nationality?</p>	
<p>Does the defendant have more than one nationality?</p>	
<p>What is the defendant’s date of birth?</p>	
<p>Was the defendant a juvenile when he allegedly engaged in the alleged criminal behavior?</p>	
<p>Was the defendant a juvenile when taken into custody?</p>	
<p>The Charges Against the Defendant</p>	
<p>What is the general thrust of the primary allegations against the defendant?</p>	
<p>Was the defendant charged with one or more of the following “traditional war crimes” that are provided for in the Military Commission Act of 2009:</p> <p>(1) Murder of Protected Persons; (2) Attacking Civilians; (3) Attacking Civilian Objects; (4) Attacking Protected Property; (5) Pillaging; (6) Denying Quarter; (7) Taking Hostages; (8) Employing Poison or Similar Weapons; (9) Using Protected Property As A Shield; (10) Torture; (11) Cruel or Inhuman Treatment; (12) Intentionally Causing Serious Bodily Injury; (13) Mutilating or Maiming; (14) Murder in Violation of the Law of War; (15) Destruction of Property in Violation of the Law of War; (16) Using Treachery Or Perfidy; (17) Improperly Using a Flag Of Truce; (18) Improperly Using A Distinctive Emblem; (19) Intentionally Mistreating a Dead Body; (20) Rape; (21) Sexual Assault or Abuse?</p> <p>(The numbers of the crimes correspond to their numbers in the MCA of 2009.)</p>	

<p>Was the defendant charged with one or more of the following “non-traditional war crimes” that are provided for in the Military Commission Act of 2009:</p> <p>(22) Hijacking or Hazarding a Vessel or Aircraft; (23) Terrorism; (24) Providing Material Support for Terrorism (no longer being charged, with convictions for this charge overturned); (25) Wrongfully Aiding the Enemy; (26) Spying; (27) Attempts; (28) Conspiracy (no longer being charged, with convictions for this charge overturned); (29) Solicitation; (30) Contempt; (31) Perjury and Obstruction of Justice; (32) Obstruction of Justice?</p> <p>(The numbers of the crimes correspond to their numbers in the MCA of 2009.)</p>	
What is the first crime the defendant is charged with?	
What is the second crime the defendant is charged with?	
What is the third crime the defendant is charged with?	
What is the fourth crime the defendant is charged with?	
What is the fifth crime the defendant is charged with?	
Is the defendant an alleged member of al Qaeda?	
Is the defendant an alleged member of the Taliban?	
Defendant’s Custody Period and Location	
When was the defendant taken into custody?	
Where has the defendant been detained?	
Was the defendant at any point held in a “black site” located outside the U.S.?	
Is mental capacity an issue with regard to the defendant?	
Is the defendant considered to be a High Valued Detainee (HVD)?	

DRAFT



[Page Intentionally Blank]

DRAFT



A. Right to be Presumed Innocent Until Proved Guilty According to Law (Right to Presumption of Innocence); Right to Burden of Proof Being on the Prosecution

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

a. General

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

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

The right to be presumed innocent is expressly provided for the ICCPR, Additional Protocol I and Additional Protocol II of the Geneva Conventions, and the Universal Declaration of Human Rights, and is considered to be one of "*the judicial guarantees which are recognized as indispensable by civilized peoples*" required in criminal tribunals per Common Article 3 of the Geneva Conventions), which binds the U.S.⁹⁷

ICCPR Article 14(2) provides:

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

This right is provided for under customary international law as reflected in numerous international, non-binding treaties, such as the⁹⁸ Additional Protocol I and Additional Protocol II to the Geneva Conventions of 1949.

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

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

⁹⁷ Treaties that address presumption of innocence that *bind the U.S.* include: *International Covenant on Civil & Political Rights (ICCPR)*, article 14(2); *Common Article 3 to the 4 Geneva Conventions of 1949*; *ICTY Statute*, article 21(3) ("The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute"); and *ICTR Statute*, article 20(3) ("The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute").

⁹⁸ Treaties that address presumption of innocence that *do not bind the U.S.* include: *American Convention*, article 8(2) ("Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law".) (The U.S. signed this treaty, but did not ratify it.); *European Convention on Human Rights*, article 6(2) ("Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"); *EU Charter of Fundamental Rights*, Article 48(1) ("everyone who has been charged shall be presumed innocent until proven guilty according to law"); and *ICC Statute*, article 66(1) ("Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.")

law.

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

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

This right is also provided for in non-treaty, non-binding international instruments.⁹⁹

c. International jurisprudence.

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

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

The United Nations Human Rights Committee, acting as an adjudicative body, found in *Dimitriy Leonodovich Gridin v Russian Federation*,¹⁰⁰ that the ICCPR was violated when high ranking government officials’ statements portraying the defendant as guilty were given wide media coverage, noting “a duty for all public authorities to refrain from prejudging the outcome of a trial”.

The European Court of Human Rights, in *Allenet De Ribemont V. France*,¹⁰¹ found that the presumption of innocence was violated by non-judicial officers who made statements outside of court about the defendant.

In *Hulki v. Turkey*, the European Court of Human Rights found that the presumption of innocence was violated by a judge’s statements, and that violations can also be found when a judge opines or acts as though a defendant is guilty before the trial is over, and may be violated when non-judicial public officials make statements encouraging the public to believe that the defendants are guilty, before the trial is concluded. The Court noted that officials may comment about a defendant, the officials must use discretion and circumspection, and avoid prejudging the defendant.¹⁰²

Secondary non-tribunal sources. Many law review articles and other secondary sources address the right to be presumed innocent.¹⁰³

⁹⁹ Non-Treaty International Instruments that do not bind the U.S. but that incorporate customary international law principles that do bind the U.S. include: *UDHR*, article 11 (“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”); *Body of Principles on Detention or Imprisonment*, Principle 36(1); *African Commission Resolution*, Paragraph 2(D); *Cairo Declaration on Human Rights in Islam*, article 19(e) (1990) (“A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence”). The African Commission’s *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, section N(d) (e) provides: “Public officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect”.

¹⁰⁰ Merits, UN Doc CCPR/C/69/D/770/1997, Communication No 770/1997, (2001) 8 IHRR 41, IHRL 2043 (UNHRC 2000), 18th July 2000, Human Rights Committee <http://www1.umn.edu/humanrts/undocs/session69/view770.htm>

¹⁰¹ European Court of Human Rights, (Application no. 15175/89), Judgment of 10 February 1995, paras 35-36, 41 ([http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57914#{"itemid":\["001-57914"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57914#{))

¹⁰² General Comment 32, para xyz.

¹⁰³ For further reading on the presumption of innocence, see Shima Baradaran, *Restoring the Presumption of Innocence*, Ohio State Law Review, 724, at 726 (tracing “the history of the presumption of innocence and its constitutional basis, beginning at ancient texts and continuing through to the common law and finally U.S. cases, with a focus on pretrial rights and bail.”) (<http://pgil.pk/wp-content/uploads/2014/04/Presumption-of-innocence-by-Baradaran.pdf>); James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 YALE L.J. 185, 188–89 (1897) (stating that . . .); see also François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107, 126 (2010) (stating that . . .); 5 John Henry Wigmore, *Evidence in Trials at Common Law* § 2511, at 504 (2d ed. 1923) (the presumption of innocence “hovers over the prisoner as a guardian angel” from the moment of indictment until the verdict is determined).



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

Though the phrase “presumption of innocence” or “right to be presumed innocent” does not appear in the U.S. Constitution in, the U.S. Supreme Court acknowledges that this right is entrenched in the due process clauses of the 5th and 14th amendment.¹⁰⁴ U.S. Supreme Court cases have held that the presumption of innocence requires the prosecutor to prove guilt beyond a reasonable doubt (*Bell v. Wolfish*),¹⁰⁵ and that the Due Process Clause of the 14th Amendment provides a “safeguard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt” (*Taylor v. Kentucky*).¹⁰⁶

The Military Commissions Act of 2009,¹⁰⁷ the Uniform Code of Military Justice,¹⁰⁸ and other U.S. Military Manuals and Regulations require that defendants be afforded the right to be presumed innocent..

e. Denying access to classified information.

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

f. Burden of proof must be on the prosecution

International and domestic law require that the burden of proving guilt beyond a reasonable doubt lies squarely with the prosecution, and the defendant is not required to prove the non-existence of any element of the crime.¹⁰⁹ This right to have the burden of proof on the prosecution is closely related to, and perhaps is a flip side of, the defendant’s right to be presumed innocent until proved guilty in accordance with law.¹¹⁰

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

g. Scope of the right to be presumed innocent.

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

¹⁰⁴ The U.S. Supreme Court has ruled that "The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty". US 1894) (*see also* more recent U.S. cases).

¹⁰⁵ 441 U.S. 520, 582 n.11 (1979)

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

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

108

109

110



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

ii. Burden of proof. To protect a defendant’s right to be presumed innocent, the prosecution necessarily bears the burden of proving the defendant’s guilt **beyond** a reasonable doubt.¹¹¹ Whether the evidence against the defendant is overwhelming or sparse, the defendant is presumed to be innocent until and unless the prosecutor meets its high burden of proof. The defendant has the right to the benefit of doubt, and all persons must treat defendants accordingly.

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

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

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

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

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

3. Right to be Presumed Innocent until proved guilty according to law (U.S. Constitution, 5th & 14th Amendment Due Process Clauses; Military Commission Act of 2009, § ___; ICCPR, art 14(2))				
	Yes	No	Don’t Know	Co mm
Comments About the Defendant’s Guilt				
Do you know whether the prosecution has made comments about the guilt of the defendant?				
Do you know whether the judge has made public comments about the guilt				

¹¹¹ See, supra



of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				
Do you know whether any members of the press have made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				
Do you know whether defense counsel has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				
Do you know whether any family members of victims have made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				
Do you know whether a former the U.S. President has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				
Do you know whether the current U.S. President has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				
Do you know whether a former U.S. Secretary of Defense has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				
Do you know whether the current U.S. Secretary of Defense has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				
Do you know whether any other current or former U.S. government official has made any public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				
Do you know whether any government leaders of other countries have made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				
Do you know whether any other stakeholders of the Military Commissions made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				
The Physical Appearance of the Defendant – In the Courtroom				
Did you see the defendant as he was being escorted into the courtroom?				
Did you see the defendant as he sat at the defense table in the courtroom?				
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?				
If the defendant was wearing handcuffs, were his hands cuffed in front of his body or behind his back?				
How many uniformed security officers were present in the courtroom guarding each defendant?				
Were there more than 4 uniformed security officers present in the courtroom for each defendant?				
How close to the defendants were the uniformed security guards sitting or standing?				
Right to Remain Silent				
Did the defendant exercise his right to remain silent during the course of the pre-trial hearings you observed?				
Did the judge require the defendant to speak at any time?				
Did the judge ask the defendant whether the defendant understood his right to be present or did the judge ask about any other right of the defendant? If so, did the defendant answer aloud? Did the judge require the defendant to answer aloud?				
Was there anything to suggest that the judge inferred guilt from the silence of the defendant?				
Was the defendant required to testify under oath?				
Did the judge inform the jury that the jury must not draw any negative inferences from the defendants choice to remain silent?				



Denying Defendant Access to Classified Information; Excluding Defendant from Portions of the Trial				
Do you know whether the defendant requested particular information from the prosecution and the prosecution refused to provide the information on the grounds that the information was classified?				
If the prosecution refused to provide information to the defendant on the grounds that the information was classified, to the best of your knowledge was this denial in part due to the presumption that the defendant was guilty, untrustworthy, or likely to be noncompliant with the law—even though the prosecution and the court are meant to presume that the defendant is not guilty and has not committed the crime charged?				
Length of Pre-Trial Detention				
How long was the defendant in detention pre-trial?				
Does the length of pre-trial detention suggest that the defendant is not presumed innocent? Or, did the length of pre-trial detention suggest that the defendant was guilty?				
Has the government indicated that if the defendant is acquitted of all charges, that the defendant <i>would be</i> released from Guantanamo Bay?				
Has the government indicated that if the defendant is acquitted of all charges, that the defendant <i>would not be</i> released from Guantanamo Bay?				
Role of Media				
Do you know whether any the media has made public comments about the guilt of the defendant? If so, what were the comments? Did the comments suggest that the defendant was guilty?				

4. Right to Have the Burden of Proof on the Prosecution (U.S. Constitution, 5th & 14th Amendment Due Process Clauses)				
	Yes	No	Don't Know	Comment
Does the burden of proof lie wholly on the prosecution throughout the process, for each crime charged?				



Does the burden of proof lie wholly on the prosecution throughout the process, for each element of each crime charged?				
Are the procedural rules in these proceedings such that the prosecution retains the full burden of proof?				

DRAFT



D. Right to Trial by an Independent, Impartial and Competent Tribunal

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

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

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

a. General

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

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

Independence of the Judiciary:

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

Impartial Judiciary:

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

A competent tribunal is one in which a judge is:

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

In order to demonstrate to the international community a high level of competence a Military Commission Judge must be able to execute duties meritoriously and to the highest possible standard available.



c. Binding Treaties which call for Independent, Impartial and Competent Tribunals

- International Covenant on Civil and Political Rights (ICCPR)
- Geneva Convention I, II, III, IV of 1949: “Common Article 3”
- International Criminal Tribunal for the Former Yugoslavia (ICTY)
- International Criminal Tribunal for Rwanda (ICTR)

The right to trial by an independent, impartial and competent tribunal established at law can be found firmly embedded in the “judicial guarantees which are recognized as indispensable by civilized peoples” provided for in in International Covenant on Civil and Political Rights (ICCPR) art 14(1)¹¹⁸ and, though not binding, generally accepted by the international community Common Article 3 of the Geneva Conventions¹¹⁹. In each of the international instruments, you will find a clear reference to the requirement to afford the accused a “independent, impartial, and competent trial.”

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

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

Common Article 3 of the Geneva Conventions prohibits:

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

International Criminal Tribunal for the Former Yugoslavia (ICTY)

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

Article 20 – Commencement and Conduct of Trial Proceedings

“[T]hat proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused ...”

International Criminal Tribunal for Rwanda (ICTR)

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

¹¹⁸ ICCPR article 14 applies to all U.S. criminal courts, including the Guantanamo Bay military commissions. The U.S. is not permitted to deviate from ICCPR requirements due to any special nature or character of the military commissions, as compared to a U.S. federal or state court. See *General Comment No. 32, infra*, note xyz, para abc (citing *Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, art. 64; *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 11 (2004).

¹¹⁹ Common Article 3 does not expressly use the terms “independent”, “impartial” or “competent”, but it does require that criminal courts must afford “all the judicial guarantees which are recognized as indispensable by civilized peoples”, with those judicial guarantees being found to include a competent, independent and impartial tribunal.



Article 19 – Commencement and conduct of trial proceedings
“[T]hat proceedings are conducted in accordance with the rules of procedure and evidence ...”

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

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

- American Convention On Human Rights “Pact of San Jose, Costa Rica”
- European Convention On Human Rights
- Rome Statute of International Criminal Court (ICC)¹²⁰
- Geneva Convention: Protocol I & II
- Charter of Fundamental Rights of European Convention
- African (Banjul) Charter On Human and Peoples Rights

Customary international law principles, incorporated into many non-binding international law instruments,¹²¹ and as interpreted in international and domestic jurisprudence,¹²² call for independent, impartial and competent tribunals:

¹²⁰ Rome Statute of International Criminal Court (ICC)

Article 36 – Qualifications, Nomination and Election of Judges

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

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

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

Article 40 – Independence of the Judges

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

Article 45 – Solemn Undertaking

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

Article 67 – Rights of the Accused

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

¹²¹ The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is incorporated into the following international instruments: *UDHR*, Article 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”); *Principles on the Independence of the Judiciary*, Principle 2 (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”); *American Convention*, Article 8(1); and *European Convention*, Article 6(1).

¹²² See, e.g., *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).

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

Article 8 – Right to a Fair Trial

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

European Convention On Human Rights

Article 6 – Right to a Fair Trial

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

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

Article 75 – Fundamental Guarantees

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

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

Article 6 – Penal Prosecutions

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

Charter of Fundamental Rights of European Convention

Article 47 – Right to an Effective Remedy and to a Fair Trial

“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”

African (Banjul) Charter On Human and Peoples Rights

Article 7

“... [R]ight to an appeal to a competent national organ against acts ...”

“... [R]ight to be presumed innocent until proved guilty by a competent court ...”

“... [R]ight to be tried within a reasonable time by an impartial court or tribunal.”

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

- United States Constitution
- U.S. Supreme Court
- Military Commission Act of 2009, § 949b,¹²³

¹²³ § 949b is titled “Unlawfully Influencing Action of Military Commission and United States Court of Military Commission”. Section 1-4 of the Regulation for Trial by Military Commissions interprets § 949b and provides:

1-4. Unlawful Influence in Military Commissions Proceedings

10 U.S.C. § 949b, prohibits unlawful influence in military commissions proceedings. All persons involved in the administration of military commissions must avoid the appearance or actuality of unlawful influence and otherwise ensure that the military commission system is free of unlawful influence. In addition, all persons, even those not officially



- Uniform Code of Military Justice (UCMJ)
- U.S. Military Commission Documents
- E.g. Rules of Court, Regulations, Case Filings, etc.

Almost every binding and non-binding source of international law discussed incorporates some form of Judicial independence, impartiality and competence. Therefore, the international community has accepted these basic common human rights afforded to an accused. Further, the International Community acknowledges the right to be tried by competent Judges who are both independent and impartial to the judiciary they are assigned.

U.S. Constitution

Sixth Amendment

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

U.S. Supreme Court

The Supreme Court rejected a Due Process challenge to the lack of fixed terms for military judges because the; “[A]pplicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve impartiality so as to satisfy the Due Process Clause.”¹²⁴

Military Commissions Act of 2009

948d. – Jurisdiction of Military Commissions

“... . A military commission is a competent tribunal to make a finding sufficient for jurisdiction.”

948k. – Trial Counsel

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

948k. –Defense Counsel

“[A] military defense counsel detailed for a military commission ... Certified as competent to perform duties as defense counsel ...”

Uniform Code of Military Justice (UCMJ)

Article 37 –Unlawfully Influencing Action of Court

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

Other MC Documents

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

¹²⁴ Weiss v. United States, 510 U.S. 163, 180 (1994)

“[R]equest abatement of proceedings until such time as the Department of Defense establishes and independent trial judiciary ...”¹²⁵

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

To determine whether the Military Commissions are independent, one should look to two sets of criteria; 1) criteria related to the appointing, assessing and retaining of Military Commission Judges; and 2) whether Military Commission judges are free from undue external influences.¹²⁶ If the Military Commissions do not satisfy either of these two tests, then they will not be deemed independent.

i. Independence related to appointing, assessing and retaining judges

International law and domestic U.S. law require courts to have in place objective and transparent criteria for selecting, paying, retaining, promoting, transferring, suspending, and removing judges.¹²⁷ Objective, fair standards should be in place to determine who is eligible to be a judge, what the selection criteria is, how the judge’s performance is evaluated, and how and when any rewards or disciplinary sanctions are provided.¹²⁸

Even judges who are appointed with life tenure do not have unfettered discretion, and under international and domestic U.S. law should be subject to removal with a showing of good and just cause, following due process.¹²⁹ Similarly, no higher authority should be permitted to remove judges from proceedings once they have commenced, except for good and just cause.¹³⁰ Rule 505(e)(1) permits the Military Commission Chief Trial Judge to remove a judge from a case, without cause, at any point in the proceedings up until the jury is sworn.¹³¹ However, the MCA of 2009 prohibits the Convening Authority from assessing a trial judge’s effectiveness, fitness or efficiency.¹³²

ii. Independence From Undue External Interference; on the Judge, court staff, the Prosecution, the Jury, and others associated with the Military Commissions such as personnel assigned to the defense¹³³

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

¹²⁵ United States v. Abd Al Hadi Al-Iraqi

¹²⁶ Commentators may “link” the judicial independence and impartiality prongs. *See, e.g.*, Frakt, pp 563 – 64; 562-70.

¹²⁷ *General Comment No. 32 -- Article 14: Right to equality before courts and tribunals and to a fair trial*, United Nations Human Rights Committee, UN Doc CCPR/C/GC/32 (23 August 2007) (*citing Human Rights Committee Concluding Observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.*)

¹²⁸ *See id.*

¹²⁹ Violations of the Good Behavior Clause may permit removal by way of a writ of scire facias, filed before a federal court; Saikrishna Prakash & Steven D. Smith, “*How To Remove a Federal Judge*”, 116 Yale L.J. 72 (2006).

¹³⁰ *See id.*

¹³¹ Military Judges have been removed with replacements assigned several times in the Military Commissions. For example, in June 2014 Chief Trial Judge Pohl, who had assigned himself to preside over the al Nashiri and had done so since proceedings were commence in 2008, removed himself from that case and assigned a new Military Judge to that case.

¹³² 10 U.S.C. 948(j).

¹³³ Appendices N & O – *Two Rulings on Executive Branch Undue Influence on the Trial Judiciary* – March & February 2015



and authority of the U.S. military chain of command (which requires subordinates to follow orders of superiors), and on the other hand, the Military Commissions as a judicial organization.

The Military Commission is not independent of the Executive Branch (e.g., the President or Vice-President, the Secretary of Defense, or Officers through the military chain of command) can exercise control over Military Commission Judges, Military Commission staff, Military Commission Jurors (who are all military officers), others associated with the Military Commissions such as personnel assigned to the defense, or the Military Commissions itself through some other means or method.¹³⁴ The rights that apply in regular U.S. courts should also apply in U.S. Military Commissions.¹³⁵

1. Undue influence and a challenge to the judiciary's independence was litigated in the 911 hearings and the al Nashiri hearings under motions listed as AE343 and AE332 respectively.

Change #1

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

The order stated that Judges; “shall be issue assignment orders for duty at the venue where the military commissions are to be convened.” The stated reason for altering the regulation by trial judiciary was “to accelerate the pace of litigation[.]” This change, and undue influence argument became known as “Change #1”.¹³⁶

Defense Argues

The defense teams requested and sought relief against Change # 1 change and argued that the charges against the Defendants should be dismissed based on “Undue Influence.”¹³⁷

They further argued that the express purpose of this rule change is to affect the conduct of this case by “accelerat[ing] the pace of litigation,” regardless of the government’s actions in disrupting the case and its strategy of denying, delaying, and degrading discovery.¹³⁸ The actions of both the Deputy Secretary of Defense and Convening Authority constitute actual and apparent unlawful influence over the trial judiciary, the “mortal enemy of military justice.”¹³⁹

¹³⁴ See *General Comment No. 26, supra* note xyz, para abc. (citing Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.)

¹³⁵ *General Comment No. 32, supra*, note xyz, para abc (citing See UN Human Rights Committee Communication No. 1172/2003, *Madani v. Algeria*, para. 8.7.)

¹³⁶ *AE343* (Mohammad, bin ‘Atash, bin al Shibh, al Baluchi); Defense Motion to Dismiss For Unlawful Influence on Trial Judiciary, 30 January 2015; *AE343B* (Mohammad, bin ‘Atash, bin al Shibh, al Baluchi); Joint Defense Reply To Government Response To Defense Motion To Dismiss For Unlawful Influence on Trial Judiciary, 20 February 2015; *AE343C* – Ruling; Defense Motion to Dismiss For Unlawful Influence on Trial Judiciary, 25 February 2015; *AE343D* – Government; Government Notice of Rescinding of Change 1 of the Regulation for Trial by Military Commission, 27 February 2015; *AE343E* – Order; Defense Motion to Dismiss For Unlawful Influence on Trial Judiciary (Denied), 27 February 2015; *AE343F* Part 1-5 - Mohammad et al.; Joint Defense Motion to Disqualify the Convening Authority Due to Unlawful Influence (Granted in part)- 10 March 2015.

¹³⁷ 10 U.S.C. § 949b(a)(1) & (2); 10 U.S.C. § 837 (2012).

¹³⁸ *AE343*

¹³⁹ *United States v. Douglas*, 68 M.J. 349, 355 (C.A.A.F. 2010).



The Court’s Order

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

“The actions by the DEPSECDEF, on the recommendations of the Convening Authority, constitute, at least the appearance of, an unlawful attempt to pressure the Military Judge to accelerate the pace of litigation and an improper attempt to usurp judicial discretion; thereby, compromising the independence of the Military Judge. As such, Change I to R.T.M.C. violates IO U.S.C. §949b.”¹⁴⁰

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

iii. Chain of Command – Independence

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

However, each of these individuals has obligations of as “Officers of the Court” or “Officers of the Military Commissions.” The military judge is obligated to carry out his responsibilities independently and impartially. The prosecutor is loyal to his client, the U.S. government, and must zealously carry out his representation on behalf of the U.S. Defense counsel is obligated zealously to represent his client, the



¹⁴⁰ AE343

Guantanamo Bay detainee. Defense counsel must among other things, keep confidential material he receives or information he learns from his client in the course of his representation.

Though the military judge, prosecutors and defense counsel may all be military personnel, none of them is permitted to follow instructions from superiors within their military chain of command, if those instructions would force a compromise in their obligations to the court or to their clients.

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

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

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

i. Actual Bias or Prejudice (Subjective Impartiality)

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

Military Commission judges “must not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.”¹⁴¹

ii. Appearance of Bias or Prejudice (Objective Impartiality)

The Military Commissions and their judges “must also appear to a reasonable observer to be impartial.”¹⁴²

1. The issue of the appearance of bias or prejudicial behavior occurred during hearings was litigated in the case of al Nashiri, in October 2016.

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

Testimony established that shortly after the revocation of Change #1, Gill began complaining to superiors at the Convening Authority that his first line supervisors continued to review the al Nashiri case in violation of the Judge’s order.¹⁴³ Subsequently Lieutenant Commander Gill was removed from his position when he had approximately nine months left on his assignment orders.

The defense argued that Lieutenant Commander Gill was unjustly removed from his position as the only Legal Advisor on the al Nashiri case because his supervisor was bias and prejudicial against him.

¹⁴¹ *General Comment No. 32, id at para xyz. (citing UN Human Rights Committee Communication No. 387/1989, Karttunen v. Finland, para. 7.2.)*

¹⁴² *Id.*

¹⁴³ Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 10/19/2016 from 9:13 AM to 9:46 AM.

Through testimony, the defense examined officials at the Convening Authority and Gill’s first line supervisor. During those examinations the defense focused on the issue that Gill was removed without any documented cause or just reason.¹⁴⁴

i. Competent Tribunal

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

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

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

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

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

¹⁴⁴ Unofficial/Unauthenticated Transcript of the *Al Nashiri* (2) Motions Hearing Dated 12/12/2016 from 11:01 AM to 12:34 PM.

If the judge in the case removed and a new judge was assigned as a substitute and either the prosecution or defense complained, what was the result?				
Did either the prosecution or defense conduct voir dire on the judge to seek to ascertain the level of the judge's independence?				
Was the judge in the case removed?				
Were you aware of any financial considerations might give rise to actual or an air of lack of independence of the judge, for example, where a judge's decisions might be or be seen to be influenced by expected remuneration based on non-removal or reappointment?				
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?				
Was the judge in the case removed?				
Were you aware of any financial considerations might give rise to actual or an air of lack of independence of the judge, for example, where a judge's decisions might be or be seen to be influenced by expected remuneration based on non-removal or reappointment?				
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?				
Independence of the Prosecutor				
Was there any indication that the Chief Prosecutor was not fully independent?				
Independence of any Guantanamo Bay actor				
Were you aware of whether the Department of Justice or other entity outside of the prosecution exerted influence of the prosecution on a decision whether to charge a particular offense, to charge an offense in a particular way, to drop a charge against a defendant, to appeal an adverse ruling, or regarding any other matter?				
Were you aware of any incident in which a Military Commission staff				



member was subject to undue influence by the Department of Justice or any other entity outside of the court staff?				
Were you aware of an instance in which the Department of Justice or other entity outside of the defense exerted influence on a person assigned to work for a defense team that might compromise that person’s ability to perform their work independently?				
Were you aware of any individual or entity exerted or sought to exerts any undue influence upon a Military Commission jury member?				
Were you aware of any air of non-independence on the part of the judge, the Military Commission staff, the prosecution, the jury, an person assigned to work for the defense, or any other person associated with the Military Commission?				
Were you aware of any financial considerations might give rise to actual or an air of lack of independence of any Military Commission personnel, for example, where that person’s decisions might be or be seen to be influenced by expected remuneration?				

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

Did any party challenge the judge or any judicial officer on the ground of lack of impartiality? If so, what was the outcome of the challenge?				
Did the judge appear to be even-handed, as between the prosecution, defense and other actors?				
Did the judge offer all relevant stakeholders an opportunity to be heard on motions and other matters before the court?				
Did it appear as though the judge considered the law carefully, and ruled on motions without bias or favor towards any side?				
Did the judge make discriminatory comments about any party as to race, color, language, religion, political or other opinion, national or social origin, property, birth or other status?				
Were you made aware of any suggestion that the judge or any judicial officer had an interest in the case beyond their traditional role of presiding over the case?				
Was there any suggestion that the judge or any judicial officer was motivated by financial gain, political aspirations, or other improper motives in presiding over the case or in any rulings in the case?				

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, NGO Observers, victims or family members of victims, aggressively or in an intimidating or otherwise inappropriate manner?				

9. Right to Trial by a Competent Tribunal (Military Commission Act of 2009, § 949b; ICCPR, art 14(1))				
	Yes	No	Don't Know	Comment
Competence of the Court				
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 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?				



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 or has difficulty making decisions?				
Are the judge’s oral and writing ruling well-reasoned, reflection a solid command of the law and facts of the case?				
Are the rulings of the court clear, firm, direct and / or unambiguous?				
Are the judge’s oral comments and questions in open court clear?				
Based on your observations, how would you describe or rate the judge’s communication skills?				
Did it appear as though the judge was able to follow applicable rules regarding Military Commission procedure?				
General Powers of the Judge and Court				
Did the judge issue or 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 (JTF-GTMO) regarding conditions of detention or other matters related to the defendants?				
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?				



P. Right to Public Proceedings

The **right to public proceedings** requires that pre-trial, trial, and post-trial hearings be open to the public. This right is not absolute, but the government has the burden of demonstrating that the hearings should be closed. The right to a public trial is incorporated into the right to a fair trial for the defendant—mainly for defendants in a criminal trial. However, other U.S. Military Commission stakeholders also share the right to public proceedings. Such stakeholders include: the prosecution, the victims and victims’ families, the press/media, and the public. The right to public proceedings in the context of Guantanamo Bay has a challenging meaning, given the remote location of the U.S. Military Commissions – on a military base on a Caribbean Island with very limited, controlled access and very narrow opportunities for the proceedings to be viewed on the U.S. mainland.

a. General

International and domestic laws provide that defendants, and all other stakeholders, are entitled to public pre-trial hearings, trials, and post-trial hearings.⁵⁷³ Other stakeholders with the right to public proceedings include the victims and the victims’ families, family members of the defendants, the press – who may also be considered members of “the public”.

All criminal proceedings must be open to the public, except that the government may exclude the public from some proceedings if the government demonstrates that the hearings should be closed.

What does the right to public proceedings mean in the context of the U.S. Military Commissions at Guantanamo Bay, Cuba? The courtroom is on a U.S. military base on a Caribbean island, with very limited access, fully under the control of the U.S. government. A maximum of only 13 or 14 public “observers” are permitted to be in the Guantanamo Bay courtroom during any proceeding, with a very small number of seats also reserved for victims and victims’ family members. The public is also permitted to view Guantanamo Bay hearings and trials via a live video-link into the Post Theater at Ft. Meade, Maryland. That base has limited access, and knowledge about the public’s ability to attend hearings at Fr. Meade is not widespread.

[This section of the Manual will be fleshed out further, as additional research is conducted on what constitutions the “right to public proceedings”, when is it determined that the right to public proceedings is being afforded to stakeholders and when is that right being denied, particularly in the context of U.S. Military Commissions at Guantanamo Bay. Researcher affiliated with Indiana University McKinney School of Law are working on these issues.]

b. International law requires public hearings

Binding international instruments require that U.S. Military Commission conduct public hearings, as do the customary international law norms contained in non-binding international instruments.

⁵⁷³ The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is also provided for in the following international instruments: UDHR, Article 10; Principles on the Independence of the Judiciary, Principle 2 (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”); American Convention, Article 8(1); and European Convention, Article 6(1). See *Karttunen v. Finland*, (387/1989), 23 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 120; *Fey v. Austria*, 24 February 1993, 255 Ser. A 13, para. 34; *Collins v. Jamaica*, (240/1987), 1 November 1991, Report of the HRC, (A/47/40), 1992, at 236 para. 8.4; See also American Convention, article 27(2) (the right to a competent, independent, impartial judiciary, may not be suspended even in states of emergency); *Inter-American Court, Advisory Opinion OC-8/87*, 30 January 1987, *Habeas Corpus in Emergency Situations*; *Inter-American Court, Advisory Opinion OC-9/87*, 6 October 1987, *Judicial Guarantees in States of Emergency*, OAS/Ser.L/V/III.19 doc.13, 1988; Article 67(1) of the ICC Statute (guaranteeing a fair hearing conducted impartially).

i. International law that binds the United States

The common law and Constitutional ideals associated with public hearing have been incorporated into international laws or treaties. One of the prominent or core treaties which binds the United States is the International Covenant on Civil and Political Rights (ICCPR).

Within Article 14(1) of the ICCPR the international community laid out the explicit rights for a fair and public hearing. Article 14(1) of the ICCPR states:

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, *everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal* established by law. The press and *the public may be excluded* from all or part of a trial for reasons of *morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires*, or to the extent strictly necessary *in the opinion of the court* in special circumstances where publicity would prejudice the interests of justice...”

[emphases added]

In addition to the ICCPR, the United States is also bound as a Party to the Geneva Conventions. Both the Third and Fourth Geneva Conventions state that representatives of the protecting power have a right to attend a trial. Only narrow circumstances can prohibit this right and allow a trial to be held *in camera* (a legal term that essentially means “private”). Specifically, Geneva Convention IV, Article 74 states: “Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held “in camera” in the interests of the security of the Occupying Power, which shall then notify the Protecting Power.” The applicable section of the Third Geneva Convention (Prisoners of War), Article 105 states: “The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held in camera in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.” Additionally, The Protocol Additional to the Geneva Conventions of 12 August 1949—Article 75 No. 4(i) states: anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly.” Note that the public element of these war trials under the Geneva Conventions are reserved as a right to the Protecting Power—that is the members of the state belonging to the accused. And, there added Protocol makes the judgement a required element of the “public trial”—necessitating its publication.

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

Non-binding International Law

International instruments that do not bind the U.S. but that incorporate binding customary international law norms that do bind the U.S. include:

The Universal Declaration of Human Rights, states in Article 10: “Everyone is entitled in full equality to a fair and *public hearing* by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him” (emphasis added). Article 11 (1) adds that: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a *public trial* at which he has had all the guarantees necessary for his defense” (emphasis added).

Thus, the ideal of a public hearing or trial is incorporated into the human rights considerations on the international plane. This legal idea is reiterated in several other treaties and declarations that do not bind the United States, but the norms of a fair and public trial within these documents have risen to the level of customary international law the norms thus bind the U.S.

The American Declaration of the Right and Duties of Man (which pre-dates the UDHR) in Article

XXVI provides:

“Every person accused of an offense has the right to be given an impartial and *public hearing*, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment” (emphasis added). As a declaration, like the UDHR, it is a document that is non-binding, but does contain norms within it that are binding.

The European Convention on Human Rights, Article 6(1) states:

In the determination of his civil rights and obligation or any criminal charge against him, everyone is entitled to a fair and public hearing.”

The American Convention on Human Rights more narrowly stipulates the right in Article 8(5):

“Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.”

The Rome Statute of the International Criminal Court, Article 64(7) states: “*The trial shall be held in public*. The Trial Chamber may, however, determine that *special circumstances require* that certain proceedings be in closed session for the purposes set forth in article 68, or *to protect confidential or sensitive information to be given in evidence*” (emphasis added). Therefore, a tension exists within these international criminal trial between the defendant’s right to a public hearing or trial and the rights and interests of other stakeholders to have confidential or sensitive information remain intact. Article 67(1) of the Rome statute reiterates the accused’s right to a public hearing, stating: “In the determination of any charge, the accused shall be entitled to a *public hearing* . . .” (emphasis added). However, the ICC statute again recognizes an exception to the principle of public hearing in article 68 (2). It states: “As an exception to the principle of fair hearing provided for in Article 67, the chambers of the court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means.”

Domestic (U.S.) Law

U.S. Constitution

The primary source for the right to public proceedings within fair trial rights for the United States is found in the Constitution’s Sixth Amendment, which states: “In all criminal proceedings, the accused shall enjoy the right to a . . . public trial.” Additionally, the First Amendment speaks to the freedom of the press. The press are often the eyes and ears of the public in judicial proceedings. Thus, the freedoms the press encounters during a trial can directly correlate to the ideals of a public trial.

U.S. Federal Case Law

In 1980, the Supreme Court directly addressed a challenge to the closure of a murder trial in *Richmond Newspapers v. Virginia*.⁵⁷⁴ In the case, the defendant moved to have the public excluded. The prosecution did not object, and, the trial judge allowed for the requested closure. This case focused on the question: can a criminal trial be “closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant’s superior right to a fair trial, or that some other overriding consideration requires closure.”⁵⁷⁵ Although this case focused more on the right of the press and public in the “public trial” guarantee, Chief Justice Burger, who delivered the opinion of the Supreme Court, walked through the origins of the modern criminal trial and where the right to a public trial came from.

Public trials have always been part of Anglo-American justice—dating back before the days of

⁵⁷⁴ 448 U.S. 555 (1980).

⁵⁷⁵ *Id.* at 564.



the Norman Conquest in England—when the public that attended the trial functioned also as a sort of jury.⁵⁷⁶ Eventually, the jury evolved into a selection from the public – as representatives of the public. Nevertheless, “the public character of the trial at which guilt or innocence was decided” remained vital and constant throughout the evolution of criminal court trials.⁵⁷⁷ The ideal of an open and public trial was also established in the ideals of the colonies and then the formation of the United States. In fact, drafters within the Continental Congress wrote: “[One] great right is that of a trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, in open Court, before as many of the people as [choose] to attend, shall pass their sentence upon oath against him . . .”⁵⁷⁸ Thus, long before the right to a public trial was codified within the Constitution, the concept of a public trial was already linked to the right of a fair trial. “[I]t gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.”⁵⁷⁹

Despite the strong historical considerations for a public trial, the Court in *Richmond Newspapers* had address: does “the Constitution afford[] protection against exclusion of the public from criminal trials.”⁵⁸⁰ The Court determined that although the right of the public to attend trials is not explicit within the First Amendment, the Court did hold that “the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated.”⁵⁸¹

With this Constitutional right in place, the Court then determined if under the accused’s Sixth Amendment right to a public trial, there is also an implicit right of the accused to a private trial. The issue with the trial judge’s decision in *Richmond Newspapers* was that the motion of closure was granted without any findings to support the closure. There was no inquiry made to see if alternative solutions could be applied to meet the needs of the accused without completely closing the trial to the press and public.⁵⁸² Thus, the Court concluded that: “[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”⁵⁸³

Six years later, in *Press-Enterprise Co. v. Superior Court [II]*,⁵⁸⁴ the Supreme Court established a test for determining if a constitutional presumption of access applies to a proceeding or to records of the proceeding). The Court gave lower courts a way to know if closure of proceedings may take place.

In *Press-Enterprise Co. [III]*, the Court also expanded the scope of the test for the Constitutional right to a public trial beyond just the criminal trial. In the case the defendant had requested the closure of the pre-trial hearings, which was uncontested by the prosecution and granted by the judge. The defendant went on to request the transcripts from the pre-trial hearings to be sealed as well—this motion was also granted. Thus, this case gives insight into how closures can be adjudicated for pre-

⁵⁷⁶ *Id.* at 565.

⁵⁷⁷ *Id.* at 566.

⁵⁷⁸ *Id.* at 568-69 (quoting 1 Journals of the Continental Congress, 1774-1789, pp. 101, 107 (1904)).

⁵⁷⁹ *Id.* at 569.

⁵⁸⁰ *Id.* at 575.

⁵⁸¹ *Id.* at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

⁵⁸² *Id.* at 580.

⁵⁸³ *Id.* at 581.

⁵⁸⁴ 478 U.S. 1 (1986).



trial hearings and court documents as well. The opinion of the Court was once again given by Chief Justice Burger. In the opinion, he states: “The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness.”⁵⁸⁵ And this case addresses the right of the public within the right of the “public trial,” not that of the defendant – “the right asserted here is that of the public under the First Amendment.”⁵⁸⁶ The Court determined that in dealing with the First Amendment right to access criminal proceedings two considerations must be made: (1) “whether the place and process have historically been open to the press and general public,”⁵⁸⁷ and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.”⁵⁸⁸

Within the *Press-Enterprise Co. [II]* opinion, Chief Justice Burger reiterated the test developed from the earlier *Press-Enterprise Co. v. Superior Court [I]*⁵⁸⁹ that courts must use to determine if the presumption of the public’s right of access to a hearing or trial can be overcome. Closure of proceedings are permissible only if on-the-record findings are made: (1) that closure is necessary to further a compelling government interest, (2) the closure order is narrowly tailored to serve that interest, and (3) that no less restrictive means are available to adequately protect that interest.⁵⁹⁰

In this case, there was a further consideration of what rights attach to pre-trial hearings (and transcripts related to it). The Court determined that because pre-trial hearings occur without a jury, it “makes the importance of public access to a preliminary hearing even more significant.”⁵⁹¹ Therefore, the Court held that “the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings.”⁵⁹² Thus, the same test established in *Press-Enterprise Co. [II]* applies to determining closures of preliminary hearings. The Court added that if the accused is the one requesting closure in the interest of the right to a fair trial “the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.”⁵⁹³

U.S. Military Law

In *ABC, Inc. v. Powell*,⁵⁹⁴ the United States Court of Appeals for the Armed Forces stated that the Sixth Amendment right of public trial for the accused extends to trials by court-martial and then expanded this right of the accused to Article 32 investigative hearings. In its reasoning, the court noted that the applicable procedural rule is found at RCM 405(h)(3), Manual for Courts-Martial, United States (1995 ed.), which states: “Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer.”⁵⁹⁵ And the additional discussion of this rule states: “Closure may encourage

⁵⁸⁵ *Id.* at 7.

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.* at 8.

⁵⁸⁸ *Id.*

⁵⁸⁹ 464 U.S. 501 (1984).

⁵⁹⁰ *Id.* at 9.

⁵⁹¹ *Id.* at 13.

⁵⁹² *Id.*

⁵⁹³ *Id.* at 14.

⁵⁹⁴ 47 M.S. 363, 365 (1997).

⁵⁹⁵ *Id.*



complete testimony by an embarrassed or timid witness. *Ordinarily the proceedings of a pretrial investigation should be open to spectators.*⁵⁹⁶ Nevertheless, the court here makes clear that closure can still occur when the elements of the Supreme Court’s Press-Enterprise test is applied. Such a test must be applied on a case-by-case basis. Thus, the right of the accused to a public trial can be overcome if cause is “shown that outweighs the value of openness.”⁵⁹⁷

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

Sessions: (c) Closure of Proceedings—

- (1) The military judge may close to the public all or part of the proceeding of a military commissions under this chapter.
- (2) The military judge may close to the public all or a portion of the proceedings under paragraph (2) only upon making a specific finding that such closure is necessary to:
 - a. Protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities; or
 - b. Ensure the physical safety of individuals.

10 U.S.C. 949d(c)

Section 949d of the MCA also provides that materials not classified or protected, such as transcripts, pleadings, filings, ruling, orders and other materials used at the military commission hearings, be accessible to the public.

Section 949d is coupled with the Rules of Military Commissions (part of the Manual for Military Commissions United States) Section 806. These rules, which were amended in June of 2013, state in section 806:

- (a) [M]ilitary commissions shall be publicly held. For purposes of this rule, “public” includes representatives of the press, representatives of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities. Access to military commissions may be constrained by location, the size of the facility, physical security requirements, and national security concerns.
- (b) *Control of spectators and closure*
 - (1) *Control of spectators.*
 - (A) In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, and exclude specific persons from the courtroom.
 - (B) Any limitations imposed by the military judge under paragraph (b)(1)(A) shall be supported by essential findings of fact appended to the record of trial.
 - (2) *Closure.*
 - (A) The military judge may close to the public all or part of the proceedings of a military commission under chapter 47A of title 10, United States Code.
 - (B) The military judge may close to the public all or a portion

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.* quoting *Press-Enterprise, Co. v. Superior Court*, 464 U.S. 501, 509 (1984).

of the proceedings under paragraph (A) only upon making a specific finding that such closure is necessary to—

- i. Protect information the disclosure of which could reasonably be expected to damage national security, including intelligence or law enforcement sources, methods, or activities; or
- ii. Ensure the physical safety of individuals.

(C) A finding under paragraph (B) may be based upon a presentation, including a presentation *ex parte* or *in camera*, by either trial or defense counsel.

(c) *Photography and broadcasting prohibited.* Except as otherwise expressly authorized by the Secretary of Defense, video and audio recording and the taking of photographs—except for the purpose of preparing the record of trial—in the court room during the proceedings and radio or television broadcasting of proceedings from the courtroom shall not be permitted. However, the military judge may, as a matter of discretion permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under R.M.C. 804 or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

(d) *Protective orders.* The military judge may, upon request of any part of sua sponte, issue an appropriate protective order, in writing, to prevent parties and witnesses from making extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members.⁵⁹⁸

Thus, the rules for military commissions lay out a narrower scope for the public to see the military proceedings in Guantanamo Bay. But, this narrow scope has not gone unchallenged.

The Guantanamo Bay Hearings

The remote location of the Guantanamo Bay hearings makes it difficult for a member of the public to exercise the Constitutional right to attend. Although a contemporaneous closed-circuit television feed is sent to Ft. Meade, Maryland for the public's viewing, it can be cumbersome to accessing the location.⁵⁹⁹

To increase the accessibility of the hearings to the public, in 2012, the defense counsel in the case *U.S. v. Al-Nashiri* submitted a motion requesting that proceedings of the military commission be available to media outlets as well as CCTV locations. In the motion, defense counsel requested that the Commission make the video feed (which already was sent to Ft. Meade, Maryland) be made available to the media without discrimination. Defense counsel pointed out that since “the video feed now exists, broadcast stations throughout the country could ‘hook into’ the same feed that goes to the restricted locations or rebroadcast the signal transmitted to Ft. Meade.”⁶⁰⁰

In its argument, defense quoted Judge Robertson of the District Court for the District of Columbia, who wrote that the “eyes of the world are on Guantanamo Bay. Justice must be done there,

⁵⁹⁸ Rules for Military Commissions, Section 806(a)-(d), <http://www.mc.mil/Portals/0/pdfs/2012ManualForMilitaryCommissions.pdf>

⁵⁹⁹ See generally Office of Military Commissions, *Viewing of Military Commission Proceedings*, <http://www.mc.mil/FACILITIESSERVICES/Facilities/CCTVSites.aspx>

⁶⁰⁰ Defense Motion Requesting that Proceeding of this Military Commission be Available to Media Outlets as well as CCT Locations, AE081, (8 June 2012).



and must be seen to be done there, fairly and impartially.”⁶⁰¹ The defense points out that the broadcast of the proceedings to remote locations that are difficult for the public to access does not “foster greater openness.”⁶⁰² Taking the Constitutional and statutory provisions as noted above, the defense points out that the defense’s right to a public trial is coextensive with the public’s right to access. The defense further argued that 10 U.S.C, § 949d(d)(2) does not forbid open broadcast of the proceedings and that R.M.C. 806(c) – which authorizes the Secretary of Defense as the sole authority to broadcast the proceedings – is not fully binding on the military.⁶⁰³ The defense also points out that the government has not provided a compelling reason to keep the broadcast of the live feed from reaching a broader audience. In fact, the broadcast is already in place – thus, the issue is why the broadcast feed is so restricted in its access (when it is not forbidden).

The government’s argument that the feed that the access to transcripts on website fulfilled the met “the law’s requirement competing public interests defense argued that Rules

The media viewing room for the Military Commissions at Ft. Meade, Maryland. A live feed is sent to the screen on stage when the Commission hearings are in session for the media and public to observe.

response relied on the was already provided, plus the military commissions public’s right of access and to balance the sometimes’ involved.”⁶⁰⁴ Although the for Military Commissions

was not binding, the government claimed that the rules were mandatory for the military court. Thus, granting the motion would be a violation of the court’s own judiciary rules. The government also points out that both court-martial and federal courts forbid the broadcasting of criminal trials. Therefore, this limitation is not an outlier rule, but one made with the support of precedent and support. The government also points out that the Constitutional rights provided in the First and Sixth Amendments does not guarantee televised trials. The government also argues from the Supreme Court’s opinion and holdings in *United States v. Moussaoui*,⁶⁰⁵ where the Court found that an audio-visual feed and online availability of transcripts “fully satisfy[ed] the constitutional requirements for openness and accessibility.”⁶⁰⁶

The government also argues that broadcasting the proceedings could impact witness testimony or the willingness of individuals (both for the prosecution and the defense) to testify. And, broadcasting the pre-trial proceedings could impact the judgment of the jury. Furthermore, the government points out that there could be a negative impact for the defendant himself, if the proceedings are widely broadcasted. Thus, broadcasting the proceedings could end up



⁶⁰¹ *Id.* (quoting *Hamdan v. Gates*, 565 F. Supp. 2d 130, 137 (D.D.C. 2008)).

⁶⁰² *Id.*

⁶⁰³ *Id.*

⁶⁰⁴ Government Response to Defense Motion Requesting that Proceedings of this Military Commission be Available to Media Outlets as well as CCTV Locations, AE081, (22 June 2012).

⁶⁰⁵ 205 F.R.D. 183 (E.D.Va 2002).

⁶⁰⁶ Defense Response, *supra* note 32 (quoting *U.S. v. Moussaoui*, 205 F.R.D. 183, 185 (E.D.Va. 2002)).



compromising a fair trial, not promoting it.⁶⁰⁷

The military court ruling denied the defense’s motion—mainly relying on the precedent that the government used in its argument and, also, the statement within R.M.C. 806(c): “[e]xcept as otherwise expressly authorized by the Secretary of Defense, video and audio recording and the taking of photographs . . . in the court room during the proceedings and radio or television broadcasting of proceedings from the courtroom shall not be permitted.”⁶⁰⁸ Based on this rule the Commission stated it did not have the discretion or authority to allow what the Defense requested.⁶⁰⁹

[The First Amendment right of public access extends to trials by court-martial.⁶¹⁰]

39. Right to Public Proceedings (Military Commission Act of 2009, 10 U.S.C. 949d; ICCPR Article 14(1))				
	Yes	No	Don't Know	Comment
Can the general public access the Guantanamo Bay proceedings via closed circuit television <i>at Ft. Meade, Maryland</i> ?				
Are there any hurdles in place that might prevent the general public from gaining access to the Guantanamo Bay proceedings at <i>Ft. Meade</i> (e.g., lack of information about the access of proceedings, ID and screening procedures to gain access to <i>Ft. Meade</i> , etc)?				
If there are hurdles that prevent the level of public hearing required by law, are those hurdles “unreasonable”?				
Does the public have access to pre-trial proceedings?				
Is the public access reasonable under the circumstances?				
Were any members of the public present at any of the pre-trial proceedings?				
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.				

⁶⁰⁷ See generally, *supra* note 32.

⁶⁰⁸ Ruling: Motion Requesting that Proceedings of the Military Commission be Available to Media Outlets as well as CCTV Locations, AE 0812C, (10 Sept 2012).

⁶⁰⁹ *Id.*

⁶¹⁰ *ABC Inc. V. Powell*, 47 M.S. 363, 365 (1997).



Can the general public access the Guantanamo Bay proceedings via closed circuit television <i>at Ft. Devins, Massachusetts</i> , or is that location reserved for victims and their families (VFMs) with no access to the general public??				
Can the general public access the Guantanamo Bay proceedings via closed circuit television <i>at Norfolk, Virginia</i> , or is that location reserved for victims and their families (VFMs) with no access to the general public?				
Can the public access the Guantanamo Bay proceedings via closed circuit television <i>at Ft. Meade, Maryland</i> ?				
Can the general public access the Guantanamo Bay proceedings via closed circuit television <i>at Camp Bulkeley (at Guantanamo Bay, Cuba) or anywhere else at Guantanamo Bay</i> ?				
Can the general public access the Guantanamo Bay proceedings via closed circuit television <i>at any other location</i> ?				
If the general public is not present at the proceedings in Guantanamo Bay in person, can that proceeding still count as a “public proceeding”?				



NGO Observers, along with the public, media and victims and family members, may view GTMO Military Commission proceedings from the Post Theater at Ft. Meade, Maryland. Ft. Meade is where military proceedings were held for Army Pfc. Chelsea Manning (formerly Army Pfc Bradley Manning) who was convicted of leading sensitive data, and is also the home of the National Security Agency (NSA).

<https://cryptome.org/info/manning-protest/manning-protest.htm>; <http://www.panoramio.com/photo/116583931>



R. Right to Equality of Arms; Equality Before the Courts; Equal Protection

The right to equality of arms and the right to equality before the courts are based in notions of fairness. Both parties to a criminal proceeding – the prosecution and the defense – should have fair, equitable opportunities in the criminal proceedings. Equality of arms and equality before the courts do not require that parties be treated identically, or that they receive precisely identical opportunities. But any distinctions between the parties must not discriminate unlawfully or otherwise be unequitable or unfair.

a. General

The prosecution and defense have the right to equality before the court, equality of arms, and equal protection of the law and procedure. It is in fact the “hallmark of due process” to be afforded procedural equality.⁶³⁴ Both sides should essentially be in procedurally equal positions during all criminal proceeding phases. The principle of “equality of arms” applied means that the defense and the prosecution must be allotted an equal opportunity to prepare their arguments. Each side should have equal access to the courts and all other resources needed for their case.

However, these principles do *not* demand identical treatment of the parties. Any distinction made between the prosecution and defense merely must not be based on unlawful discrimination, must not violate the rights of either side, and otherwise must not be inequitable or unfair. “The principle of equality of arms means that the procedural conditions at trial and sentencing must provide a ‘fair balance’ for all parties.”⁶³⁵

This part of the *Guantanamo Bay Fair Trial Manual* discusses the rights and principles of equality of arms, equality before the courts, and equal protection of the law which are provided for in international law instruments (section b); in customary law international norms incorporated into instruments not binding on the U.S. (section c); in international law jurisprudence (section d); in U.S. Military and U.S. Military Commission law (section e); and in U.S. Constitutional and domestic case law (section f).

b. Treaties Binding on the U.S.

The International Covenant on Civil and Political Rights, art. 14(1)⁶³⁶ provides for equality of arms and all other rights relating to equality of the prosecution and the defense. It does so in relevant part:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law... .”⁶³⁷

Further explanation by the UN Human Rights Committee provides interpretation on the rights of equality of arms, equality before the court, and equal protection. The Committee notes that ICCPR art. 14 relates to the right of equality *before* courts and tribunals, granting rights of equal access to the court

⁶³⁴ Martha F. Davis, Participation, Equality and the Civil Right to Counsel: Lessons from Domestic and International Law, 122 Yale L.J. 2260, 2268 (2013). (though it primarily examines the right to counsel). See also Charles Chernor Jalloh and Amy Elizabeth DiBella, Equality of Arms in International Criminal Law: Continuing Challenges In The Ashgate Research Companion to International Criminal Law-Critical Perspectives, William A. Schabas, et al., eds., Ashgate, 2013, U. of Pittsburgh Legal Studies Research Paper No. 2013-28

⁶³⁵ David J. R. Frankt, Applying International Fair Trial Standards to the Military Commissions of Guantanamo, 37 S. Ill. Univ. L. J. 551, 580 (2013).

⁶³⁶ See also Universal Declaration of Human Rights, art. 10 (Everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.)

⁶³⁷ ICCPR, art. 14(1)



and equality of arms with the goal of ensuring that neither side is treated with any discrimination.⁶³⁸ By ensuring equality of the parties before courts and tribunals, the right to equality of arms is also ensured.⁶³⁹ In order to make sure that all of those rights are protected, no distinction between the parties should be made unless those distinctions are both based in law and can be “justified on objective and reasonable grounds”.⁶⁴⁰ There may be no “actual disadvantage or other unfairness” to the defendant.⁶⁴¹

General Comment 32 asserts that the fulfillment of the rights of equality of arms and equality before the court are essential to guaranteeing the right to fair trial,⁶⁴² and that the rights equality before the court and of arms require the following:

Adequate Time and Facilities. That the defendant must have adequate time and preparation of his defence and to communicate with counsel of his own choosing (per ICCPR Article 14(3)(b)).⁶⁴³

Examination and Cross-Examine Witnesses. That the defendant has the right to examine, or have examined, all witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses used against him (per ICCPR Article 14(3)(e)). This promotes a defendant’s and his counsel’s effective defense, and “thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”⁶⁴⁴

Interpreter/Translator Assistance. That the defendant have the free assistance of an interpreter if the accused cannot understand or speak the language used in court, available at all stages of the Military Commission proceedings (per ICCPR Article 14(3)(f)).⁶⁴⁵

In addition to the text of ICCPR art. 14 and the Human Rights Committee’s comments regarding equality before the court, there are also the International Criminal Tribunal of the Former Yugoslavia Statute, article 21(4)⁶⁴⁶, and the International Criminal Tribunal of Rwanda Statute, article 20(4)⁶⁴⁷, which guarantee “full equality” in any proceeding.

⁶³⁸ General Comment 32 on Article of the ICCPR, UN Doc CCPR/C/GC/32, Human Rights Committee (2007). (hereinafter “GC 32”).

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

⁶⁴¹ The Committee gives the example of only the prosecutor, and not the defendant, being able to appeal a decision. *Id.*

⁶⁴² *Id.*

⁶⁴³ GC 32, *supra* note 83. In *Wright v. Jamaica*, *supra* note xyz the UN Human Rights Committee, which oversees implementation of the ICCPR, addressed equality of arms in the context of the rights to adequate time and facilities to prepare a defense.

The right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes “adequate time” requires an assessment of the individual circumstances of each case.

See also section H of this *Manual*.

⁶⁴⁴ GC 32, *supra* note 83; *See also* section U of this Checklist.

⁶⁴⁵ GC 32, *supra* note 83; *See also* section O of this Checklist

⁶⁴⁶ *See* ICTY Statute, art. 21(4) (“In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in *full equality*”) (emphasis added)

⁶⁴⁷ ICTR Statute, art. 20(4) (“In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in *full equality*”) (emphasis added)



c. Customary International Law

Several treaties to which the U.S. is not a party but contain provisions that have risen to the level of customary law that have relevant principles regarding equality of arms, equality before the court, and equal protection. These treaties include the *American Convention*,⁶⁴⁸ the *African Charter*,⁶⁴⁹ and the *ICC Statute*.⁶⁵⁰

Additionally, article 10 of the Universal Declaration on Human Rights provides: "Everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

d. International Jurisprudence

In 1981, the European Commission on Human Rights noted that most nations have legislation either entrusting criminal investigations to a member of the judiciary or to a prosecutor's office on the condition that all exculpatory evidence be discovered to the defense in order to establish equality between the prosecution and defense.⁶⁵¹ It is the "rights of the defence" which establish said equality, which is why such rights have been instituted.⁶⁵²

The European Commission went further in *Kaufman v. Belgium*, stating that the right to quality of arms "entails a party shall have a reasonable opportunity of presenting [its] case to the court under conditions which do not place [it] at a substantial disadvantage" compared to its opponent.⁶⁵³ This case established that, in order for a petitioner to be granted relief on a claim based on equality of arms, the petitioner must have suffered a substantial prejudice.⁶⁵⁴

In determining what other rights a defendant must be afforded in order to ensure equality before the court or equal protection, various courts have ruled on cases where petitioners claimed that had been deprived of certain procedural and other rights.

For example, in *Wright v. Jamaica*, the Committee on Civil and Political Rights noted that a person must have adequate time and facilities to prepare a defense in order for the right to equality of arms to be satisfied.⁶⁵⁵

Additionally, the U.N. Human Rights Committee officially recognized the right to "equality of arms" in 1994, almost a decade before publishing General Comment 32.⁶⁵⁶

Also in 1994 was the case of *Barbera, Messengue and Jabardo v. Spain*, in which the European Court found that a defendant must be able "to examine or have witnesses against him and to obtain the

⁶⁴⁸ American Convention on Human Rights, article 8(2) ("...During the proceedings, every person is entitled, with full equality, to the following minimum guarantees")

⁶⁴⁹ African Charter, art. 3 ("Every individual shall be equal before the law"; "Every individual shall be entitled to equal protection of the law"); African Charter, art. 19 ("All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.")

⁶⁵⁰ 86 ICC Statute, art. 67 ("In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality")

⁶⁵¹ *Jespers v. Belgium*, No. 8493, Report the Eur. Comm'n H.R., 27 DR [1981] 61

⁶⁵² *Id.*

⁶⁵³ *Kaufman v. Belgium*, App. No. 10938/84, 50 Eur. Comm'n H.R. Dec. & Rep. 98, 115 (1986)

⁶⁵⁴ *Id.*

⁶⁵⁵ *Wright v. Jamaica*, Communication No. 349/1989, U.N. Doc. CCPR/C/45/D/349/1989 (1992) ("The right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms.")

⁶⁵⁶ *Grant v. Jamaica*, 353/1988, U.N. Doc. CCPR/C/50/D/353/1988 (1994). "The right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case.")

attendance of witness on his behalf under the same conditions as witness against him” in order for the right to a fair trial to have been satisfied.⁶⁵⁷

However, there are limits to guaranteeing such rights. Equality does not mean identical in the sense of these rights.⁶⁵⁸ In general, “the principle of equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”⁶⁵⁹

e. US Military and Military Commission Law

Some U.S. Military Commission cases have addressed law regarding equality between the defense and the prosecution.

For example, in the *al Bahlul* case, the defendant was tried under the 2006 Military Commission Act. He was convicted of performing media relations for Osama bin Laden, and he was sentenced to life imprisonment. However, in 2014, his conviction was overturned by the D.C. Court of Appeals (D.C. Circuit) since the charges he was convicted of were not recognized as war crimes when he was convicted.⁶⁶⁰ Though the D.C. Circuit did not expressly mention “equality of arms”, it based its ruling in part on lack of equality within the 2006 Act.⁶⁶¹ Under the Military Commission Act of 2006, the only appellate review option for defendants was a trio of Pentagon appointees, which arguably was counter to the defendant’s right of equality before the court and equal protection of the law.⁶⁶²

It has been argued that the Military Commission Act of 2009, enacted 3 years after the 2006 Act, provides for a more balanced appellate process, having all final verdicts automatically sent to the US Court of Military Commission Review.⁶⁶³ The 2009 act also provides for the right to be informed of the charges promptly (in detail and in a language understood by the defendant), the right to be present at the trial, and the right to counsel; the right to at least one free defense counsel and a second learned civilian counsel in capital cases; and, technically, right to communication confidentially with their legal counsel.⁶⁶⁴ Additionally, the Act affords the defense “the opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the constitution.”

All of these listed rights arguably afford defendants closer equality of arms,⁶⁶⁵ though some argue that some concerns remain. Regarding obtaining witnesses and evidence, it has been argued that the 2009 Act only provides that “reasonable” opportunity should be afforded to the defense to obtain witnesses, etc. when, usually, criminal rules provide for “equal” opportunity,⁶⁶⁶ and that Guantanamo prosecutors may refuse to produce a witness, very much unlike US federal criminal procedure.⁶⁶⁷ There has also been discussion about detainees rights to a trial without “undue delay”.⁶⁶⁸ Concerning equal protection specifically, arguments have been made that both the 2006 and 2009 Military Commission Acts are per

⁶⁵⁷ *Barbera, Messegue and Jabardo v. Spain*, 11 EHRR 360 (1994).

⁶⁵⁸ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment of Appeals Chamber (Int’l Crim. Trib. or the Former Yugoslavia July 15, 1999) (The tribunal rejected the defendant’s claim that he was denied equality of arms because he was unable to secure the attendance of witnesses for his defense at trial.)

⁶⁵⁹ *Id.*

⁶⁶⁰ *See Al Bahlul v. U.S.*, 767 F.3d 1 (D.C. Cir. App. 2014).

⁶⁶¹ *Id.*

⁶⁶² 10 U.S.C. § 949j

⁶⁶³ 10 U.S.C. § 950c.

⁶⁶⁴ 10 U.S.C. § 948a, § 948s, § 949a(2)(B)-(C), § 949a(C), and § 949c(b)(7).

⁶⁶⁵ Frakt, *supra* note 80.

⁶⁶⁶ *Id.* at 582-3.

⁶⁶⁷ *Id.* at 583 (However, as Frankt points out, such a refusal may be made in military court martial proceedings.)

⁶⁶⁸ *Id.* at 583.

se discriminatory.⁶⁶⁹

The Uniform Code of Military Justice provides: “The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.”⁶⁷⁰

f. The US Constitution and Domestic Case Law

Several Amendments to the US Constitution address equality of arms, equal protection and equality before the court.⁶⁷¹ However, there are no Supreme Court cases on the specific matter of equality of arms.

One U.S. federal case that refers expressly to equality of arms is *US v. Tucker*, which effectively dismissed the concept and right of equality of arms as non-applicable in US domestic law.⁶⁷² All that matters in the US is that the defense and the prosecution be “adequately matched”, nothing more.⁶⁷³

One author noted:

Fairness in our system...is the result of an overall balance between the superior resources of the prosecution and the constitutional protections of the defense. To seek a balance between the defense and prosecution with respect to each procedural right, the argument goes, is neither feasible nor desirable. This argument, while superficially appealing, is simplistic.⁶⁷⁴

See also this discussion⁶⁷⁵:

⁶⁶⁹ See Jordan J. Paust, Still Unlawful: The Obama Military Commissions, Supreme Court, and Deviant Dicta in the D.C. Circuit, 45 Cornell Int'l L.J. 367, 378 (2012). (“Under the 2006 and 2009 MCA, only an ‘alien unprivileged enemy belligerent is subject to trial by military commission.’ This provision necessarily violates several relevant treaty-based and customary international laws requiring the United States to give detainees equal protection under the law”).

⁶⁷⁰ 846 Article 46 (“The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions”).

⁶⁷¹ See Due Process clauses under the 5th and 14th Amendments to the US Constitution.

⁶⁷² *U.S. v. Tucker*, 249 F.R.D. 58 (S.D.N.Y. 2008) (“The principle of equality of arms may apply in certain international criminal law contexts, but it has no place in our constitutional jurisprudence. For better or worse, due process demands only that a criminal defendant receives a constitutionally “adequate” defense, not that the parties to a criminal prosecution be equally matched.”)

⁶⁷³ *Id.*

⁶⁷⁴ Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, Wisconsin Law Review, Wis. L. Rev. 1007, at 1039, (1990).

⁶⁷⁵ Anna Maria Martignetti, *The Classified Information Procedures Act (CIPA) and Suspected Terrorists in Federal Civilian Courts: Subject to the Most Exacting Demands of Justice?* (lup.lub.lu.se/student-papers/record/1670606/file/1670607.pdf)

Equality of arms is “a procedural right of each advocate to formulate and present her case.”The principle mandates that the defendant not be placed in “a worse position” than the prosecution because of a *lack of equivalence* in terms of time and facilities to prepare its case and access information material to the case, the same standard utilized in CIPA cases.As noted by Professor Jay Sterling Silver, equality of arms existed in the origins of the adversarial process as “it would not have been fair to give one contestant in a trial by battle a lance and a shield and the other only a knife.”Similarly, it would be nonsensical to interpret the principle of equality of arms as implying interchangeability of the parties, as it would be inappropriate to grant the government personal constitutional rights and undesirable to grant each defendant uninhibited access to investigative resources.What the concept does indeed require is that whatever the arms, each opposing party is given

[Due Process under the 5th and 14th Amendments may also be relevant. To be explored]

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

44. Equality of Arms – Pre-Trial Hearing Stage				
	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?				
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?				

“ample opportunity” to fight.



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?				



[Page Intentionally Blank]

DRAFT



IX. Rights / Interests of Non-Governmental (NGO) Observers

Independent, objective non-governmental organizations (NGOs), such as *The Gitmo Observer*, seek to ascertain whether all stakeholders are receiving a fair trial at the Guantanamo Bay Military Commissions. NGOs may seek to determine whether the Military Commissions comply with, or do not comply with, international and U.S. law. To be able to make this assessment, certain logistical, access and other conditions must be in place for the NGOs.

a. General – Why NGOs?

The Pentagon has stated that it seeks to have open, transparent Military Commission proceedings at Guantanamo Bay. To facilitate this openness and transparency, the Pentagon has permitted Non-Governmental Organizations (NGOs) to travel to Guantanamo Bay, Cuba to monitor the proceedings.⁸⁷¹ 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 and be observed, analyze, critique and report on Guantanamo Bay proceedings, with a bird’s eye view.



NGOs giving statements and fielding questions at a Press Conference held at Guantanamo Bay the week of the conviction of the first GTMO defendant, David Hicks, in March 2007. NGOs were permitted to participate in press briefings at GTMO during that period.

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



As of June 2014, NGOs were no longer permitted to participate in or attend press conferences at GTMO. This photo is of an NGO Observer viewing a Military Commission press conference by video-feed from in the same building, yards away from where the press, prosecution, and defense teams are conducting the press conference.

ascertain for themselves whether they believe that the Military Commissions are complying with, or not complying with, international and domestic law. The NGO representatives can publish their reports accordingly.

For NGOs to be able to do their job well – to attend, observe, analyze, critique and report well – they require the hand of the Pentagon.

[This introductory section on NGO Observers is being developed further.]

⁸⁷¹ The Pentagon’s stated criteria in selecting NGO Observers are: (a) the reach of the applicant (e.g., audience size, readership, subscriptions, circulation, viewers, listeners, website hits, writings, broadcasts, professional standing, diversity of audiences, etc.); (b) the nexus of the applicant’s organizational mission to military commissions, wartime detention or prosecution, international law, and/or human rights; and (c) the extent to which applicant has provided longstanding and frequent coverage of issues relating to military commissions, wartime detention or prosecution, international law, and/or human rights. See <http://www.mc.mil/Portals/0/Observer%20Selection%20Criteria.pdf>. See also *infra* at TAN xxx – yyy.





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

66. NGO Observers - Participation				
	Yes	No	Don't Know	Comment
Presence & Participation of NGO Observers				
What other Observers were present during your observation mission?				
If you observed at Guantanamo Bay, did the Office of Military Commissions inform you of the identities of other Observers before you departed on the mission, to permit you an opportunity to reach out to other NGO participants for coordination, collaboration or other purposes?				
Were any of the proceedings closed to Observers?				
If any of the legal proceedings were closed to NGO Observers, what were those legal proceedings and what was the legal basis for closing the proceedings to NGO Observers?				



67. NGO Observer Facilities, Internet Access, and Other Aspects of NGO Observers Fulfilling Their Responsibilities				
U.S. Constitutional Rights of NGOs				
In your opinion, in conjunction with the Military Commissions, were NGO Observers afforded their First Amendment rights to free expression, including right to share information and the right to receive information?				
In your opinion, in conjunction with the Military Commissions, were NGO Observers afforded their First Amendment rights to freedom of association, regarding, for example, being able to contact and spend time with other stakeholders in the Military Commission process?				
Were any NGO Observers subject to any discipline action or reprimanded for allegedly breaching any Guantanamo Bay or Military Commission rules or procedures?				
If any NGO Observer was subject to any disciplinary action or reprimand for allegedly breaching any Guantanamo Bay or Military Commission rules or procedures, what was the nature of the alleged breach and what was the outcome of the disciplinary action or reprimand??				

68. NGO Access to Information, Contact with Other Stakeholders				
NGO Observer Access to Information				
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?				
At Guantanamo Bay, did NGOs have access to the information they needed in order to carry out their NGO Observer responsibilities?				
NGO Observer Discussion Opportunities with the Prosecution?				
Did the NGO Observers have an official (or unofficial) meeting with the Chief Prosecutor or prosecution team members at Guantanamo Bay?				



If the NGO Observers had an official (or unofficial) meeting with the Chief Prosecutor or with prosecution team members at Guantanamo Bay do you believe that the Chief Prosecutor or prosecution team members answered your questions candidly and directly?				
Did the Chief Prosecutor or prosecution team members provide NGO Observers with written information about the hearings?				
Did the Chief Prosecutor or prosecution team members provide NGO Observers with computer disks containing information, or provide electronic links to information?				
NGO Observer Discussion Opportunities with the Defense?				
Did the NGO Observers have an official (or unofficial) meeting with the Chief Defense Counsel, or with any Defense Counsel or defense team members at Guantanamo Bay?				
Was the NGO Observer official (or unofficial) meeting with the Chief Defense Counsel separate from any meeting(s) with any Defense Counsel or any defense team members?				
If the NGO Observers had an official (or unofficial) meeting the Chief Defense Counsel, or any Defense Counsel team or team members at Guantanamo Bay do you believe that the Chief Defense Counsel or Defense Counsel members answered your questions candidly and directly?				
Did the Chief Defense Counsel or defense team members provide NGO Observers with written information about the hearings?				
Did the Chief Defense Counsel or defense team members provide NGO Observers with computer disks containing information, or provide electronic links to information?				
NGO Observer Discussion Opportunities with Office of Military Commissions personnel, Joint Task Force Detention personnel, victims & victims' families, the press, and other stakeholders?				
Did the NGO Observers have opportunities for substantive discussions with Office of Military Commissions personnel				
Did the NGO Observers have opportunities for substantive discussions with Joint Task Force Detention personnel?				



Did the NGO Observers have opportunities for substantive discussions with victims and victims' families?				
Did the NGO Observers have opportunities for substantive discussions with the press?				
Did the NGO Observers have opportunities for substantive discussions with any participants in the process other than the prosecution, defense, Office of Military Commissions, Joint Task Force Detention personnel, or press?				

69. NGO Observer Facilities, Internet Access, and Other Aspects of NGO Observers Fulfilling Their Responsibilities				
NGO Observer Facilities – Guantanamo Bay				
At Guantanamo Bay, did NGO Observers have reasonable access to facilities needed to fulfill their observers' responsibilities?				
At Guantanamo Bay, were facilities in the NGO Internet Resource Center adequate?				
At Guantanamo Bay, was a printer with printer supplies made available for NGO Observers to use?				
At Guantanamo Bay, were other materials made available to help facilitate NGO Observers to do their jobs?				
NGO Observer Facilities – Ft. Meade				
At Ft. Meade, did NGO Observers have reasonable access to facilities needed to fulfill their observers' responsibilities?				
At Ft. Meade, was a printer with printer supplies made available for NGO Observers to use?				
At Ft. Meade, were other materials made available to help facilitate NGO Observers to do their jobs?				
NGO Observer Internet Access				



At Guantanamo Bay, did NGO Observers have internet access by Ethernet in the NGO Resource Center? Wireless??				
At Guantanamo Bay, if NGO Observers had internet access via Ethernet in the GTMO NGO Resource Center, what was the cost to the NGO Observer of that internet access?				
At Guantanamo Bay, if NGOs were charged a fee to connect to the internet using Ethernet, what was the fee?				
At Guantanamo Bay, if there was an internet fee for connecting via Ethernet, was the usage fee prorated if the hearings were for less than one week, or was the rate fixed and payable whether the internet was connected and used for one minute only or used for the entire week?				
At Guantanamo Bay, if NGOs were charged a fee to connect to the internet using wifi, what was the fee?				
At Guantanamo Bay, if there was an internet fee for connecting via wifi, was the usage fee prorated if the hearings were for less than one week, or was the rate fixed and payable whether the internet was connected and used for one minute only or used for the entire week?				
At Ft. Meade, could NGO Observers access the internet while viewing the hearings?				
NGO Accommodations				
Were the Guantanamo Bay housing accommodations adequate?				
Access to / Tours of Detention Facilities				
Did the NGO Observers have a walking tour of Camp X-Ray or other detention facilities at which prisoners <i>are no longer held</i> ?				
Did the NGO Observers have a drive-by tour of Camp X-Ray or other detention facilities at which prisoners <i>are no longer held</i> ?				
Did the NGO Observers have a walking tour of Camp X-Ray or detention facilities at GTMO at which prisoners <i>are currently held</i> ?				
Did the NGO Observers have a drive-by tour of Camp X-Ray or detention facilities at GTMO at which prisoners <i>are currently held</i> ?				



70. Threats, Intimidation, Security Issues, Monitoring the Observers; NGO Hurdles				
Threats, Intimidation, Security Issues, Monitoring the Observers				
Did you feel threatened in any way by personnel or others during your trip to Ft. Meade or Guantanamo Bay?				
Were you aware of any government monitoring of your activities, movements or communications while at Guantanamo Bay?				
Were you aware of any government monitoring of your activities, movements or communications while at Ft. Meade?				
Did any observation, monitoring or other your observation mission limit your ability to carry out your observation objectives?				
Did you encounter any logistical, security or other issues regarding your observation at Guantanamo Bay or Ft. Meade?				
When you arrived at th Ft. Meade Visitor Center to collect your Ft. Meade access badge did you encounter any difficulties? Was your approved paperwork ready? Did you receive the correct (daily, weekly, yearly) badge? Did you have to wait long? Were you able to reach the viewing room on time?				
Did you have difficulty securing entrance to Ft. Meade?				
Hurdles to NGO Observers				
Did you encounter any hurdles to your ability to carry out your NGO Observer responsibilities?				
If you encountered any hurdles to your ability to carry out your NGO Observer responsibilities, what were those hurdles?				
If you encountered any hurdles to your ability to carry out your NGO Observer responsibilities, were those hurdles overcome? How were those hurdles overcome? In what manner? Who facilitated the removal of the hurdles?				
Were you as an NGO Observer able to fulfill your remit per your sending organization?				



71. NGO Observers De-Briefing; Being Eyes and Ears of Outside World;				
NGO Observer Reports / De-Briefing Memos / Blog Posts / Scholarly Articles / Other Publications?				
Did you prepare a NGO Observation Report, De-Briefing Memo, Blog Post, or other publication on your hearing observations?				
Did you publish your NGO Observer Report, De-Briefing Memo, or Blog Post, or Scholarly Article?				
If you published your NGO Observer Report, De-Briefing Memo, or Blog Post, or Scholarly Article, what is the citation / URL?				
NGO Observer as Eyes and Ears to Outside World for Those Unable to attend Military Commission Hearings				
As an NGO Observer did you feel as though you had the resources and facilities to serve as the eyes and ears to the outside world for those unable to attend U.S. Military Commission proceedings at Guantanamo Bay, Cuba or Ft. Meade?				
As an NGO Observer did you believe that you served as the eyes and ears to the outside world for those unable to attend U.S. Military Commission proceedings at Guantanamo Bay, Cuba or Ft. Meade?				
As an NGO Observer did you fulfill your and your organization’s goals of attending, observing, analyzing, critiquing and disseminating information about the Military Commissions at Guantanamo Bay, Cuba?				
NGO Recommendations				
Do you as an NGO Observer have any recommendations or comments to offer to any individual or entity associated with the U.S. Military Commissions at Guantanamo Bay, Cuba?				
Do you as an NGO Observer have any recommendations or comments to offer to any U.S. Military Commissions at Guantanamo Bay, Cuba stakeholder?				

VI. Rights & Interests of Joint Task Force-Guantanamo Bay (JTF-GTMO)

Joint Task Force-Guantanamo Bay (JTF-GTMO) comprises about 2,000 U.S. military and civilian personnel who perform various prisoner detention functions and U.S. Military Commission functions at Guantanamo Bay, Cuba. These personnel have a wide range of rights and interests.

a. General

A joint task force (JTF) is a military organization consisting of elements of different military branches that work together for a unitary mission. A JTF is established when “the scope, complexity, or other factors of the contingency or crisis require capabilities of Services from at least two Military Departments operating under a single joint force commander (JFC).”⁸³⁵

Joint Task Force-Guantanamo Bay (JTF-GTMO) consists of representatives of multiple branches of the U.S. military and performs various prisoner detention functions and various U.S. Military Commission-related functions at Guantanamo Bay, Cuba.⁸³⁶ Currently, there are approximately two-thousand U.S. military and civilian personnel associated with JTF-GTMO.⁸³⁷ Approximately twelve-hundred JTF-GTMO personnel are assigned to the Joint Detention Group (JDG), which is JTF-GTMO’s detainee guard force.⁸³⁸

JTF-GTMO members have a wide range of rights associated with performing their official duties, including right to security (e.g., reasonable protection of their identities to help curb retaliation from detainees); right not to be instructed to perform acts that might violate international or domestic law (e.g., protection from possible war crimes or other criminal charges associated with following illegal orders); and rights to non-discrimination in employment. They have rights while they are posted at Guantanamo Bay, Cuba. And they have rights after they depart Guantanamo Bay and return home.



Military personnel at Joint Task Force – GTMO perform detention functions and support the Military Commissions. A motto is “Honor Bound to Defend Freedom”.

The Mission Statement of JTF-GTMO follows:

JTF Guantanamo conducts safe, humane, legal and transparent care and custody of detainees, including those convicted by military commission. We conduct intelligence collection, analysis and dissemination for the safety and security of detainees and JTF Guantanamo personnel working in facilities as well as in support of ongoing overseas contingency operations. We also provide support to law enforcement, war crimes investigations and the Office of Military Commissions.

Upon entering the armed forces, while individuals do not lose their human rights, “states can limit their enjoyment of human rights due to requirements related to particular characteristics of military

⁸³⁵ http://www.dtic.mil/doctrine/new_pubs/jp3_33.pdf

⁸³⁶ To illustrate the joint nature of the task force, the current commander of JTF-GTMO is a member of the Navy, the deputy commander is a member of the Air Force, and the senior enlisted leader is a member of the Army. <http://www.jtfgtmo.southcom.mil/wire/pdf/v18/TheWire18-37.pdf>

⁸³⁷ http://www.jtfgtmo.southcom.mil/xWEBSITE/fact_sheets/JTFMissionSept2015.pdf

⁸³⁸ http://www.jtfgtmo.southcom.mil/xWEBSITE/fact_sheets/guard_force.pdf



life.”⁸³⁹ The realities of military life that justify the restrictions on the exercise of human rights are usually related to the preservation of order and discipline, establishing political neutrality of the armed forces, maintaining operational effectiveness, protecting classified information, and maintaining the military hierarchical structure.⁸⁴⁰

Servicemembers have the right to free speech and expression but these rights must be consistent with the good order and discipline of the military and national security.⁸⁴¹ For example, a soldier may participate in a demonstration or protest, but may not do so in uniform.⁸⁴² A servicemember may express their opinion on political subjects or candidates, but may not attend partisan political events in uniform or as a representative of the armed forces, even if they do not actively participate.⁸⁴³ Servicemembers may make financial contributions to a political campaign but are prohibited from actively managing a partisan political campaign.⁸⁴⁴

Additionally, servicemembers, like civilians, have the Fourth Amendment right to be free unreasonable search and seizure.⁸⁴⁵ However, in order to access most military installations, servicemembers consent to be subject to search of their person or quarters at any time.⁸⁴⁶ The base commander can issue an order to search the servicemember or his/her quarters.⁸⁴⁷

i. Types of military personnel

Military personnel fall into multiple categories and types of personnel based on their status (full-time active duty v. part-time reservists or national guard, or full-time reservists or national guard), based on the different branches (Army, Air Force, Navy, Marines, and Coast Guard), based on the type of unit of which they are a member (e.g. combat arms, combat support, combat service support), or based on their ranks (within the enlisted v. commissioned officer ranks). Civilians also play important roles in the military. How these categories of military personnel fit and work within JTF-GTMO may depend the category to which they belong. For example, a specific branch of service with active duty personnel may handle their GTMO mission differently than other branches or reserve components. A reserve component, such as a state’s National Guard, has different employment/ staffing issues at JTF-GTMO than active duty categories.⁸⁴⁸

ii. Conduct of military personnel at GTMO

JTF-GTMO, like all military personnel must adhere to operating procedures contained in documents entitled Standard Operating Procedures (SOPs). JTF-GTMO and other military members conducting special operations are subject to strict SOPs based on their mission. Commanders and other leadership are responsible for briefing their personnel on the operation procedures contained in the SOP, and “failure to comply with this prohibitions and mandatory requirements of this SOP by military personnel is a violation of Article 92, Uniform Code of Military Justice.”⁸⁴⁹

These SOPS contain guidelines on how JTF-GTMO are to deal with prisoners (convicted and not convicted), with others within JTF-GTMO, with other GTMO base military personnel who are not part of JTF-GTMO, with participants in the U.S. Military Commissions, including civilians such as most Observers, media, and victims and victims’ family members.

b. International instruments addressing rights/interests of JTF-GTMO Personnel

International humanitarian law (the law of war / the law of armed conflict) is relevant to JTF-GTMO,

⁸³⁹ <https://www.osce.org/odihr/31393?download=true>

⁸⁴⁰ <https://www.osce.org/odihr/31393?download=true>

⁸⁴¹ http://nlgmilf.org/leaflets/GI_Rights_free_speech.html

⁸⁴² <http://www.dtic.mil/whs/directives/corres/pdf/133401p.pdf>

⁸⁴³ Army Regulation 600-20, Appendix B.

⁸⁴⁴ http://www.dod.mil/dodgc/defense_ethics/ethics_regulation/1344-10.html

⁸⁴⁵ See <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1516&context=wmborj>

⁸⁴⁶ <https://www.flexyourrights.org/faqs/does-the-constitution-apply-to-rights-of-military-members/>

⁸⁴⁷ In the area of search and seizure, commanders have magisterial powers to grant the military equivalent of search warrants, search authorizations. MIL. R. EVID. 315(b)(I).

⁸⁴⁸ For example, a National Guard unit may face difficulty in finding personnel qualified to fulfill the number of slots needed for the mission, whereas an active duty unit may have plenty of qualified personnel to choose from.

⁸⁴⁹ <http://www1.umn.edu/humanrts/OathBetrayed/SOP%201-238.pdf>

as is U.S. military law generally.

The Army’s Operational Law Handbook, defines the law of war as follows:

“The law of war is defined as that part of international law that regulates the conduct of armed hostilities. It is often termed the law of armed conflict.”⁸⁵⁰

The law of war is derived from several sources: treaties, the Geneva Conventions, The Hague Land War Conventions, judicial decisions, military regulations, military manuals and other sources. The basic principles of this area of law are simple: the wounded and sick, prisoners of war, and civilians must be protected; military targets must be attacked in such a manner as to minimize civilian casualties and



Soldiers from Indiana National Guard who were deployed to Guantanamo Bay, Cuba in 2013.

damages; humanitarian and peacekeeping personnel must be respected and cannot be targeted; neutral states have certain rights and duties; and the use of certain weapons (including chemical weapons) and methods of warfare which cause unnecessary suffering are prohibited.

Under international law, JTF-GTMO personnel are members of an armed force and must be treated as combatants. Under the Third Geneva Convention of 1949, combatants are legally entitled to fight. Combatants may attack enemy forces, kill or injure them, and destroy property while

conducting military operations. These activities, if not done not in wartime, would be criminal acts. If captured, combatants must be treated as prisoners of war, rather than as criminals, because of their combatant status.

JTF-GTMO personnel are required to treat the detainees / prisoners at GTMO humanely, in accordance with international and U.S. law that prohibits torture, cruel and inhumane treatment or punishment, and discrimination based on race, creed or color or other characteristics. JTF-GTMO must respect the internationally- and U.S.-recognized rights of detainees / prisoners, including the right to a fair trial. Conversely, the detainees / prisoners are obligated to respect rights of JTF-GTMO personnel.

c. Right to Privacy

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to privacy, and this right is to be afforded to JTF-GTMO personnel.

Article 17 provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” According to the ICCPR General Comment No. 16 for Article 17, “this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons.”⁸⁵¹ The comment further provides, “the obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.”⁸⁵² Additionally, “Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end.”⁸⁵³ Individuals must be effectively able to protect themselves against any unlawful attacks that occur and have an effective remedy against those responsible.

JTF-GTMO SOPs for many years have shielded most JTF-GTMO personnel identities from being known to detainees / prisoners, presumably in part to protect the privacy of JTF-GTMO personnel and in part for perceived security reasons (to protect the JTF-GTMO personnel and their family members from retaliation by detainees / prisoners, who without knowing the names of the JTF-GTMO personnel would not be able to track them or their families down or harm them back in the U.S.).

⁸⁵⁰ Operational Law Handbook, International and Operational Law Department, The Judge Advocate General’s Legal Center & School, U.S. Army. 2007. Pages 12-16.

⁸⁵¹ <http://www.refworld.org/docid/453883f922.html>

⁸⁵² <http://www.refworld.org/docid/453883f922.html>

⁸⁵³ <http://www.refworld.org/docid/453883f922.html>



Before the advent of Velcro nametapes, anytime personnel were in the vicinity of detainees, the nametapes on their uniforms were meant to be covered with adhesive tape.⁸⁵⁴ Now JTF-GTMO personnel simply swap their velcroed nametapes for blank ones. The 2003 SOP for JTF-GTMO personnel states “personnel will only interact with detainees on official business that is essential for mission accomplishment. Personnel will not fraternize with detainees nor accept personal favors or services. This includes idle chatter and small talk conducted with the detainee.”⁸⁵⁵ It may help personnel comply with their obligation not to fraternize if personnel name plates are fictional or blank and the detainees do not know the names of personnel.

d. Right not to be instructed to perform acts that might violate international or domestic law (e.g., protection from war crimes or other criminal charges related to following illegal orders)

The United States military has a long history with many traditions upon which the current military is built. In multinational missions, the US military is often the leader and serves as a force many countries look up to. The main reason for this is the high level of discipline the US military maintains at all levels, which has a direct impact on its effectiveness as a force. Maintaining discipline throughout the organization is critically important to the success or failure of the organization’s mission. The aim is to control a body of human beings through training for a concerted action towards a common goal. US Navy Rear Admiral Arleigh Burke stated, “a well-disciplined organization is one whose members work with enthusiasm, willingness, and zest as individuals and as a group to fulfill the mission of the organization with expectation of success.”⁸⁵⁶

Military discipline, order in the ranks and combat effectiveness depend on obedience to orders. Thus, servicemembers are trained from the very beginning of their training to obey orders from their superiors.

i. Obedience to Superior Orders

Servicemembers that fail to obey the lawful orders of their superiors risk serious consequences. Each member of the military swears an oath upon their induction to “obey the orders of the President of the United States and the orders of the officers appointed over me, according to the regulations and the Uniform Code of Military Justice.”⁸⁵⁷ Several provisions of the UCMJ outline the punitive articles that apply to disobeying orders. Willfully disobeying a lawful command of a superior commissioned officer is a crime pursuant to Article 90 of the UCMJ. In wartime, this may be punishable by death. It is a crime to disobey any lawful order from a superior officer or non-commissioned officer under Article 91 of the UCMJ. Under Article 92, it is a crime to violate or fail to obey any lawful general order or regulation, having knowledge of any lawful order issued by any superior member of the armed forces, which it has a duty to obey, fails to obey the order, or is derelict in the performance of his duties.⁸⁵⁸ Violations of the UCMJ can subject a servicemember to criminal charges and non-judicial punishment and can often end a career.

Though the UCMJ does not define what an unlawful order is, the UCMJ purposely qualifies those orders that the servicemember must follow as being “lawful.” This implies that an order which is unlawful or illegal does not need to be obeyed. This comports with customary international law in which “every combatant has a duty to disobey a manifestly unlawful order.”⁸⁵⁹ Obeying an unlawful order can result in criminal prosecution of the one who obeys it. Military courts have held that military members are accountable for their actions even while following orders - if the order was illegal.⁸⁶⁰ Servicemembers have a duty to ensure that they understand the orders given to them and understand the legality of those orders.

What would an unlawful order be in the context of GTMO? If, for example, a superior officer ordered

⁸⁵⁴ 1-7. U.S. Personnel Standards of Conduct, JTF-GTMO SOP, 2003, <http://www1.umn.edu/humanrts/OathBetrayed/SOP%201-238.pdf>

⁸⁵⁵ 1-7. U.S. Personnel Standards of Conduct, JTF-GTMO SOP, 2003, <http://www1.umn.edu/humanrts/OathBetrayed/SOP%201-238.pdf>

⁸⁵⁶ <http://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/d/discipline-in-the-us-navy.html>

⁸⁵⁷ <http://www.army.mil/values/oath.html>

⁸⁵⁸ <http://www.ucmj.us/>

⁸⁵⁹ https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule154

⁸⁶⁰ See *Riggs v. State*, 3 Coldwell 85 (Tenn. 1866), *United States v. Schultz*, 18 USCMA 133, 39 CMR 133 (1969), *United States v. Calley* 22 USCMA 534, (1973).



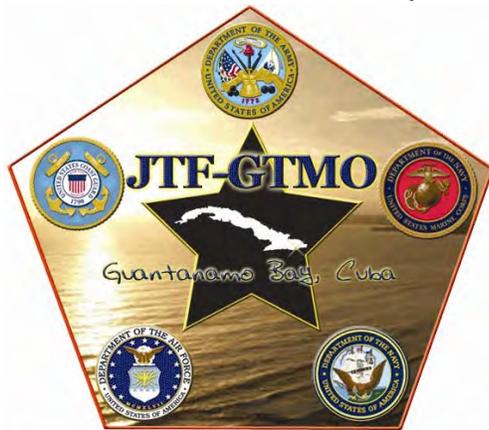
a serviceman to torture a detainee or to treat a detainee inhumanely. That would be an unlawful order, and the serviceman would be required under law to disobey that order. The superior officer would be in violation of the law for ordering torture or inhumane treatment, and a service who follows such an order would also be in violation of law.

Similarly, since it is unlawful to deny a detainee the right to a fair trial, it would be unlawful to issue an order that would deny a detainee the right to a fair trial, and it would be unlawful to follow an order that would deny a detainee the right to a fair trial.

ii. Defenses

The UCMJ affords the same defenses that are available to civilians in federal criminal and civil cases. A servicemember charged with a UCMJ violation may raise defenses of mistake, justification or consent. Likewise, they may raise appropriate affirmative defenses like self-defense, assumption of risk, mutual mistake, good faith or sole negligence of a co-defendant.

A servicemember will ordinarily not be able to benefit from the defense of “superior orders” (“I took the unlawful action only because I was following orders that I was obligated to follow”). For a discussion on “superior orders”, see above.



Joint Task Force – Guantanamo Emblem

e. Domestic law

i. The United States Constitution

JTF-GTMO personnel are subject to the U.S. Constitution and the rules governing the military that flow from the Constitution.

The Second Amendment provides that “A well-regulated Militia, being necessary to the security of a free State...shall not be infringed.”

Art. I Section 8 of the Constitution provides that Congress shall “make Rules for the Government and Regulation of the land and naval Forces”.

Congress enacted the Uniform Code of Military Justice (“UCMJ”) in 1950. The UCMJ contains the substantive and procedural laws governing the military justice system. The UCMJ applies to all servicemembers. The UCMJ incorporates the Constitutional protections afforded to all US citizens, however military service and the government’s interest in maintaining order and discipline in the armed forces, allows some of these rights to be abridged.

ii. Federal civil rights law

Some aspects of federal civil rights law apply in the JTF-GTMO context.

Title VII of the Civil Rights Act of 1964 prohibits employers with 15 or more employees from discriminating against employees on the basis of sex, race, color, national origin, and religion. Federal courts have held Title VII inapplicable to persons in the military or who are seeking to enlist.⁸⁶¹ Additionally in *Chappell v. Wallace*, the court held that military personnel are precluded from bringing lawsuits against superior officers to recover damages for injuries resulting from constitutional rights violations in the course of the military member’s service.⁸⁶²

However, section 717 of Title VII provides that “all personnel actions affecting employees or applicants for employment...in military departments...shall be made free from any discrimination based on race, color, religion, sex, or national origin.”⁸⁶³ In *Gonzalez v. Department of Army*, the court concluded that “the term ‘military departments’ in section 717(a) of Title VII, when read in the context of the statutory definitions to which it refers, can be fairly understood to include only civilian employees of the Army, Navy, and Air Force and not both civilian employees and enlisted personnel...”⁸⁶⁴ Thus, a civilian member of JTF-GTMO could bring a claim under Title VII and a military member of JTF-GTMO

⁸⁶¹ See *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987).

⁸⁶² See *Chappell v. Wallace*, 462 U.S. 297 (1983).

⁸⁶³ <http://www.eeoc.gov/laws/statutes/titlevii.cfm>

⁸⁶⁴ *Gonzalez v. Department of Army*, 718, F.2d 926, 928 (9th Cir. 1983).



could not. However, a military member could file a complaint with their Equal Opportunity representative or the Inspector General for further investigation into the matter.

f. Female Guards and JTF-GTMO Employment Rights

Multiple GTMO prisoners, all of whom are Muslim men, have claimed that their religion forbids for them to be touched by females who are not family members. They argue that female JTF-GTMO personnel touching the detainees violates the detainees’ religious rights. A future version of this *Manual* will discuss how this issue was raised and dealt with at GTMO. For now, the *Manual* will provide information about the female guard issue as it relates to one case – the case of Hadi al Iraqi.

In October 2014 the defense counsel for Hadi al-Iraqi filed an emergency motion for appropriate relief for physical contact with female guards to cease. Hadi al-Iraqi had been in a meeting with his attorneys, and upon the conclusion of that meeting, a female guard came to unshackle and re-shackle him to effectuate the transfer back to his cell. At the time, Hadi requested that a male guard be called to complete the procedure. A member of JTF-GTMO interpreted this as non-compliance and proceeded to use force to return him to his cell, allegedly causing Hadi physical injuries. Hadi then indicated he would no longer attend attorney-client meetings or Commission hearings if he would be touched by female guards during shackling / transfer as these conditions significantly interfered with his religious beliefs.⁸⁶⁵

The presiding Judge, Captain J.K. Waits, issued an interim order granting the defense’s emergency motion to prevent female guards from escorting Hadi.⁸⁶⁶ The interim order remained in effect until the Commission could issue a final ruling on the defense’s motion.⁸⁶⁷ Following oral arguments in session, the Judge issued a final order denying the defense’s motion in February 2015. The Judge concluded that Hadi is not afforded the protections of the Religious Freedom Restoration Act. Hadi failed to show the detention facility’s policy was not rationally related to a legitimate government interest. The



JTF-GTMO personnel escorting a Guantanamo Bay prisoner.

government’s evidence showed that the commander of the guard force for a previous rotation had a difficult time in filling the positions with qualified people. He argued that because a number of the qualified personnel were women, he had little choice in personnel available to assign to those positions, and removing the women from their assigned teams created cohesion issues among the teams, and this might have jeopardized the security of their assigned areas. Thus, the policy to allow female guards to do their jobs was “in furtherance of the legitimate governmental interests of running a well-functioning detention facility and eliminating gender discrimination.”⁸⁶⁸

As mentioned above, the 9/11 case also includes a similar issue relating to female guards touching detainees. In January 2015, the

presiding judge issued an interim order also temporarily “limiting the use of female guards to physically touch the accused during movements to and from attorney-client meetings and Commission hearings, absent exigent circumstances” until the Commission makes a final ruling on the defense motion.⁸⁶⁹

[Again, more info / analysis on the female guard and other JTF-GTMO rights and interests will be included in a forthcoming revision of the *Manual*.]

⁸⁶⁵ [http://www.mc.mil/Portals/0/pdfs/alIraqi/al%20Iraqi%20\(AE021\).pdf](http://www.mc.mil/Portals/0/pdfs/alIraqi/al%20Iraqi%20(AE021).pdf)

⁸⁶⁶ According to Hadi’s defense counsel at the time, Major Thomas Jasper, this was the only time the Judge ruled in favor of the defense. <http://gitmoobserver.com/2015/09/22/guantanamo-defendant-hadi-al-iraqi-fires-his-legal-counsel/>.

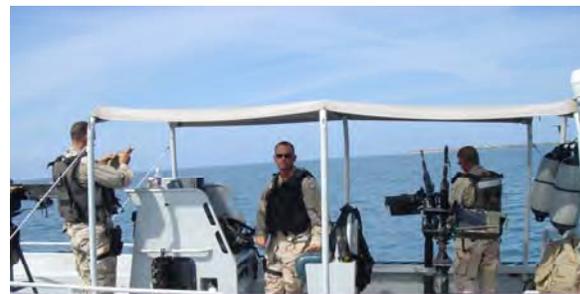
⁸⁶⁷ [http://www.mc.mil/Portals/0/pdfs/alIraqi/al%20Iraqi%20\(AE021B\).pdf](http://www.mc.mil/Portals/0/pdfs/alIraqi/al%20Iraqi%20(AE021B).pdf)

⁸⁶⁸ [http://www.mc.mil/Portals/0/pdfs/alIraqi/AI%20Iraqi%20\(AE021DD\).pdf](http://www.mc.mil/Portals/0/pdfs/alIraqi/AI%20Iraqi%20(AE021DD).pdf)

⁸⁶⁹ [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE254JJ\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE254JJ).pdf)



63. Joint Task Force-GTMO				
	Yes	No	Don't Know	Comment
Were you aware of any complaints by JTF-GTMO personnel about working conditions?				
Did you encounter any JTF-GTMO personnel whose name patches on their uniforms were covered up with Velcro or other material?				
Were you aware of any JTF-GTMO personnel who believed that they were ordered to conduct illegal acts?				
Were you aware of any JTF-GTMO personnel who objected to participate in enteral feeding ("force feeding") of detainees?				
If you were aware of any JTF-GTMO personnel who objected to participating in enteral feeding ("force feeding"), are you aware of whether the personnel was reprimanded or otherwise disciplined for this?				
Were you aware of any JTF-GTMO personnel who believed that they were ordered to conduct illegal acts?				



U.S. Coast Guard at Guantanamo Bay
www.uscg.mil/lantarea/msst91114/pages/gtmo.asp



[Page Intentionally Blank]

DRAFT



Glossary

DRAFT



[Page Intentionally Blank]

DRAFT



Draft Glossary

A

3 Piece Suit. See Three Piece Suit.

4 Piece Suit. See Four Piece Suit.

505(g) Notice. Rule 505(g) of the MCA of 2009 requires the defense to file a document, commonly known as a 505 notice, to inform the prosecution and the Military Commission that the defense seeks to refer to classified material in live court.

505(h) Hearing. Pursuant to Rule 505(h) of the Military Commission Rules of Evidence, upon request and relevant demonstration of reasonable national security concern from the Government, the military judge may conduct an *in camera* presentation to determine whether the information at issue may be disclosed. (Source: Rule 505(h), the Military Commission Rules of Evidence)

505(h) Notice. Pursuant to Rule 505(h) of the Military Commission Rules of Evidence, prior to an *in camera* presentation prompted by a 505(g) filing, the Government shall provide the defense notice identifying what information that the defense wishes to use is classified. (Source: Rule 505(h), Military Commission Rules of Evidence)

505. Rule 505 of the Military Commission Rules of Evidence. Provides general rules of the use of classified information and “applies to all stages of the proceedings.” (Source: Rule 505, Military Commission Rules of Evidence)

506 Hearing. Pursuant to Rule 506 of the Military Commission Rules of Evidence, upon any party’s motion or *sua sponte*, the military judge may hold a pretrial session to consider the disclosure of “government information”, which includes official communications and documents and other non-classified information within the custody or control of the Federal Government and is privileged.

701. Rule 701 of the Military Commissions Rules of Evidence (check this!) permits a military judge to allow testimony from any witness whose lay or expert opinion would have probative value to a reasonable person.

703. Rule 703 of the Military Commissions Rules of Evidence (check this!) requires the defense to request that the government to produce witnesses on behalf of the defense, because under military commission rules, the defense has no power to subpoena or otherwise compel witnesses to attend and testify.

706. Rule 706 of the Military Commissions Rules of Evidence (check this!) permits the prosecution, defense, or military judge to request that a defendant’s competency to stand trial be evaluated.

802 Conference. After a case is referred, Rule 802 of the Military Commission Manual permits that the judge “may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.” Conferences under 802 are intended to inform the judge of anticipated issues and to resolve issues upon which the parties agree. The Conferences are not intended to litigate or decide contested issues. Matters raised at 802 conferences could include, for example, apprising the judge of issues or problems, or discussing schedules, issues related to voir dire, or courtroom seating arrangements. Hearings under 802 may be held before or during trial, and may be conducted by radio, telephone, or other method.

803. Rule 803.

806. Rule 806 of the Rules for Military Commissions (14 August 1012) is the general rule that provides that military commission hearings / trials shall be held in public. It provides in part:

(a) In general. Except as otherwise provided in chapter 47A of title 10, United States Code, and this Manual, military commissions shall be publicly held. For purposes of this rule, “public” includes representatives of the press, representatives of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities. Access to military commissions may be constrained by location, the size of the facility, physical security requirements, and national security concerns.

909 hearing. Rule 909 of the Military Commission Rules of Evidence (check this) covers a hearing on whether the defendant is competent to stand for trial..

After Action Report (AAA). When a project is completed, in the military may analyze what went well and what went poorly and compile that into an After Action Report.

Abate. (See Abatement). To cause a proceeding to be interrupted or suspended. To suspend a military commission. To stop the proceedings. Proceedings may be abated until a specified event occurs, or indefinitely. During an abatement, proceedings do not occur. They are put on hold.

Abatement. (See Abate). When a proceeding is interrupted, suspended or put on hold. E.g., the judge may order that the case against a defendant be abated (or be in abatement) pending the outcome of some legal issues. Abatements have been ordered in different Guantanamo cases, for example, following the issuance of “Change 1” until that order was lifted, in July 2017 on the issue of interference with judicial independence, and in February 2018 while awaiting a ruling from a superior court. **See Stay. Continuance.**

Abu Ghraib.

Accede (See Accession). Method by which a state may become party to a treaty when the state did not sign the treaty. A state may “accede” to a treaty. A state may become party to a treaty by the process of “accession”. Accession is a method through which a state expresses its consent to be bound to a treaty and thus becomes obligated to comply with the terms of the treaty in good faith. *See Vienna Convention on the Law of Treaties.*

Accession. (See Accede). Method by which a state may become party to a treaty when the state did not sign the treaty. A state may “accede” to a treaty. A state may become party to a treaty by the process of “accession”. Accession is a method through which a state expresses its consent to be bound to a treaty and thus becomes obligated to comply with the terms of the treaty in good faith. *See Vienna Convention on the Law of Treaties.*

Alternative Compensatory Control Measure (ACCM). A DoD security classification in a track different from “secret” or “top secret”.

Accused. A defendant charged with one or more Military Commission crimes.

After Action Report (AAR). A professional evaluation of an event, including observations, ideas, details and insights of a particular event, aimed at assessing the event under professional standards and improving future performance. (Source: Headquarters Department of the Army, Training Circular 25-20, A Leader’s Guide to After-Action Reviews http://www.au.af.mil/au/awc/awcgate/army/tc_25-20/tc25-20.pdf)

Agency (The Agency). Slang or colloquialism referring to the Central Intelligence Agency (CIA).

Al Qaeda. The group that has taken credit for the 9/11 and other terrorist attacks, formerly headed by Osama bin Laden.

Alec Station. Alec Station was the U. S. government-sanctioned Central Intelligence Agency (CIA) program designed to hunt down, capture, or kill Osama bin Laden. It was conceived of in 1995 and began operation on 8 January 1996.

Alford Plea. When a defendant pleads guilty to a crime not based on his admitting that he committed the acts charged, but based on his believing that the prosecution would be able to prove that he committed the acts charged. David Hicks, the first detainee to plead guilty at Guantanamo Bay, pleaded pursuant to Alford, and was convicted without admitting that he committed the crime in question – material support for terrorism.

Alien Unprivileged Enemy Combatant (AUEB). The Military Commission Act of 2009 provides that “Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.” (10 U.S.C. § 948c, titled “Persons subject to military commissions”) A military commission may not exercise jurisdiction over a person unless they are an AUEB.

Alien. The Military Commission Act of 2009 provides that the “term ‘alien’ means an individual who is not a citizen of the United States.” (§ 948a(1))

Alternative Compensatory Control Measure (ACCM). Pentagon intelligence program.

Amicus Curiae. Literally “friend of the court.” Amici are disinterested persons, usually attorneys or experts in a relevant field, who appear and participate in judicial proceeding to assist the court by providing information and broadening their perspectives on issues raised by the parties. For example, an individual or group might file an *Amicus Curiae Brief* explaining why a procedure or standard of review should or should not be applied in a given case.

Amparo. The writ of Amparo, a procedural instrument to protect fundamental rights and freedoms not covered by habeas corpus, regardless of whether a public or private authority produced the violation. The writ derives from the domestic practice of Mexico and developed into different forms in Latin American countries. (Source: G. O.

Hoyos, The *Amparo* Context in Latin American Jurisdiction: an approach to an empowering action, GlobaLex www.nyulawglobal.org/globalex/Amparo.htm)

Analytic Task Force (ATF). For the Periodic Review Secretariat, with responsibilities for the Periodic Review Boards:

(1) Consistent with section 7 of Reference (a), the ATF shall be composed of military officers or full time civilian personnel from the Departments of Defense, Homeland Security, Justice, and State; the Joint Staff; and the Office of the Director of National Intelligence, and other departments and agencies, as required. These representatives shall have appropriate intelligence, counterterrorism, military, diplomatic, or legal expertise, as determined by the heads of the representatives' departments or agencies with the concurrence of the Secretary of Defense.

(2) The ATF shall assemble and analyze all of the information required to be considered by the PRB pursuant to section 3 of Reference (a) or these guidelines in consultation with the Office of the Director of National Intelligence. Consistent with subsection 3.a.(5) of Reference (a), the ATF shall also coordinate the preparation of all substitutes and summaries of such information that its members, in consultation with appropriate information disclosure officers of affected agencies and departments, have determined to require protection from disclosure due to national security or other concerns, including the protection of intelligence sources and methods or law enforcement or legally privileged information."

Andrews Air Force Base. See Joint Base Andrews.

Annual Review Board (ARB). According to the DoD, "Administrative Review Boards [or ARBs] are annual reviews to determine the need to continue the detention of an enemy combatant. The review includes an assessment of whether the enemy combatant poses a threat to the United States or its allies in the ongoing armed conflict against terrorist such as al Qaeda and its affiliates and supporters and whether there are other factors bearing on the need for continued detention (e.g., intelligence value). Based on that assessment, a review board will recommend whether an individual should be released, transferred or continue to be detained. This process will help ensure no one is detained any longer than is warranted, and that no one is released who remains a threat to our nation's security." (16 October 2006)

Anti-Taliban Forces.

APACS (Automated Personnel and Aircraft Clearance System). Individuals embarking on Department of Defense authorized travel outside of the United States must be cleared for such travel through the DoD Foreign Clearance Program. The APACS is used to standardize the form of the clearance requests and provides a single communication venue to send, receive and process requests. It is designed to capture all the travel requirements.

Appeal (Appeal of Verdict). A challenge to a court's verdict. Each case that includes a guilty verdict is referred to the U.S. Court of Military Commission Review. After the Court of Military Commission Review makes a decision, either party may appeal to the U.S. Court of Appeals for the District of Columbia. By writ of certiorari, the United States Supreme Court may review the Court of Appeals judgment. (Source: <http://www.mc.mil/aboutus.aspx>)

Appeal (Interlocutory Appeal). Generally, only final judgments are appealable. However, an appeal from an interlocutory order, issued before a final judgment, is possible when: (1) the order conclusively determined the disputed question; (2) the order "resolve[s] an issue completely separate from the merits of the action"; and (3) the order is "effectively unreviewable on appeal from a final judgment." *Hallock v. Bonner*, 387 F.3d 147(2d Cir. 2004), In context of the military commissions, the United States may take an interlocutory appeal to the United State Court of Military Commission Review of any ruling or order of the military judge (1) that terminates the proceeding with respect to a charge or specification; (2) that excludes evidence that is substantial proof of a fact material in the proceeding or (3) that relates to a matter of classified information under certain conditions. (See 10 USC §950d)

Appellate Exhibit (AE). A document or object identified by the U.S. Military Commission court as evidence. (Source: Rule 506, 505, 612, Military Commission Rules of Evidence)

Appellate.

Administrative Review Board (ARB). In the early 2000s, the Pentagon held a formal hearing for each detainee to determine whether he continued to be a threat to the national security of the U.S. Each detainee was entitled to an ARB each year. ARBs were replaced with Periodic Review Boards (PRBs).

AR 190-8. Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees. This regulation addresses legal considerations when conducting detainee operations. Parallel regulations in other U.S. armed

forces include Chief of Naval Operations Instruction (OPNAVINST) 3461.6; Air Force Instruction (AFI) 31-304; and Marine Corps Order (MCO) 3461.1.

Area of Operations (AO). A designated area in which specific tasks are performed. At Guantanamo, the area of operation for military commissions is known as "AO Patriot" and consists of the area surrounding the Expeditionary Legal Complex, including the offices, tents for non-governmental organizations and media, trailers, and other structures.

Armed Forces. According to Customary International Humanitarian Law, the "armed forces" of a party to the conflict consist of "all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates." The U.S. Naval Handbook (1995) states that combatants include "all member of the regular organized armed forces of a party to the conflict...as well as irregular forces who are under responsible command and subject to internal military discipline, carry their arms openly, and otherwise distinguish themselves clearly from the civilian population." (Source: Rule 4, ICRC Customary International Humanitarian Law; §5.3, United States, the Commander's Handbook on the Law of Naval Operations NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7)

Arraignment. Usually the first step in a criminal prosecution. In the arraignment, the defendant appears before the court to hear charges against him or her, and to enter a plea. Pursuant to Rule 904 of the Manual for Military Commissions, an arraignment "shall be conducted in a military commission session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead." (Source: Rule 904, Manual for Military Commissions)

Arrested

Article III. Refers too Article III of the U.S. Constitution, which establishes the federal judiciary. **See Article III Court.**

Article III Court. A court established under Art. III of the U.S. Constitution. Article III courts include U.S. District Courts with original jurisdiction, U.S. Courts of Appeals, and the U.S. Supreme Court. These are also known as "federal courts", as distinguished from "state courts" of the different U.S. states. The federal courts may only decide cases over which the Constitution grants them authority. Art. III, Sect. II of the Constitution describes the types of cases that federal courts may adjudicate. Judiciable controversies include those "between two or more states; between a State and Citizens of another State; between Citizens of different States; [or] between Citizens of the same State claiming Lands under Grants of different States." (U.S. Const. Art. III) The Constitution also provides that federal courts may hear cases involving relations with other nations.

Assistant Staff Judge Advocate (ASJA). At Guantanamo, each of the detention camps is assigned an Assistant Staff Judge Advocate who acts as a legal advisor within that camp.

Attorney. A person who is designated to practice law before relevant authorities. For Military Commissions proceedings, defendants do not have a free choice of attorneys. Instead, they only have access to military lawyers (JAGS) or civilian attorneys with the relevant security clearance. (Source: "Trial Guide for Military Commissions, 2004." United States Department of Defense. August 17, 2004).

Attorney-client Privilege (ACP). Stemming from the strong tradition of loyalty between the attorney and client, this privilege provides the client the right to prevent his attorney from disclosing any confidential communications between the client and the attorney. The privilege is protected under federal and international law. This privilege protects written and oral communications between an attorney and a client. (Source: Model Rules of Professional Responsibility, Rule 1.6, ICCPR Art. 14(3)(b)) At Guantanamo, there have been many allegations that the government has breached the attorney client privilege by installing and using microphones in rooms where detainees meet their attorneys to eavesdrop on privileged conversations, taking custody and control of materials protected by the attorney client privilege, etc.

Appellate Exhibit (AE). The military commission use "Appellate Exhibit" numbers to keep track of the thousands of filings and exhibits tendered by the prosecution, defense, and the commission. Each filing is assigned an "AE" number, which consists of the letters "AE", followed by a three digit number and at least one letter, sometimes another number, and often the initials of a defendant (e.g., AE013FF-1 (AAA)). The Trial Judiciary assigns the AE numbers.

AUMF. **See Authorization for the Use of Military Force.**

Authority (Persuasive Authority). Distinguished from "binding authority", persuasive authority does not bind on a court, but carries some weight and may assist judges in making decisions. Persuasive authority may come from legal experts, other jurisdictions, scientific studies, polls, etc. (Source: "Binding Authority." West's Encyclopedia of American Law, edition 2. 2008. The Gale Group 3 Mar. 2015)

Authorization for the Use of Military Force (AUMF). On 14 September 2001, days after the 9/11 attacks, the U.S. Congress passed the Authorization for the Use of Military Force (AUMF). Section 2(a) of the AUMF provides that the “President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”. Since 2001, that AUMF has been used to justify U.S. force against multiple organizations and individuals in many countries. Efforts have been made since 2001 for an “updated” AUMF, Congress has not passed a new AUMF

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

Base Emergency Engineering Force (BEEF). At Guantanamo Bay BEEF is the unit that provides Camp Justice services, including maintenance of the Quanset hut tents (including bedding, furniture, electricity), laundry, latrines, showers, and the grounds.

Baseline review. In October 2011, JTF-GTMO changed the military prison security policy. These changes included a review of communications between the defense counsels and detainees related to commission cases. JTF-GTMO comprehensively searched and inventoried all property of the defendants, including their legal materials. JTF-GTMO seized all legal mail from high-value detainees. Defense attorneys of these detainees objected, alleging that the military authorities violated the attorney-client privilege. This review is known as “Baseline Review”. Source: http://www.washingtonpost.com/pb/world/national-security/guantanamo-authorities-reading-attorney-client-mail-lawyers-say/2011/11/01/gIQAXoQkdM_story.html

Bates Stamp. When a party to a military commission tenders a document to another party, they affix a unique page number to each page of the document to help keep track of the documents and their pages. When a party wants to refer to a particular page of a document, they may refer to the Bates Stamp number.

Bean Hole Cover. See Bean Hole. The latchable door to a bean hole.

Bean Hole. The slot in “food tray slot” in the door of a detainee’s cell through which food is transferred in, empty food trays are transferred out, and through which detainee’s hands are inserted for shackling or unshackling. Items other than food may also be passed through bean holes. Standard Operation Procedure requires that the latchable bean hole covers be closed at all times except when serving food, shackling, passing items to detainees, or for medical checks.

BEEF. See Base Emergency Engineering Force

Behavioral Health Unit. The psychiatric unit at the Guantanamo Bay detention facility.

Behavioral Science Consultation Team (or BSCT, read "biscuit").

Belligerent. A person is engaged in hostilities during an armed conflict. Includes privileged enemy belligerents and unprivileged / unlawful enemy belligerents.

Binding (Binding Authority). Distinguished from “persuasive authority”. In international law, binding laws are rules that have legal force and impose obligations on the state parties upon signature, ratification of the treaty (for treaties), or simply as a member of the international community (for customary international law and *jus cogens*.) In federal law, binding laws are rules that impose obligations on a court through relevant statutes or case law precedent. (Source: “Binding Authority.” *West's Encyclopedia of American Law, edition 2*. 2008. The Gale Group 3 Mar. 2015)

Black sites. CIA detention facilities that operated pursuant to a secret order issued by President George Bush soon after 9/11, that authorized the CIA to create and operate prisons for suspected al Qaeda members, and to interrogate them there. Over 100 detainees were held at secret facilities in multiple countries until 2006, under the CIA’s RDI program. The locations of the black sites remain classified.

BOSS. Body Orifice Scanner. A chair-like device upon which detainee / defendants sit that detects contraband before entering the courtroom. It permits the Guantanamo Bay guards to search the defendant without physically insertions into any orifices, providing non-invasive screening. A BOSS is set up immediately outside the Guantanamo courtroom door, near the cells where defendants are held before court.



Brig. Abbreviation of Brigadier. Also the name of a military prison.

Brigadier General (a “1 star” General).

BRONE. Brothers Network

Burden of Proof. A party’s duty to establish facts proposed in court by evidence under certain thresholds. Examples of thresholds include “probable cause”, “preponderance of the evidence”, “clear and convincing evidence”, and

"beyond a reasonable doubt." In criminal cases, the burden of proof is on the prosecution and this must be established beyond a reasonable doubt.

C-130. Lockheed C-130 Hercules, a four-engine turboprop military transport aircraft.

Camp 1. *See* **Camp Delta.**

Camp 2. *See* **Camp Delta.**

Camp 3. *See* **Camp Delta.**

Camp 4. A medium security detention facility at Guantanamo Bay.

Camp 5 Echo. This is the detention facility within Camp 5.

Camp 5. A maximum security detention facility at Guantanamo Bay.

Camp 6. A maximum security detention facility at Guantanamo Bay.

Camp 7. A secret, "hidden" camp at Guantanamo Bay that houses High Value Detainees (HVDs). Commentators have likened it to a Supermax prison in the continental U.S.

Camp America.

Camp Delta. This is also known as **Camps 1, 2 & 3.**

Camp Echo. A facility at Guantanamo where detainees can meet their lawyers. Different detainees have attorney / client meetings at different facilities. Defendants in the 9/11 case meet their attorneys in "Echo 2".

Camp Iguana. A detention facility at Guantanamo Bay that at one point housed juvenile detainees. It also at one point held Uighur detainees, who were Muslim from China. Camp Iguana was raised in 2017.

Camp Justice. The expeditionary legal complex at the Guantanamo Bay Naval Base. Camp Justice is a tent city where non-governmental observers media, and other personnel live when participating in the Military Commissions. The courtroom is housed there, along with other facilities.

Camp X-Ray.

Capital Case. Pursuant to Rule 103(a)(3) of the Rules for Military Commissions, "capital case" refers to "a military commission to which a capital offense has been referred with an instruction that the case be treated as capital, and, in the case of a rehearing or new or other trial, for which offense death remains an authorized punishment under R.M.C." (Source: Rule 103(a)(3), Rules for Military Commissions)

Captured. A person, usually a combatant, who is detained by a belligerent party in the battlefield.

Casper. *See* **Ghost Detainee or Ghost Prisoner.**

Convention Against Torture. a convention the United States has ratified prohibiting torture and other forms of cruel, inhuman, and degrading treatment and providing certain rights to people who allege torture.

Change 1. In January 2015, the Deputy Secretary of Defense issued "Change 1", an order that required all Guantanamo military commission military judges to relocate to Guantanamo until their respective military commissions ended. This Change was withdrawn.

Charge.

Chief Defense Counsel (CDC). Chief Defense Counsel is a military position in the Department of Defense. It the administrative head of what was originally known as the Office of the Chief Defense Counsel, a component of the Office of Military Commissions. Chief Defense Counsel Brigadier General John Baker changed the name of the office to the Military Commission Defense Organization (MCDO – pronounced "Mac Doe"). The CDC is responsible for supervising all military commission defense activities, and for ensuring and facilitating the proper representation of all defendants referred to trial before the Military Commission. (Source: <http://www.mc.mil/aboutus/organizationoverview.aspx>; <http://www.defense.gov/news/May2003/d20030430milcominstno4.pdf>)

CHU. "**Compartmentalized Housing Unit**". Guantanamo trailers used to house military commission personnel who travel to Guantanamo temporarily. Prosecutors, military defense counsel, Office of Military Commission personnel, and others are often assigned to live at this "hard housing" (as compared to tent, where NGOs and media are housed, in what are called "soft housing").

CIDT. Cruel, inhuman, and degrading treatment. This is prohibited under the United Nations Convention Against Torture and Other Cruel and Inhuman Treatment and Punishment. It is also prohibited under the U.S. Constitution and U.S. statutory law.

Court Information Security Officer. (CISO). Military judge's staff member who sits in the courtroom next to the military judge, and oversees the handling of classified information inside the courtroom. The CISO controls the red hockey light that stops audio feed from leaving the courtroom and cuts video feed to remote locations when he deems that classified information has been shared. Formerly "Court Security Officer" (CSO).

Citizen of the U.S. (See Permanent Resident of the U.S.; National of the U.S.). Rule of Military Commission 103(a)(5), notes, regarding “citizen of the United States”, that “[a] person may become a citizen of the United States only by birth within the territory of the United States, by birth to parents who are United States citizens, or by naturalization. See 8 U.S.C. §§ 1401, 1427.”

Civil Law. Legal system originating from Roman law, in which codified codes serves as the primary source of law. Unlike in the common law system, case law does not bind under a civil law regime.

Civilian. A person, including a federal employee, who is not a military serviceperson.

Civilian Internee. Any civilian, including those described by Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, who is in the custody or control of an opposing power during an armed conflict or occupation, such as those held for imperative reasons of security or protection.

Classified Information Procedures Act (CIPA). 18 U.S.C. App. III. Sections 1- 16 Classified Information Procedures Act, aiming at protecting unnecessary disclosure of the classified information. (Source: <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-app-classifie.pdf>)

Classified Information. The Military Commission Act of 2009, § 948a(2) provides that the term ‘classified information’ means the following:

“(A) Any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security.

“(B) Any restricted data, as that term is defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

Clean Team. Investigators who gather information without using information gained through torture or other prohibited or controversial methods.

Clearance. See Security Clearance.

Client. In military commission cases, usually refers to the defendant, who is the defense counsel represents and for whom the defense counsel works.

Commissions Logistics Office (CLO). The office at Guantanamo responsible for military commission logistical matters such as organizing housing and on-site transportation for commission stakeholders. Pronounced “cloh.”

Coalition Partner (of the U.S.). The Military Commission Act of 2009 defines ‘coalition partner’ as any State or armed force directly engaged along with the U.S. in such hostilities or providing direct operational support to the U.S. in connection with such hostilities. (948a(3))

Cobalt. See Salt Pit.

Co-Defendant. One of multiple defendants who has been charged for prosecution in the same case. (Source: Black’s Law Dictionary)

Combat Status Review Tribunal. Determine whether a person meets the criteria to be designated as an enemy combatant.

Combatant. See Non-Combatant.

Commanding Officer (CO). Officer in command of a military unit. Pursuant to Art. 15 of Uniform Code of Military Justice, a commanding officer may impose non-judicial punishment “for minor offenses without the intervention of a court-martial”. (Source: Art. 15, Uniform Code of Military Justice)

Commission (See Military Commission). Pursuant to the Military Commission Act, a Military Commission is a military court exercising jurisdiction over alien unprivileged enemy belligerent who has engaged in hostilities, or who has purposefully and materially supported hostilities against the United States, its coalition partners or was a part of al Qaeda. (Source: §948, Military Commission Act 2009)

Common Access Card. Used by the Department of Defense as both identification and an encryption token. A CAC is often redundantly called a “CAC card.”

Common Article 2 of the Geneva Conventions. Each of the four Geneva Conventions contains an identical Article 2, and Article 2 is thus “common to” all four of the Geneva Conventions. Common Article 2 relates to armed conflicts of an international nature.

Common Article 3 of the Geneva Conventions. Each of the four Geneva Conventions contains an identical Article 3, and Article 3 is thus “common to” all four of the Geneva Conventions. Common Article 3 relates to armed conflicts of a non-international nature.

Common Law. In contrast to civil law, common law refers to a body of law developed by judges through precedents. The core principle for common law is *stare decisis*.

Communications Management Units (CMU). (a/k/a Guantanamo North). Federal prison facilities in Terre Haute, Indiana and Marion, Illinois occupied primarily by Muslim men.

“Compartmentalized Housing Unit”. See **Chu**.

Competent (To Stand Trial). The ability of a military commission defendant to understand the nature of the commissions and to have the ability to cooperate in his defense to the charges. The military commission may order a competency hearing if a defendant’s competency is in question.

Competent (Tribunal). A form of judicial guarantee ensuring that the defendant receives a fair trial. Art. 14(1) of International Covenant on Civil and Political Rights and Art. 8(1) of American Convention on Human Rights mention the term “competent” tribunal, meant to ensure that the tribunal is independent and impartial. Noticeably, Art. 84(2) of Geneva Convention III provides that “in no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality.” This requirement also applies to military tribunals trying a prisoner of war. (Source: Art. 14(1), ICCPR; Art. 8(1), ACHR; Art. 84(2), GCIII)

Computer Voice Stress Analyzer (CVSA).

Conditions of Confinement. The status of a detainee / defendant’s lodging and treatment while in custody, before, during and after a military commission.

Confidential. A category of classified information requiring clearance. According to Executive Order 12958, "confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe. (Source: Executive Order 12958 on Classified National Security Information) This is the lowest tier of classified information.

Containerized Housing Unit (CHU). See **Cuzco**. A trailer like, non-permanent structure in which civilian and military Guantanamo personnel live. ==-j b=-

Continuance. When the judge orders the date of a trial or hearing or other court appearance be postponed, be request of a party, by requested of all parties, or on the judge’s own motion (sua sponte). See **Stay; Abate; Abatement**.

Contractor. A civilian who works for a private company that has been hired by the U.S. government to provide services. Many individuals who work with the military commissions are servicemembers, but many, including counsel, are contractors.

Convening Authority (CA). The individual empowered to convene military commissions, refer charges, negotiate pre-trial agreements, and review records. Generally, the Office of Convening Authority is responsible for “the overall management of the military commission process.” (<http://www.mc.mil/aboutus/organizationoverview.aspx>). Per the Rules of Military Commissions, the “Convening Authority” “means the Secretary of Defense or any officer or official of the United States designated by the Secretary of Defense for that purpose”. Rule of Military Commission 103(a)(8). The Convening Authority has power to decide whether to charge defendants, whether the government will seek the death penalty, and how to handle logistics and resources for both prosecution and defense.

Convention. A term that refers to a treaty (source Vienna Convention on the Law of Treaties). For examples, the *International Covenant on Civil and Political Rights*. [*Quote the definition of “treaty” from the Vienna Convention on the Law of Treaties.*]

Conviction. The judicial determination that a defendant is guilty of a crime. Must be decided by a "beyond a reasonable doubt" standard.

Counsel (Learned Counsel). In capital cases, a defendant will be appointed a “learned counsel” who is specialized in capital litigations at the expense of the Department of Defense. The Learned Counsel may be a military attorney or a civilian defense attorney. (<http://www.mc.mil/aboutus/organizationoverview.aspx>)

Counterterrorism Center (CTC). The CTC is a division of the CIA's National Clandestine Service.

Courier Card. A document / credential required for a person to transport classified materials.

Court Security Officer (CSO). A member of the military judge’s staff. In the courtroom during a proceeding, the CSO sits next to the military judge and has the ability to cut the audio and visual if any classified information is presented in the courtroom. (<http://www.reuters.com/article/2013/01/31/us-usa-guantanamo-idUSBRE90U0Z720130131>; http://www.huffingtonpost.com/2013/01/28/guantanamo-secret-censor_n_2568595.html) (renamed CISO??)

Court. Judicial tribunal authorized to resolve legal disputes.

Court-Martial. The legal system, operating under the Uniform Code of Military Justice (UCMJ) in place to prosecute U.S. servicemembers accused of crimes. The U.S. military commissions system is based on the courts-martial system, but different in significant respects.

Crimes Against Humanity. Early developed by treaty law (1899 Hague Conventions) and international judicial practice (Nuremberg, ad hoc Tribunals for Former Yugoslavia and Rwanda, International Criminal Court), crimes against humanity generally refers to large-scale crimes shock the conscience of the humankind as a whole. Noticeably, terrorism per se is not explicitly included in the crimes against humanity under the International Criminal Court statute. ~~Meanwhile, the terroristic activities meeting the elements of crime shall fall within the category of crimes against humanity. (Source: Crimes against Humanity, Max Planck Encyclopedia of Public International Law) Crimes Against Humanity must be widespread or systematic, and can include slavery, torture, extrajudicial punishments, kidnappings, persecution, etc. Such crimes do not constitute Crimes Against Humanity if they are isolated in nature. Such isolated acts may, however, be deemed War Crimes under international law under the right circumstances.~~

Cross-Examine. A party's questioning the witness testifying in favor of the opposing party. The purpose of cross-examination is usually to discredit the witness in order to cast doubt upon his testimony. The scope of questions asked during cross-examination is generally limited to topics raised during direct-examination. ("cross-examination." A Law Dictionary, Adapted to the Constitution and Laws of the United States)

Cruel, inhuman or degrading treatment of punishment. *[Also reference to the 8th Amendment to the U.S. Constitution]* Act prohibited by various human rights instruments and customary international law. The prohibition of torture and cruel, inhuman, or degrading treatment or punishment is absolute and non-derivable. Moreover, international tribunals and national courts have both decided that this prohibition has become *ius cogens* and binds on all states. (Source: Art. 5, Universal Declaration on Human Rights; Art. 7, ICCPR; Art. 5(2), ACHR; Art. 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Prosecutor v. Furundzija, Trial judgment, Case No IT-95-17/1-T, ICL 17 (ICTY 1998); ex parte Pinochet v Bartle and Commissioner of Police for the Metropolis, Appeal, [1999] UKHL 17, ILDC 1736 (UK 1999)) **D.C. Circuit.** United States Court of Appeals for the District of Columbia Circuit.

Customary International Law. A source of international law which has binding force upon states. Different from international treaties, customary international law refers to obligations arising from state practice and *opinio juris*.

Cuzco. A trailer like, non-permanent structure in which civilian and military Guantanamo personnel live. They are "hard housing", and are distinguished from "soft housing" such as tents. "Cuzcos" are named after the site of the 1898 Battle of Cuzco Well, during which the US first took possession of Guantanamo. These units are also called "CHUs" (containerized housing units).

D.C. Circuit. The U.S. Court of Appeals for the District of Columbia.

DAESH. An acronym for the Arabic name of the Islamic State – al-Dawla al-Islamiya fi al-Iraq wa al-Sham. *See also* Islamic State; ISIL; and ISIS.

Dark Prison. *See* Salt Pit.

Death Penalty Mitigation Specialist (See Mitigation Specialist). A member of the defense team specialized in coordinating investigations of the defendant's background, history, physical and mental situation, level of participation in the alleged offense, as well as other relevant evidence, in order to provide reasons why the defendant should not be sentenced to death. They are mandatory participants in all military commission capital cases. (Source: ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases. (Rev. Ed. Feb. 2003)

Death Penalty. Available type of punishment before the Military Commission. The Military Commission requires unanimous votes of its members on conviction and on sentence before a defendant can receive the death penalty. (Source: <http://www.deathpenaltyinfo.org/rules-military-tribunals>)

Declarant. A person who makes a statement or declaration.

Defendant. The accused person in a military commission.

Defense Counsel. The attorney who represents the defendant in a military commission.

Defense Enterprise Email ("DEE"). *See* DEE Migration.

DEE Migration. *See* Defense Enterprise Mail. DEE Migration was when the DoD was shifting osd.mil to mail.mil – new e-mail servers.

Defense Intelligence Agency (DIA). DIA is a Department of Defense combat support agency, which produces, analyzes, and disseminates foreign military intelligence. (Source: <http://www.dia.mil/About/FAQs.aspx>)

Defense Team. The defense counsel and others who are working on behalf of the defendant in a military commission. Team members may include paralegals, Learned Counsel, detailed counsel, interpreters, security officers, and others.

Defense(s). The defendant's assertion stating why the plaintiff/prosecution shall not prevail in the case before the court.

Defense Information Security Officer (DISO) See Defense Security Officer (DSO). A security officer who by court order is assigned to assist a military commission defense team with handling classified information. In 2015, this position was renamed from "Defense Security Officer" (DSO).

Defense-Initiated Victims Outreach (DIVO). A defense-initiated victims outreach program seeks to provide a bridge between victims and their families and the attorneys who represent the defendant, especially in capital cases.

Defense Intelligence Agency (DIA). A Department of Defense agency that provides and manages non-U.S. military intelligence, and supports combat.

Deposition. A witness' out-of-court testimony. Per to Rule 702 of the Manual for Military Commissions, "A deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission." (Source: Rule 702, Manual for Military Commissions)

Derogation. ~~An exemption from certain legal obligation. A derogation is a partially revoked law, as opposed to the total abrogation of a law.~~ (Source: *A Law Dictionary, Adapted to the Constitution and Laws of the United States.* By John Bouvier. S. v. "derogation." Retrieved March 3 2015)

Detail. An appointment of a person to a particular duty. §948 of the Military Commission Act provides the composition of the Military Commissions and detail of military judge, trial counsel, defense counsel, reporters, interpreters and other personnel. (Source: §948, Military Commission Act)

Detailed Defense Counsel. Detailed Counsel. An attorney appointed to represent the defendant at the Guantanamo military commissions.

Detainee Assessment Briefs (DABs).

Detainee Information Management System (DIMS)

Detainee Information Management System-Fusion (DIMS-F). Detainee Information Management System-Fusion (DIMS-F) has been selected as acquisition program of record. DIMS-F is a web-accessible automated information system that will integrate the best capabilities of the Detainee Information Management System (DIMS) and Detainee Reporting System.

Recent additions include medical and legal modules to ensure a robust, expeditionary, and single-system for detainee information and facility management. The DIMS-F provides an end-to-end system tied to Biometric Automated Toolset (BAT); Distributed Common Ground System-Army (DCGS-A); original Detainee Management System (DMS); capture tags; screening; property exploitation; interrogation plans and summaries; Intelligence Information Reports; collection, management, and dissemination (CM&D); and legal adjudication.

Detainee. A person who is held in custody by an authority. ~~Pursuant to the Detainee Treatment Act, "Detainee" refers to a person "in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility."~~ (Source: ~~Detainee Treatment Act Title X, H.R. 2863~~)

Detention. Holding a person in custody. Most persons being held at Guantanamo Bay are in "pretrial detention", with no charges filed against them.

DIMS. Detainee Information Management System. A log JTF-GTMO personnel use to record their activities in detail. [A DIMS entry might describe, for example, detainee transport to or from their cell, detainee meal times and what was eaten, or routine inspections or cell maintenance.]

DIMS-Fusion. Detainee Information Management System-Fusion. The U.S. Army website noted this about DIMS-Fusion:

Discovery. A party's inquiry into non-privileged matters relevant to the ongoing proceeding. Discovery is the process by which the opposing parties exchange information about a case. If one side requests discovery and the other refuses to produce it, the requestor can file a motion to compel.

Discovery Request (DR). When the defendant seeks evidence from the prosecution, the defendant issues a discovery request. Each DR is assigned a DR number.

Dismissal. A military judge's order to terminate one or more charges against a military commission defendant.

Docket. A judge's order that lists motions and other matters scheduled to be heard during a particular military commission hearing. Though a hearing's docket is typically posted on the military commission website (www.mc.mil) before the hearing, the docket will not be immediately viewable by the public because items posted on that website are

not visible to the public until 14 days after posting. Thus, dockets are typically not available to the public until after the corresponding hearing.

Department of Defense (DoD). A U.S. Executive Branch department charged with all matters related to the U.S. military, including the U.S. military commissions. The DoD employs or pays for staff of the Convening Authority, the Trial Judiciary (military commissions judges), much of the prosecution (except that provided by the DoJ), the defense (except most expenses associated with for civilian defense counsel for military commissions), and the general operation of the military commissions.

Department of Justice (DoJ). A U.S. Executive Branch department charged with enforcing laws of the U.S. The DoJ handles all civil and criminal litigation on behalf of the United States. The DoJ supports the military commissions by providing non-military Special Trial Counsel or regular prosecution team members, who are DoJ employees and not DoD employees.

Drop box. Guantanamo defense attorneys used to be able to leave non-legal mail in a “dro box” for delivery to their clients. In 20xx, the drop box was removed.

Defense Switched Network (DSN). The DSN is a secure phone, fax, and information system that the Department of Defense uses.

Defense Security Officer (DSO). See **Defense Information Security Officer (DISC).** A security officer who is responsible for ... In 2015, this position was renamed “Defense Information Security Officer” (DISO).

Due Process. The requirements of “Due Process” stem from the 5th and 14th Amendment of the Constitution. There are two aspects of “Due Process”—substantive due process and procedural due process. Substantive Due Process prohibits the government from depriving a person of life, liberty or property “arbitrarily”. Procedural Due Process requires that notice and hearing shall be guaranteed if a person is deprived of life, liberty or property. (Source: Max Planck Encyclopedia of Public International Law)

Enterprise Information Technology Services Directorate (EITSD). Provides information technology services to the Office of the Secretary of Defense, which includes the components of the military commissions.

Expeditionary Legal Complex (ELC). The Guantanamo complex that houses the courtroom where hearings are conducted.

Elmo. A camera brand name, frequently used generically. An Elmo captures images real time and displays them on a screen for people in the courtroom or other room to see.

Enemy Combatant. See **Unprivileged Enemy Belligerent.**

Ensure. A brand of liquid nutritional food supplement that is used to forcefeed / enteral feed detainees who refuse to eat. A tube is inserted into the detainee’s nose cavity, pushed down until the end of the tube reaches his stomach, and by gravity the Ensure flows directly into the detainee’s stomach.

Enteral Feeding. See **Forcefeeding, Force Feeding.**

Enterprise Information Technology Services Directorate (EITSD). A branch of the Department of Defense Washington Headquarters Service. EITSD provides information technology equipment and services to the Office of the Secretary of Defense. Source: <http://www.whs.mil/our-organization/enterprise-information-technology-services-directorate>

Equality of Arms. States shall guarantee that the parties in a legal proceeding have equal opportunity to state or defend their case. Equality of arms is the core notion of fair trial in both civil and criminal cases. (Source: *Äärelä and Näkkäläjärvi v Finland*, Merits, Communication No 779/1997, UN Doc CCPR/C/73/D/779/1997, IHRL 2823 (UNHRC 2001), 24th October 2001, United Nations Human Rights Committee). Essentially, the “equality of arms” principle mandates that parties have adequate resources and access to evidence and witnesses so as to have a “reasonable opportunity of presenting [their] case to the court under conditions which do not place [them] at substantial disadvantage” in relation to the opponent. (Source: *Bulut v. Austra*, ECTHR, No. 17358/90)

Escort. Military officer accompanying others for security, guidance, and convenience.

Evidence. Witness testimony, written documents and other tangible objects used to seek to demonstrate the existence or non-existence of a fact matter in legal proceedings.

Ex parte. Latin term meaning “from the side”. A military commission proceeding, or action, involving the judge and either the defense or the prosecution, but not both the defense and prosecution concurrently. The prosecution may have an “ex parte” oral or written communication with the military judge, and the defense may have an ex parte oral or written communication with the judge. Ex parte communications are an opportunity for either side to communicate with the judge without the other side knowing the contents of the communications. The judge may issue an ex parte order in favor of the prosecution, without notifying the defense.

Examine. A party questioning a witness.

Exculpatory evidence. Evidence tending to negate the criminal defendant's guilt or reduce the degree of guilt. Pursuant to 10 U.S.C. §949j (b), trial counsel in a military commission shall disclose the existence of exculpatory evidence. (Source: 10 U.S.C. §949j (b))

Executive Order. An order issued by the U.S. President as the head of Executive Branch providing instruction or direction to federal agencies and officials.

Expeditionary Legal Complex (ELC). A Guantanamo Bay complex constructed in 2008, that houses the secure courtroom where U.S. Military Commissions are conducted.

Expert Witness. A witness qualified as an expert by knowledge, skill, experience, training or education. Pursuant to Rule 703 of the Military Commission Rules of Evidence, an expert witness may testify in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods [and (3) the witness has applied the principles and methods reliably to the facts of the case. Rule 706 provides that the trial counsel, defense counsel and the military commission may obtain expert witnesses. Moreover, the accused may select his expert witnesses at his own expense. (Source: Rule 703, 706 of the Military Commission Rules of Evidence) However, the prosecution must approve all defense witnesses, and arrange for facilitation of their travel and other logistics for testimony at Guantanamo Bay, by video, or by other means.

Extraordinary Rendition. See Rendition

Fair Trial. The right to fair trial is a fundamental human right that requires states to respect the rule of law and protect individuals from arbitrary treatment in judicial proceedings. A fair trial contains several components, including, for example: (1) competent, independent and impartial tribunal; (2) public trial; (3) equality of arms; (4) access to a court; (5) other guarantees ensuring the equality. The right to fair trial is provided for in various international human rights law instruments, including International Covenant on Civil and Political Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms and Fundamental Freedoms, American Convention on Human Rights, the Geneva Conventions, etc.

Family (Family of Victim, Family of Detainees / Defendants) (See Victims, Victim and Family Member - VFM)

Fatwa. An authoritative opinion, issued by a Mufti or a learned scholar on Islamic law, on a question of Islamic law. A fatwa binds those who follow the Mufti.

Freedom of Information Act (FOIA). An federal statute through which private citizens may request that the U.S. government release to the public certain information that the government had chosen not to release. A person would make a "FOIA request" if they wanted access to information that the government denied giving to them.

Forcefeed or Force Feed. See Enteral Feeding. When a detainee refuses to eat, Guantanamo camp staff may pump nutrition into the stomach of the detainee via a tube inserted through the detainee's nose cavity. One end of the tube is connected to a can of Ensure, which is a brand of liquid nutritional supplement. The other end of the tube sits inside the detainee's stomach. Gravity causes the Ensure to travel through the tube to the detainee's stomach.

Forcible Cell Extraction (FCE). If guards wish a detainee to move from his cell, for whatever reason, and the detainee refuses to move, guards will order an forcible cell extraction, and use force remove the detainee. A team of 5 or 6 guards dress in riot gear – with shields, full head helmets covering the face, batons or other implements, and conduct the FCE in a carefully orchestrated manner. Some call this a "tackle and shackle" process.

FOUO. "For Official Use Only." A marking on documents, unrelated to classification of those documents, that indicates that restricts their distribution.

Four piece or four-piece suit. Restraint used on Guantanamo prisoners, consisting of handcuffs, leg irons and waist chain (and with security boxes to cover key holes on the restraints). (Cf. 3-piece = handcuffs, leg restraints, and a chain around their waists)

Federal Rules of Evidence. Rules applicable in federal courts that govern the introduction and use of evidence in federal court proceedings. The FRE do not apply directly at military commissions, but military judges may refer to the FRE when interpreting and apply evidentiary rules in the commission, and some elements of the FRE were incorporated into the military commission evidentiary rules, and some were excluded.

Frequent Flyer Program. a/k/a Operation Sandman. Detainees would be forced to move from cell to cell many times each night, disrupting their sleep.

Ft. Meade. Fort George G. Meade, Maryland, which is a military installation providing service, infrastructure and other support to service members, DoD civilian employees and other personnel. Ft. Meade is an observing site for Military Commission trials. The public may observe the trial proceedings through video and audio feed transmission. (Source: <http://www.ftmeade.army.mil>)

General Principles of Law. A source of international law. Listed in Article 38(1)(c) of the International Court of Justice Statute, it refers to a set of rules recognized by “civilized nations” and binds on states.

Geneva Conventions. The four Conventions of 1949 and three additional protocols are a central body of international humanitarian law (law of armed conflict), protecting persons not part of the hostilities during a conflict and setting limitations to belligerent parties’ methods of warfare based on humanitarian concern. Most provisions of the Geneva Conventions have achieved the status of customary international law, thus binding all states.

Git-Meow. *See Operation Git-Meow.*

Gitmo (See Guantanamo Bay Naval Station, GTMO).

GTMO (See Guantanamo Bay Naval Station, Gitmo).

Ghost Detainee (or Ghost Prisoner). *See Casper.* Detainees who were held in secret CIA-operated detention facilities, known as black sites, off the radar, with the International Committee of the Red Cross and others not knowing that the detainees were being held there. Over 100 detainees were ghost detainees. The final 14 ghost detainees, considered by the U.S. to be High Value Detainees (HVDs) spent several years at black sites before being taken to Guantanamo in 2006

Habeas Corpus (or “Habeas”). A writ to challenge the legality of a person’s detention. The source of habeas corpus is Art. I, Section 9, Clause 2 of the Constitution. Congress has the power to suspend habeas corpus. The Executive Branch (U.S. President) does not have such power. habeas corpus”, latin for “show the body.” Guantanamo detainees may challenge the lawfulness of their detention by requiring the government to present evidence justifying their continued detention; however, the legal standard required is much lower than would be required for conviction in a criminal court (including at a commission trial). Habeas appeals go to the DC Circuit.

Habeas Counsel. Civilian attorneys representing Guantanamo detainees before Periodic Review Boards in habeas challenges, and during appeals of those proceedings in the DC Circuit. Detainees are not permitted to have military counsel serve as habeas counsel.

Hague Convention. The Hague Conventions of 1899 and 1907 include a series of international treaties and declarations addressing the laws and customs of warfare. The Convention's provisions are considered to embody rules of customary international law, and thus bind States which are not formal parties. (Source: <https://www.icrc.org/ihl/INTRO/195>)

Hearing. A legal proceeding before a military commission judge during which the prosecution and defense counsel argue points of law and facts related to particular issues. The judge may make an oral ruling “from the bench” at the conclusion of the hearing, or the judge may issue a written ruling after the hearing.

Hearsay. An out-of-court statement to prove the truth of the matter it asserts. Pursuant to Section III of the Military Commissions Rules of Evidence, hearsay evidence is inadmissible unless the witness is unavailable, and then only with notice to the opposing party, and only if it is material, probative, reliable and the interests of justice will be served by admission. (Source: Rule 801, 802, 803, Military Commissions Rules of Evidence) Hearsay evidence is more readily admissible before military commissions than before courts martial or Art. III courts.

Hezb-i-Islami Gulbuddin. A group in Afghanistan labeled as a terrorist group.

High-Value Detainee (HVD) (Or HVTD – High Value Terrorist Detainee). Based on the Office of Director of National Intelligence’s Summary of HVTD Program, HVTD refers to “detainees who have been in the inner circle of al-Qaeda, occupying some of the most important positions in the organization, who hold information that cannot be obtained from other sources.” Currently there are 14 detainees on the Department of Defense’s list. (Source: <http://www.defense.gov/pdf/thehighvaluedetaineeprogram2.pdf>; <http://www.defense.gov/pdf/detaineebiographies1.pdf>)

High-Value Detainee Working Group (HIG). A three-agency entity, administered by the FBI, and including the Central Intelligence Agency (CIA), and Department of Defense (DoD)—created in 2009 under President Obama following widely-reported questionable CIA interrogation. HIG intelligence professionals conduct interrogations of high-value targets who are nominated by FBI, CIA, and DoD leadership. The HIG director is from the FBI, and two deputies are from the DoD and CIA.

Hizb-i-Islami Gulbuddin (HIG). *See Hezb-i-Islami Gulbuddin.*

Hockey light. A red light in the courtroom that the court security officer will flash when classified information is accidentally shared during a public session. The flashing hockey light is a signal that the audio feed out of the courtroom is being cut, so that anyone in the observer gallery in the back of the courtroom, who hear what is said in the courtroom on a 40-second delay, will not be able to hear the classified information. The courtroom viewing gallery is separated from the courtroom by a triple-paned glass window, so viewers will still be able to see what is going on in the courtroom. When the hockey light flashes, video links to remote sites are also cut,

along with audio. Thus, observers at Ft. Meade, Ft. Devon, and other remote sites will not be able to see or hear what is going on in the courtroom after the hockey light is switched on. The courtroom viewing gallery has TV monitors where observers can see and hear what is happening in the courtroom, on a 40 second delay, and that is the same feed that goes to the remote sites. Audio and video feed is cut to the courtroom gallery when the red hockey light flashes, just as it is cut to the remote sites. The red light sits in the front of the courtroom on the judge's bench, between the judge and the courtroom security officer.

In 201*, the red hockey light started flashing during a hearing. Neither the judge nor the courtroom security officer triggered the light. It was determined that an outside U.S. agency triggered the light. The military judge ordered the outside agency not to take control of the light, as courtroom proceedings are government by the military judge, and should not be subject to any outside control. See ____

Hooch. Any sort of housing unit for military personnel.

Hostilities. The Military Commission Act of 2009, § 948a(9) provides that the term 'hostilities' means any conflict subject to the laws of war.

<https://www.army.mil/article/114405>

<https://www.justice.gov/usam/criminal-resource-manual-2052-contacts-intelligence-community-regarding-criminal-investigations>

ICCPR. See **International Covenant on Civil and Political Rights.**

International Covenant on Civil and Political Rights. A United Nations Treaty signed and ratified by the U.S., and thus binds the U.S. to comply with its terms. The ICCPR provides that ICCPR states parties, such as the U.S., are obligated to provide a host of civil and political rights to persons within their territory and under their control. The U.S. has acknowledged that it is bound to comply with the ICCPR regarding the detainees at Guantanamo and their treatment, and regarding the military commissions. ICCPR rights that the U.S. is obligated to afford to stakeholders related to Guantanamo include the right to a fair trial. The ICCPR also protects freedom of expression, freedom of religion, and freedom from discrimination. The detainees are protected by the ICCPR at Guantanamo. Also, other stakeholders have rights that are protected at Guantanamo, for example, the media has the right to access so they can gather and disseminate news related to Guantanamo, prison guards have the right to be free from sex discrimination when decisions are made about assigning guards to certain tasks, and the public has a right to access to military commission proceedings. Many focus on the detainees' / defendants' rights to a fair trial, but their rights are not the only rights in question.

Initial Denial Authority (IDA). A U.S. government official who has the authority to deny release government records that are requested through Freedom of Information (FOIA) requests.

Iguana. A genus of herbivorous lizards that can be found at Guantanamo, and that are protected under Guantanamo rules. Harming an iguana can result in a \$10,000 fine.

Immediate Reaction Force (IRF). A team of military officers on stand-by to respond to emergencies. IRF specializes in the extraction of inmates who are combative, resistant, or possibly processing weapons in their cells. There have been allegations that IRF has been used as a "punishment squad" to terrorize detainees illegally. (Source: http://www1.umn.edu/humanrts/OathBetrayed/sop_2004.pdf)

Impartial (Tribunal). Subjectively, it requires that there be no personal prejudice by judges or jury members. Objectively, it requires that "there can be no legitimate doubt by any party that the judges or jury are not biased in any way." (Source: Max Planck Encyclopedia of Public International Law; Karttunen v Finland, Merits, Communication No 387/1989, UN Doc CCPR/C/46/D/387/1989, (1993) 1-1 IHRR 78, IHRL 2753 (UNHRC 1992), 23rd October 1992, United Nations Human Rights Committee)

In Camera. Latin for "in chambers". When the judge holds proceedings outside the view of the public and press.

Independent (Tribunal). A requirement that the judiciary functions distinctly and free from interference by the executive and other outside factors. (Source: Oló Bahamonde v Equatorial Guinea, Merits, Communication No 468/1991, UN Doc CCPR/C/49/D/468/1991, (1993) 1-2 IHRR 147, IHRL 1685 (UNHRC 1993), 20th October 1993, United Nations Human Rights Committee) For example, the military commissions should not be subject to interference by non-judicial military officers

Independent counsel. An attorney, separate from regular military or civilian defense counsel, who may advise a military commission defendant on issues, partitioned off from the regular military or civilian defense counsel. For example, if a potential conflict of interest arises between the defendant and his regular military or civilian defense counsel, the military commission may appoint an "independent counsel" who would advise the defendant about that potential conflict.

Infantry. Army troops trained to fight on foot, for example, in face-to-face combat.

Information Assurance. Keeping information secure.

Informational Contraband. At the military commissions, any information that the defense counsel is not permitted to share with the military commission defendants. Informational contraband may include unclassified and classified information.

Informational contraband. As opposed to physical item, anything containing information that JTF-GTMO determine to be “impermissible of inappropriate” for a detainee to possess, including documents, electronic media, and other materials. (Source: http://www.lawfareblog.com/wp-content/uploads/2012/03/2_Enclosure-1-Buzby-Memo.pdf)

Interlocutory Appeal (See Appeal (Interlocutory Appeal)). An appeal from an interlocutory order. Generally, the appealable issues are limited to final judgments. Provided by *Hallock v. Bonner*, 387 F.3d 147(2d Cir. 2004), an appeal from an interlocutory order is possible when: (1) the order must have conclusively determined the disputed question; (2) the order must “resolve an issue completely separate from the merits of the action”; (3) the order must be “effectively unreviewable on appeal from a final judgment.” In context of military justice, the United States may take an interlocutory appeal to the United State Court of Military Commission Review of any ruling or order of the military judge (1) that terminated the proceeding with respect to a charge or specification; (2) that excludes evidence that is substantial proof of a fact material in the proceeding and (3) that relates to a matter of classified information under certain conditions. (Source: 10 USC 950d)

Interlocutory Order. An order issued by a court that is not a final order of the court. An interlocutory order would be issued during a hearing or proceedings, rather than at the end of the case. An interlocutory order would not be a final order. Some interlocutory orders may be appealed.

Internment Serial Number (ISN). The military assigns each Guantanamo inmate a unique identifying number, or Internment Serial Number (ISN).

International Committee of the Red Cross (ICRC).

International Humanitarian Law (IHL). Source of law that applies during armed conflict, and that govern, for example, the treatment of prisoners, the conduct of military commissions, and the protection of rights of all armed conflict stakeholders. Whereas IHL applies only during an armed conflict, international human rights law (IHRL) applies in times of armed conflict and in times of peace.

International Human Rights Law (IHRL). Source of law that applies during peace time and during armed conflict that govern, for example, provision of and respect for fundamental human rights. Whereas IHRL applies in times of peace and in times of armed conflict, international humanitarian law (IHL) applies only during periods of armed conflict.

Interpreter. Personnel providing simultaneous interpretation in the courtroom during proceedings, a deposition, or outside the courtroom, for example during client meetings, witness interviews, or other investigations. Office of Military Commission provides such service to support military commissions. Pursuant to §948l of Military Commission Act, “the convening authority of a military commission under this chapter may detail to or employ for the military commission interpreters who shall interpret for the military commission, and, as necessary, for trial counsel and defense counsel for the military commission, and for the accused.” Further, § 949g requires that the interpreters take an oath “to perform their duty faithfully.” (Source: <http://www.mc.mil/FACILITIESSERVICES/Services/TranslationInterpretation.aspx>; §948l, §949, Military Commission Act)

Interrogation. Formal questioning by law enforcement or the military of a person who is arrested or suspected of committing a crime. (Source: Black’s Law Dictionary) Under federal and international law, torture is not a permissible form of interrogation. (Source: 18 U.S. Code § 2340A, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)

Investigative Search Request (ISR). A formal request to the government to search a database or other information technology system.

IRF (See Immediate Reaction Force; Initial Reaction Force). A team of military officers stand-by to respond to emergencies, specializing in the extraction of an inmate who is combative, resistive or possibly processing weapon in the cell. Meanwhile, there has been allegations about IRF being used as punishing squad terrorizing detainees and committing various inhumane activities. (Source: http://www1.umn.edu/humanrts/OathBetrayed/sop_2004.pdf)

IS (Islamic State). See also Daesh. ISIL; ISIS.

ISIL. (Islamic State of Iraq and the Levant). The “Levant” is a French term meaning “lands of the rising sun”. The Levant includes modern-day Syria, Lebanon, Israel, Palestine and Jordan. See also Daesh; ISIS; Islamic State.

ISIS. (Islamic State in Iraq and Syria). *See also* Daesh. ISIL; Islamic State.

Islamic State. *See also* Daesh. ISIL; ISIS.

Judge Advocate (JA). A military attorney.

Judge Advocate General (JAG). Any military attorney.

JAG Corps (See Judge Advocate General Corps).

Joint Detention Group (JDG). One of the components of JTF-GTMO, responsible for administration of the detention centers at Guantanamo.

Jihad.

Joint Base Andrews. Formerly "Andrews Air Force Base".

Joint Chiefs of Staff. A body of military commanders in the Department of Defense, who serve as military advisers to the President, the Secretary of Defense, and the National Security Council. According to the Goldwater-Nichols DOD Reorganization Act of 1986, "The Secretaries of the Military Departments shall assign all forces under their jurisdiction to unified and specified combatant commands to perform missions assigned to those commands..."; the chain of command "runs from the President to the Secretary of Defense; and from the Secretary of Defense to the commander of the combatant command." (Source: <http://www.jcs.mil/About.aspx>)

Joint Detention Operation Group (JDOG)

Joint Interrogation Group (JIG)s

Joint Personnel Recovery Agency (or JPRA). The agency with organizational supervisory control over Survival-Evasion-Resistance-Escape (or SERE) training.

Joint Service Provider (JSP). A Department of Defense organization established in 2015 to consolidate information technology (IT) services provided to over 38,000 customers in the Pentagon and the Washington, DC area. JSP was slated to become a Defense Information Systems Agency (DISA) field activity. JSP was formed by consolidating the Army's Information Technology Agency and DOD's Washington Headquarters Services' Enterprise Information Technology Services Directorate. Its initiatives have included implementing a Wi-Fi network with 1,700 access points throughout the Pentagon.

Joint Worldwide Intelligence Communications System (JWICS). (pronounced "JAYwix), is a TS/ SCI (Top Secret / Secure Compartmentalized Information) network operated by the US Defense Intelligence Agency (DIA), and used in various U.S. agencies including the Department of State, the Department of Homeland Security, the Department of Justice, and the Department of Defense.

JTF-160 Joint Task Force – Guantanamo Bay – Detention. This was established in January 2002 to handle detention operations at Guantanamo Bay.

JTF-170 Joint Task Force – Guantanamo Bay – Interrogations. At the request of the Secretary of Defense, the Department of Defense, through the Southern Command, created this interagency interrogation effort on 16 February 2002, weeks after the first detainees arrived at Guantanamo. It's mission included to handle interrogation operations for the Department of Defense, and to coordinate interrogations by military and governmental agencies, focusing on gathering intelligence, protecting the forces, and preventing future terrorist attacks. This was in support of Operation Enduring Freedom.

JTF-GTMO (Joint Task Force – Guantanamo Bay). JTF-GTMO is a military police unit maintains detention operations at Guantanamo Bay, essentially running the facilities where charged, uncharged, and convicted men are held. The Task Force also assists the Military Commissions in its investigations and trials of alleged war criminals. JTF-GTMO is at times referred to as "the guard force". www.jtftgmo.southcom.mil/xWEBSITE/fact_sheets/GTMO%20Overview.pdf

Judge Advocate General (JAG). (See The Judge Advocate General) A military officer serving as a lawyer in a branch of the military (Army, Navy, Air Force, Marines and Coast Guard). Colloquially, individual JAG Corps officers are known as JAGs.

Judge Advocate General Corps (JAG Corps). JAG Officers usually serving as legal advisers in the military branch to which they are stationed. At Guantanamo Bay, JAG Officers often serve as prosecutors and defenders of detained individuals accused of terrorist acts.

Judge Advocate General of the United States Army, The (TJAG). The commanding officer of the Judge Advocate General's Corps of a Branch of the U.S. Military.

Judge Advocate. (See Judge Advocate General; The Judge Advocate General)

Judge, Civilian. A judicial official administering justice, with a civilian status.

Judge, Military. A commissioned military officer certified by the Judge Advocate General as qualified for duty.

Jurisdiction (Personal Jurisdiction). Pursuant to Rule 202 of the Rules for Military Commissions and 10 U.S.C. § 948e, military commissions have personal jurisdiction over alien unlawful enemy combatant, which includes an individual who: (1) has engaged in hostilities against U.S. or its coalition partners; (2) has purposefully and materially supported hostilities against the U.S. or its coalition partners; or (3) was part of Al Qaeda at the time of the alleged offense under chapter 47A of 10 U.S.C. With regard to Guantanamo detainees, the individual's combatant status shall be determined by the Combatant Status Review Tribunal. (Source: Rule 202, Rules for Military Commissions; 10 U.S.C. § 948e; 948a(1)(ii); 948a(7))

Jurisdiction (Subject Matter Jurisdiction). Pursuant to Rule 203 of the Rules for Military Commissions, military commissions may try any offense under the Military Commission Act or the law of war. The MCA defines the following offenses: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying quarter; taking hostages; employing poison or similar weapons; using protected persons or property as shields; torture, cruel or inhuman treatment; intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce or distinctive emblem; intentionally mistreating a dead body; rape; sexual assault or abuse; hijacking or hazarding a vessel or aircraft; terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying; attempts; conspiracy; solicitation; contempt; perjury and obstruction of justice. Noticeably, this list is not exhaustive. (Source: Rule 203, Rules for Military Commissions; 10 U.S.C. §§950p– 950t)

Jury. A group of people selected in accordance with law and empowered to be trier of fact. Unlike in Art. III courts, the military commissions impanel military officers on active duty to play the role of jury. The Convening Authority selects the members from a list of nominations.

Jus cogens (see peremptory norm). Certain international law principles so fundamental that they do permit states to derogate from them. Such norms include the prohibition of use of force, prohibition of genocide, prohibition of slavery, etc. ~~In other words, jus cogens violations are illegal even if a state has not signed a treaty or criminalized the act in its penal code. Individuals who commit jus cogens violations may be prosecuted by any state.~~

JWICS. See **Joint Worldwide Intelligence Communications System.** JWICS (pronounced “JAYwix”), is a TS/ SCI (Top Secret / Secure Compartmentalized Information) network operated by the US Defense Intelligence Agency (DIA), and used in various U.S. agencies including the Department of State, the Department of Homeland Security, the Department of Justice, and the Department of Defense.

Learned Counsel (See Counsel). In military commission capital cases (in which the defendant faces the death penalty), the military commission will appoint for each capital defendant a “learned counsel” who is specialized in death penalty litigation. The Learned Counsel, who is paid by the Department of Defense, may be a military attorney or a civilian defense attorney. (Source: <http://www.mc.mil/aboutus/organizationoverview.aspx>)

Legal Advisor. A person in official capacity providing advises for legal matters.

Legal bin. A plastic container in which a Guantanamo defendant may store materials related to his case.

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

Logistics Memo. A memorandum providing instructions or directions for logistics issues.

Looking 40 seconds into the future. There is a 40-second delay between the events at the Guantanamo Bay gallery and the video and sound transmitted to Ft. Meade. Thus, observers at the gallery will view the proceedings 40 seconds ahead of those viewing them on the television feed. While watching the hearing from the gallery you witness the live action 40 seconds in the future relative to what is shown on the television.

Low-value detainee (LVD). Detainees at Guantanamo who were not held in CIA custody at black sites before being transferred to Guantanamo. This distinguishes them from High-Value detainees who were held at black sites before being transferred to Guantanamo. HVDs are housed in secret Camp 7 at Guantanamo, whereas LVDs are and have been housed at other Guantanamo detention camps.

LPR. Lawful Permanent Resident of the U.S.

Manual for Courts-Martial (M.C.M.) Implements the Uniform Code of Military Justice, governing trial by court-martial.

Manual for Military Commissions (M.M.C.). Contains rules of procedure and evidence for the Guantanamo Bay Military Commissions. The M.M.C. was promulgated in 2012.

Mark Center. An office complex in Alexandria, Virginia, near the Pentagon, where the Office of the Convening Authority is based.

Marks Center. Facility in Virginia that houses part of the Office of Military Commissions. Witnesses may travel to the Marks Center to testify by video in proceedings being held at Guantanamo Bay.

MCA 2006. Congressionally enacted legislation that authorized the Department of Defense to create military commissions with limited jurisdiction. This MCA of 2006 has been superseded by the MCA of 2009.

MCA 2009. Congressionally enacted legislation that authorizes the Department of Defense to create military commissions with limited jurisdiction. The MCA of 2009 supersedes the MCA of 2006.

Military Commissions Defense Organization (MCDO). the component of the Department of Defense responsible for the defense of military commissions defendants and potential defendants. Pronounced “mic-dough.” Formerly known as “Office of the Chief Defense Counsel.”

Military Commissions Rules of Evidence (MCRE).

Member (Jury Member, See Jury). A group of people selected in accordance with law and empowered to be trier of fact. Unlike in Art. III court, in military commissions a panel of members who are active duty commissioned officers in military play the role of jury, and person who performs the jury function is a “member”. The Convening Authority selects the members from a list of nominations reasonably.

Memorandum of Understanding (see MOU)

Motion for Leave (MFL). A motion that asks the judge to grant discretionary permission on an issue.

Military Commission Act of 2006 (MCA. or MCA of 2006). Congressionally enacted legislation that authorized the Department of Defense to create military commissions with limited jurisdiction. This MCA of 2006 has been superseded by the MCA of 2009.

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

Military Commission Order. Usually refers to Military Commission Order No. 1 (M.C.O.), which is authorized by Art. II of the Constitution and the Presidential Military Order of Nov. 13, 2001. The subject is “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism”. (Source: <http://www.defense.gov/news/Mar2002/d20020321ord.pdf>)

Military Commission Regulation. Regulation for Trial by Military Commission (2011) (Source: <http://www.mc.mil/Portals/0/2011%20Regulation.pdf>)

Military Commission Rules of Evidence (MCRE). Rules applying in trials by military commissions convened pursuant to the Military Commission Act. (Source: [http://www.defense.gov/pubs/pdfs/Part%20III%20-%20MCREs%20\(FINAL\).pdf](http://www.defense.gov/pubs/pdfs/Part%20III%20-%20MCREs%20(FINAL).pdf))

Military Commission. Pursuant to the Military Commission Act, a Military Commission is a military court exercising jurisdiction over alien unprivileged enemy belligerent who has engaged in hostilities, or who has purposefully and materially supported hostilities against the United States, its coalition partners or was a part of al Qaeda. (Source: §948, Military Commission Act 2009)

Military Commissions Defense Office (MCDO). The office within the OMC that handles the defense counsel for all detainees who have counsel or are seeking counsel. Defense counsel for any accused include military attorneys, and may also include and civilian attorneys employed by the Department of Defense and / or civilian defense counsel retained by the accused at no cost to the government. All defense counsel are appointed by the Chief Defense Counsel. If a defendant is charged with a death penalty offense, he will be assigned a “learned counsel”, with death penalty experience. A Learned Counsel may be a civilian attorney paid for by the DoD, or a military attorney. Formerly known as the “Office of Chief Defense Counsel”.

Military Commissions Trial Judiciary Rules of Court (24 April 2012, as amended 4 June 2014). Rules established pursuant to Manual for Military Commissions and Rules for Military Commissions, applying to all cases referred to trial by Military Commission. (Source: [http://www.mc.mil/Portals/0/pdfs/Trial%20Judiciary%20Rules%20Of%20Court%20\(24%20Apr%202013\).pdf](http://www.mc.mil/Portals/0/pdfs/Trial%20Judiciary%20Rules%20Of%20Court%20(24%20Apr%202013).pdf))

Military Judge (See Judge, Military). A commissioned military officer certified by the Judge Advocate General as qualified for duty.

Military Objectives. Pursuant to customary international humanitarian law, “Military Objectives” are defined by their purpose. “Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” According to U.S. Manual for Military Commissions, “Military Objective” refers to combatants and those objects during hostilities “(1) which, by their nature, location, purpose, or use, effectively contribute to the opposing force’s war-fighting or war-sustaining capability; and (2) the total or partial destruction, capture, or neutralization of which would constitute a definite

military advantage to the attacker under the circumstances at the time of the attack.” (Source: Part IV (1)(a)(1), Manual for Military Commissions; https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter2_rule8)

Military Working Dogs (MWD). Service dogs contributing to combat and security operations.

Mission. A particular duty assigned to certain unit or individual.

Mitigate.

Mitigation Specialist (or Death Penalty Mitigation Specialist). A member of the defense team who investigates the defendant’s background, history, physical and mental situation, level of participation in the alleged offense, along with other relevant evidence, to make a case against the death penalty.

Monitor (Trial Monitor; Trial Observer; NGO Observer). Individuals or organizations who attend, observe, analyze, critique, and disseminate information about military commission hearings or trials.

Motility. The ability to move spontaneously.

Motion. A party’s request to the court for ruling on a certain issue or on certain issues.

MOU (Memorandum of Understanding). An agreement between parties indicating a consensus on a certain issue. For Military Commission cases, it usually deals with access to classified information. In the Guantanamo context, the military commission requested that defense counsel (and the prosecution) sign an MoU to comply with a protective order about classified information, with the understanding that any defense counsel who did not sign the MoU would be unable to receive classified information.

Movant- ~~A non party petitioning the judge. For example, the Associated Press has filed motions as a movant requesting that the judge release certain documents to the public.~~

Military Police (MP).

Military Rules of Evidence (MRE). Govern the introduction and use of evidence at courts-martial in the military justice system. Though the MRE do not bind a military commissions trial, military commission judges may look to the MREs for guidance when the Guantanamo Military Commission Rules of Evidence (MCRE) are silent or unclear. The MCRE are derived from the MRE. “MRE” also stands for “Meal Ready to Eat”, a pre-made, single-serving meal that is sometimes served to Guantanamo inmates, and also customarily served to military personnel when hot meals are not available.

Motion to Compel (MTC). When the prosecution or defense requests the military judge to order opposing counsel or a non-party to take some action, for example, to turn over documents.

Motion To Dismiss (MTD).

Muslim.

MWR (Morale, Welfare & Recreation). Quality of life and support programs provided for military personnel and their families and retirees at U.S. military bases around the world. MWR builds and operates quality-of-life facilities and organizes recreational activities throughout the military.

National of the U.S. See Citizen of the U.S.; Lawful Permanent of the U.S.

National Security Agency (NSA). National Security Agency is a member of the Intelligence Community, which is an executive branch agency conducting intelligence activity. The missions of NSA include: (1) Signal Intelligence, which means gathering information of U.S. adversaries; (2) Information Assurance, which means protect U.S. vital national security information; (3) Combining the first two, enabling “Network Warfare”, a military operation. (Source: https://www.nsa.gov/about/faqs/about_nsa.shtml)

National Security Council (NSC). National Security Council sits in the Executive Office of the President and assists the President on national security and foreign policy issues. (Source: 50. U.S.C. 401 et seq; <http://www.whitehouse.gov/administration/eop/nsc/>)

National Security. The Military Commission Act of 2009, § 948a(8) provides that the “term ‘national security’ means the national defense and foreign relations of the United States.

NATO Phonetic Alphabet. Words assigned to represent alphabet letters. “Alpha” represents “A”, “Bravo” represents the letter “B”, etc., through “Zulu” representing the letter “Z”. At the military commissions, this alphabet is used when referring to motion numbers that are indicated by a combination of letters and numbers. For example, a motion labeled “AE1267B” may be referred to orally as motion “AE 1267 Bravo”. The first NATO phonetic alphabet is: Alpha, Bravo, Charlie, Delta, Echo, Foxtrot, Golf, Hotel, India, Juliet, Kilo, Lima, Mike, November, Oscar, Papa, Quebec, Romeo, Sierra, Tango, Uniform, Victor, Whiskey, X-ray, Yankee, Zulu.

NAVSTA (Naval Station). The U.S. Naval Station at Guantanamo Bay includes all the land, facilities and personnel present there. This includes the detention operations, the military commissions, and the substantial portion of the facility that is unrelated to detention and military commission. Pronounced “Nav-stay.”

Non-Commissioned Officer (NCO). A high-ranking enlisted servicemember who is not commissioned. Many military commission paralegals are NCOs.

Non-disclosure agreement (NDA). An agreement in which parties promise not to reveal information that falls within the terms of the agreement. For example, persons with security clearances must sign a NDA in which they promise not to reveal information they learn through their security clearance.

Need to Know. When a person has a security clearance, they are entitled to have access to classified information, but only if that person has a “need to know” that information. To receive classified information, a person needs: (a) to have a security clearance; and (b) have a need to know the information.

News Media Representatives (NMR). Personnel representing media who are provided access to Naval Station, Guantanamo Bay Cuba. NMRs are subject to Media Ground Rules for Guantanamo Bay, Cuba.

Naval Exchange (NEX). On a Naval Station, a store. At Guantanamo, the NEX is a combination supermarket / grocery store and department store.

NGO Internet Café”). See NGO Resource Center.

NGO Lounge. See NGO Resource Center.

NGO Observer. NGO Monitor. An individual representing a non-governmental organization who attends, observes, analyzes, critiques, and disseminates information about military commission hearings or trials. **See Monitor.**

NGO Resource Center. (formerly “NGO Lounge” or “NGO Internet Café”). Space at Guantanamo Bay in which NGOs can work as they carry out their mission of attending, observing, analyzing, critiquing, and reporting on the U.S. Military Commissions.

NGO. A non-governmental organization.

NIPRNet. See **Non-classified Internet Protocol (IP) Router Network** (pronounced “NipperNet”). The Department of Defense uses NIPRNet for unclassified information, and permits users to access the internet. It is commonly referred to simply as the “internet”. **See SIPRNet and JWICS.**

Non-classified Internet Protocol (IP) Router Network (NIPRNet -- pronounced “NipperNet”). The Department of Defense uses NIPRNet for unclassified information, and permits users to access the internet. See also SIPRNet and JWICS.

Non-disclosure Agreement (NDA). A binding legal agreement between parties protecting the confidentiality of certain information. Form 4414 provides the general form of Sensitive Compartmented Information Nondisclosure Agreement between the defendant and the United States. (Source: Regulation for Trial by Military Commission)

Non-legal Mail. Communications except for Legal Mail. (See Legal Mail). This could include communications between a Guantanamo prisoner and his lawyers, or between a Guantanamo prisoner and his family. Non-legal mail is not protected by attorney-client privilege. JTF-GTMO inspects all mail, both legal and non-legal.

Non-official cover (NOC). In covert governmental operations, a/k/a espionage or spying, NOCs are agents who assume covert roles in organizations, but have no official, on-the-record ties to the government or the intelligence agency of the government for whom they are working covertly.

National Security Agency (NSA). A section of the Department of Defense that focuses on intelligence.

National Security Council (NSC). A forum within the White House in which the cabinet officials and senior advisors advise the President on national security and foreign policy matters.

OBE. Overtaken by events. Moot. No longer relevant. Military term for moot or no longer relevant.

Objection. A statement one party makes in order to oppose the other party’s statement in court. The objecting party shall state the basis for the objection. (Source: Black’s Law Dictionary)

Observer (Trial Observer; Trial Monitor; NGO Observer). Individuals or organizations who attend, observe, analyze, critique, and disseminate information about military commission hearings or trials.

Original Classification Authority (OCA). The U.S. designates OCAs to determine what information should be classified. The term “OCA” may refer either to the individual or the organization which “owns” certain classified information.

Office of the Chief Defense Counsel (OCDC). Obsolete. The former name of the Military Commissions Defense Organization.

Office of the Chief Prosecutor (OMC) (or OMC-P – Office of Military Commissions-Prosecution). This office contains Department of Defense personnel responsible for prosecuting at the military commissions.

OCRM. Other Case Related Materials. A mark required to be placed on documents transmitted from defense counsel to a defendant that the counsel or defendant did not create but that are related to his defense in his military commission.

Office of Chief Defense Counsel (obsolete). See MCDO -- Military Commissions Defense Office

Office of Legal Counsel (of the Department of Justice). An agency of the Department of Justice. The OLC assists the Attorney General and provides legal advice to other branches of the Department of Justice. (Source: <http://www.justice.gov/agencies>)

Office of Military Commissions (OMC). General name given to all components involved in the military commissions.

Office of Special Security (OSS). The agency that manages the Sensitive Compartmented Information (SCI) security program and oversees SCI functions. (Source: Enclosure 2-9, Sensitive Compartmented Information Administrative Security Manual: Administration of Information and Information Systems Security, DoD 5105.21-VI, Oct. 19, 2012)

Office of the Chief Defense Counsel OCDC or OMC-D). OCDC is responsible for providing a defense for each defendant before the military commissions. (Source: <http://www.mc.mil/ABOUTUS/OrganizationOverview.aspx>)

Office of the Chief Prosecutor (OCP or OMC-P). OCP investigates alleged crimes, prepares charges against defendants, and represents the Government before military commissions. (Source: <http://www.mc.mil/ABOUTUS/OrganizationOverview.aspx>)

Office of the Convening Authority (OMC-CA). OMC-CA is responsible for “the overall management of the military commissions process.” The **Convening Authority** has the power to convene military commissions, refer charges against defendants for trial, decide whether a crime will be charged as a capital offense in which the defendant faces the death penalty, negotiate pre-trial agreements with defendants, approve or disapprove sentences, review records of trial, take action on the findings and sentence of all military commission cases. Source: <http://www.mc.mil/ABOUTUS/OrganizationOverview.aspx>)

Office of the General Counsel (OGC). OGC consists of attorneys for the Department of Defense. OGC attorneys supervise the military commission Office of the Chief Prosecutor (OCP) and the Military Commission Defense Organization (MCDO). OGC attorneys are part of the Special Trial Counsel.

Office of Legal Counsel (OLC). A section of the Department of Justice that provides legal advice to the U.S. President. The OLC might provide advice in the form of memoranda, for example, the “Torture Memos” provided to the White House during the Bush Administration.

Office of Military Commissions (OMC). The Department of Defense office with overall responsibility for the military commissions.

Office of the Secretary of Defense (OSD). Office within the Department of Defense that serves as the parent of the military commissions.

Office of Special Security (OSS). Department of Defense office that handles military commission information and physical security.

OMC flights. A flight that carries military commission participants to / from Joint Base Andrews and Guantanamo at the beginning and end of military commission hearings weeks.

Operation Enduring Freedom (OEF) / Afghanistan. Commenced in Afghanistan on 7 October 2001, soon after the 9/11 attacks in the U.S., with air attacks against al Qaeda and the Taliban.

Operation Git-Meow. A non-profit based in Virginia dedicated to helping the feral cat issue at Guantanamo Bay.

Operation Iraqi Freedom (OIF). The U.S. and the United Kingdom launched Operation Iraqi Freedom by attacking Iraq on 20 March 2003, following statements that Iraq was harboring weapons of mass destruction (WMDs).

Operation Sandman. A/K/A Frequent Flyer Program. Detainees would be forced to move from cell to cell many times each night, disrupting their sleep.

Opinio Juris. A constituent element of customary international law. Opinio Juris refers to a state's subjective sense of obligation to act in a certain way because it is bound by the law.

Order. A military judge's ruling on points of law or fact related to a military omission. Orders bind the military commission parties, and may have reach outside the parties. For example, the military judge may order JTF-GTMO guards to perform certain actions, or order witnesses to testify.

Order of March. The order in which it is determined that activities or events will take place.

Original Classification Authority (OCA). According to Executive Order 13526, the President designated the OCAs “to classify information originally as Top Security or Secret.” (Executive Order 13526 Original Classification Authority) (Source: <http://www.whitehouse.gov/the-press-office/executive-order-original-classification-authority>)

Paralegal. A person assisting an attorney on legal issues but who is not a licensed attorney.

Pardon. An official nullification of punishment for a crime.

Party (Party to a Criminal Case). Prosecution or defendants in a criminal proceeding. In a non-criminal case, a person or group involved in a legal proceeding as a litigant.

Party (Party to a Treaty). State or entity with treaty-making capacity that has expressed its consent to be bound by a treaty.

PCS. Permanent Change of Station orders. When a military servicemember is assigned to relocate his home from one place to another.

PENTTBOM. Name given to the FBI investigation into the 9/11 attacks. "PEN" stands for the Pentagon. "TT" stands for the World Trade Center Twin Towers. "Bom" stands for the bomb / explosions of aircrafts into the Twin Towers and the Pentagon.

Per Curiam. A "per curiam" decision by a court is issued in the name of and on behalf of the court itself, and not on behalf of any specific judge or judges. Per curiam opinions are not necessarily unanimous, and some per curiam opinions have dissents. An example of a per curiam Guantanamo Bay U.S. Military Commission decision is *al-Bahlul v. United States*, 840 F.3d 757, 758, (D.C. Cir. 2016) (en banc).

Peremptory norm (see jus cogens). Certain international law principles so fundamental that they do not allow any derogation by states. Such norms include the prohibition of use of force, prohibition of genocide, prohibition of slavery, etc.

Periodic Review Board. PRB. In a 2011 Executive Order, President Obama ordered all remaining detainees at Guantanamo Bay to be permitted to be periodically reviewed to determine whether they pose a threat to the national security of the U.S., and if they are found not to pose such a threat, they could be repatriated to their home country or transferred to a third country.

Permanent Change of Station orders. See PCS.

Persuasive Authority (See Authority). Authority not particularly binding on the court, but carries some weight and may assist judges making decisions. (Source: "Persuasive Authority." West's Encyclopedia of American Law, edition 2. 2008. The Gale Group 3 Mar. 2015)

Ping.

Platinum, Task Force. Guards at Guantanamo's Camp 7.

PRB. See Periodic Review Board.

Precedent. A decision by court, whose holding represents identical or similar features to the factual or legal question of the present case. Precedent may be either binding or persuasive. Decisions are binding if the precedent comes from a higher court within the same jurisdiction as the one adjudicating the new case. Precedent is merely persuasive if it comes from a different jurisdiction, or if the relevant content is dicta, i.e. statements made in passing which are not relevant to the holding.

Preferred. When the prosecution decides to accuse a defendant of a specific crime in a court martial, the prosecution prefers the charge.

Pre-Trial Hearing. An informal meeting held before trial among the parties and the judge to resolve substantive and procedural issues.

Prisoner (See Detainee). A person who is held in custody by an authority. Pursuant to Detainee Treatment Act, "Detainee" refers to a person "in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility." (Source: Detainee Treatment Act Title X, H.R. 2863)

Privilege Review Team (PRT). At Guantanamo Bay, before a lawyer is permitted to give or show any documents to a detainee, a government "privilege review team" (or "privilege team") must review those documents and stamp the documents the team approves. The privilege team is associated with the government but not specifically associated with the prosecution of this case. The privilege team reviews documents transmitted from the defense counsels to their clients to ensure they do not contain "informational contraband."

Privilege Team. (See Privilege Review Team - PRT).

Privilege, Attorney Client.

Privilege, National Security.

Privilege, Priest / Penitent.

Privilege, Work Product.

Privilege.

Privileged Belligerent. The Military Commission Act of 2009 provides that "the term 'privileged belligerent' means an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War. (§ 948a(6))."

Privilege Review Team (Privilege Team).

Pro se. Latin for “For oneself” in Latin. When a criminal defendant chooses to represent himself without an attorney that defendant is acting “pro se”. Military Commission judges have permitted Guantanamo defendants to be pro se, but a detailed military defense counsel is always assigned to a charged detainee, whether the detainee wishes to be represented by the detailed military counsel. The detailed military counsel or another counsel may serve as “stand by counsel”, and may advise the defendant but not officially represent the defendant. A defendant may have a “hybrid counsel” where the defendant is pro se for only part of their defense and counsel represents the defendant for the other portion.

Proceeding. ~~The process of a civil lawsuit or criminal prosecution.~~

Protected Information. Information of which the disclosure could reasonably be expected to detriment to the national security. This is distinguished from “classified information”.

Protected Person. Under international humanitarian law, those do not take active part in hostilities shall be protected from military attack. Geneva Conventions and Additional Protocols generally provide that the sick, wounded and shipwrecked not taking part in hostilities, prisoners of war, other detained persons and civilians are “Protected Persons”. (Source: Geneva Conventions 1949; ICRC Customary International Humanitarian Law, <https://www.icrc.org/eng/war-and-law/protected-persons/overview-protected-persons.htm>)

Protected Property. Under international humanitarian law, “Protected Property” shall be free from military attack in an armed conflict as long as it is not used for military purposes. (Source: Geneva Conventions 1949, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter2_rule9)

Protective Order. A court order prohibiting certain conduct. For example, a judge might issue a protective order that prohibits military commission lawyers from revealing certain classified information to the detainees or to the public. Pursuant to Rule 505(e) of Military Commissions Rules of Evidence, upon the Government’s request, the military judge may issue protective orders to prevent the “compromise of information disclosed to the defense.” (Source: Rule 505, Military Commissions Rules of Evidence)

Prudential Search. According to the U.S. Attorney’s Manual, section 2052. Titled “Contacts with The Intelligence Community Regarding Criminal Investigations or Prosecutions”, a prudential search is:

Public Affairs Officer (PAO). PAO is primarily responsible for assessing and assisting public affairs and developing working relationships with the media.

Purple. A military term that refers to a military organization consisting of members from more than one branch, and possibly including civilians and contractors. Within the military commission system, the following entities are considered purple: Trial Judiciary; Prosecution; Defense.

Ratify (Ratified, Ratification).

RDI (rendition, detention, and interrogation). Run by the U.S. Central Intelligence Agency during the Bush Administration, this was a a global operation aimed at apprehending and interrogating terrorist suspects. Also known as the “Torture Program”. The CIA would capture individuals, subject them to enhanced interrogation techniques (EITs) / torture in the country of capture or in another country where the captives were rendered. Many men subjected to the RDI program were eventually sent to Guantanamo.

Read On.

Red Carpet. When military commissions flight arrive or depart from Guantanamo, travelers engage in a check-in/check-out process at the Red Carpet, which is area at Guantanamo Bay near the Florida Gate of the Expeditionary Legal Complex. Upon arrival at Guantanamo, passengers collect luggage they checked on their flight and pick up cell phones, accommodations assignments, and other information and materials useful for their stay at Guantanamo. When departing Guantanamo, they check their luggage at Red Carpet, pick up their boarding passes, and turn in security badges, phones, and other materials.

Referral (of Charge)

Regulations for Trial by Military Commissions (RTMC) (2011 Edition). The Rules for Military Commission (RMC) are derived from the RTMC.

Rendition. (Extraordinary rendition). Transfer a person to another jurisdiction for the purpose of arrest, detention and interrogation. Extradition is the most common form of rendition. In this context, it often refers to “extraordinary rendition”, which means the extrajudicial transfer of a person between jurisdictions.

Reservation. A statement made by a state or entity, purporting to exclude the legal effect of certain treaty provision in its application to such state or entity. (Source: Section 2, Vienna Convention on Law of Treaties)

Retained Personnel. A person described by Article 28 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and Article 33 of the Geneva Convention Relative to the

Treatment of Prisoners of War and who is in the custody or control of an opposing power. "Detainees" in the custody of an opposing power who fall into one of the following categories: (a) designated enemy medical personnel and medical staff administrators who are exclusively engaged in either the search for, collection, transport, or treatment of wounded or sick or disease prevention; (b) National Red Cross and Red Crescent Societies staff, staff of other volunteer aid agencies, duly recognized and authorized by their governments to assist medical service personnel of their own armed forces, provided they are exclusively engaged in the search for, or the collection, transport or treatment of wounded or sick, or in disease prevention, and provided that the staff of such societies are subject to military laws and regulations; (c) Chaplains attached to enemy armed forces.

Retroactive Classification. When information is released to the public, and that information is later deemed to be classified. For example, information was revealed during public commission and in publicly filed military commission documents, and later a decision was made to classify that information – after the fact.

Rules for Military Commissions (RMC). Govern military commission procedure. They are derived from the Regulations for Trial by Military Commissions (RTMC) (2011 Edition), and are part of the Manual for Military Commissions.

Rotator. A regularly scheduled military flight that travels between Guantanamo and several east coast U.S. cities, such as Jacksonville, Florida and Norfolk, Virginia. Typically rotator travelers include military members or contactors. OMC flights carry military commission participants to / from Joint Base Andrews and Guantanamo at the beginning and end of military commission hearings weeks. But military commission participants may also fly on the rotator.

Rough Justice. (Phrase used by Bush Administration??)

Salt Pit. (a/k/a "Cobalt" or "Dark Prison"). A CIA "black site" in Afghanistan in which enhanced interrogation was conducted against alleged al Qaeda and Taliban suspects.

SCI. (See Sensitive Compartmented Information). Based on the Director of Central Intelligence Directive 1/19, SCI refers to "classified information concerning or derived from intelligence sources, methods, or analytical processes, which is required to be handled within formal access control systems established by the Director of Central Intelligence." (Source: <http://www.fas.org/irp/offdocs/dcid1-19.html>)

SCIF (See Sensitive Compartmented Information Facility). Based on the Director of Central Intelligence Directive 1/19, SCIF refers to "an accredited area, room, group of rooms, buildings, or installation where SCI may be stored, used, discussed, and/or processed." (Source: <http://www.fas.org/irp/offdocs/dcid1-19.html>)

Secret Internet Protocol Router Network (SIPRNet). A computer networks used by US government departments (e.g., Defense Department, State Department) to transmit information up to the classification level "SECRET". **See also NIPRNet and JWICS.**

Secret. A category of classified information requiring a security clearance. According to Executive Order 12958, "secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe." (Source: Executive Order 12958 on Classified National Security Information) "Secret" is lower than "Top Secret" but higher than "Confidential".

Secretary of Defense. Chief executive officer of the Department of Defense. The Secretary of Defense has "authority, direction and control over the Department of Defense", and is further designated by the same statute as "the principal assistant to the President in all matters relating to the Department of Defense." (Source: 10 U.S.C. § 113)

Secretary of State. Chief executive officer of the Department of State, who is appointed by the President with advice and consent of the Senate. The Secretary of State's primarily role involves advising the President on foreign affairs and policies.

Security Classification Review Team (of the DoD). A DoD component serves as classification authority, in addition to the original classification authority, responsible for reviewing classified materials. Pursuant to the Regulation for Trial by Military Commissions, "all requests for the declassification of classified materials intended to be used by the Defense in a military commission shall be in writing, and submitted, through trial counsel, to the DoD Security Classification/Declassification Review Team, when the materials originate with DoD, or to the original classification authority of any non-DoD federal departments or agencies." "Requests for further declassification of classified materials, or for reconsideration of a declassification decision, shall be in writing, and submitted, through trial counsel, to the DoD Security Classification/Declassification Review Team, when the materials originate with DoD, or to the original classification authority of any pertinent non-DoD federal department or agency." (Source: Regulation for Trial by Military Commission; 10 U.S.C. § 949p-1(c))

Security Clearance (or “Clearance”). If a person has a security clearance (or clearance), they have been vetted with background checks and “cleared” to receive classified information at a specific level. Holding a security clearance is not enough alone to receive classified information. The cleared person must also have a specific “need to know” the information. Thus not all persons with security clearances are entitled to access all classified information.

Security Declassification Review Team (of the DoD). A DoD component serves as classification authority, in addition to the original classification authority, responsible for declassification of relevant materials. (See Security Classification Review Team).

Security Officer. ~~Personnel (military or civilian) in official capacity responsible for protecting persons and property.~~

Self-Executing. A self-executing treaty refers to a treaty, upon ratification, whose provisions can be applied domestically within the state party without the need of further transformation (by legislative or administrative measures). In *Foster and Elam v Neilson*, the Supreme Court ruled that a treaty is self-executing when it “operates of itself without the aid of any legislative provision”, and is not self-executing when “the terms of the stipulation import a contract.” (Source: Max Planck Encyclopedia of Public International Law; *Foster and Elam v Neilson*, 27 US (2 Pet) 253 (1829))

Semper En Obscurus. *Latin* for “Always in the Dark”

Senate Select Committee on Intelligence (SSCI). In December 2014, the SSCI released an over 500 page redacted Executive Summary of the committee’s review of the CIA’s Rendition, Detention, and Interrogation (RDI) program. The SSCI report is over [6,000 pages], and is based on 6.3 million pages of underlying documents.

Senior Medical Officer. SMO. The JTF-GTMO official responsible for medical decision-maker in the prison. Pronounced “smow” to rhyme with “snow” or “sew”.

Sensitive Compartmented Information (SCI). A type of classified information concerning or derived from intelligence sources, methods, or analytical processes requiring handling with formal access control systems established by the Director Central Intelligence (DCI). Due to the sensitivity of the SCI, it requires special procedures for the protection of SCI. (Source: Intelligence Community Classification and Control Markings Implementation Manual, Office of the Director of National Intelligence) (Source:) SCI refers to separate sub-compartments of classified information at the Secret or Top Secret level. “SCI” can also refer to security clearances required to access such information.

Sensitive Compartmented Information Facility (SCIF). An area where SCI being processed, stored, used or discussed. The requirement of SCIF is stipulated in Intelligence Community Directive No. 705. (Source:) [List the requirements of a SCIF]

Severance. If defendants are charged together, they are co-defendants, and would ordinarily be tried together. The judge may order one or more defendants “severed”, and tried separately.

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

SIPRNet. Secret Internet Protocol Router Network. A computer network, including e-mail and websites, used by US government departments (e.g., Defense Department, State Department) to transmit information up to the classification level "SECRET". **See also NIPRNet and JWICS.** Also sometimes refers to secret-level electronic information, for example, “SIPR discovery.”

Smoke detectors.

SOP. (Standing Operating Procedure or Standard Operating Procedure). Written instructions guiding certain routine activities. SOPs typically provide detail as to how tasks or series of related functions are to be carried out.

SOUTHCOM (Southern Command). SOUTHCOM is a joint military command located in Doral, Fla., as one of the nine unified Combatant Commands (COCOMS) in the Department of Defense. SOUTHCOM’s is responsible for the land mass of Latin America south of Mexico, the waters adjacent to Central and South America and the Caribbean Sea, including Guantanamo Bay. (Source: <http://www.southcom.mil/aboutus/Pages/About-Us.aspx>)

Special Trial Counsel (Special Review Team). Department of Justice attorneys detailed by the Chief of Prosecutor in the 911 case to resolve the potential conflicts of interest issue stemming from an investigation by the Federal Bureau of Investigation in April 2014. (Source: [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE292QQ\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE292QQ).pdf)) See also “FBI Investigation.”

Special Review Team. Another name for Special Trial Counsel.

Staff Judge Advocate (SJA). A staff judge advocate designated as the principal legal advisor for a judge advocate. Provides legal advice and services to a military command. The SJA at GTMTO typically refers to the legal staff of JTF-GTMO.

Stakeholder. Individual or organization holding certain interest upon the subject. The stakeholders of Guantanamo proceedings include defendants and defense counsel, the prosecution, victims and victims' families, judges and judicial staff, fact and expert witnesses, the press, governments with detained citizens, governments whose citizens were injured by the alleged crimes, Guantanamo Bay detention facility staff (Joint Task Force – Guantanamo), and the general international and U.S. publics.

Stay. When the court orders a temporary or indefinite halt to the hearing, trial, or other proceeding. **See Continuance. Abate. Abatement.**

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

Subject Matter Expert.

Subpoena. A court order compelling a person to appear before court or tribunal. If such person fails to comply, he or she shall be subject to judicial penalty.

Supreme Court (U.S.). Established by Art. III of the U.S. Constitution, the last resort of U.S. federal court system, holding the judicial power of U.S. It consists of the Chief Justice of the U.S. and eight associate justices.

Suspense (or "suspense date"). A deadline.

Swearing of Charges. Pursuant to § 948q of the Military Commission Act, charges against an accused in a military commission "shall be signed by a person...under oath before a commissioned officer of the armed force authorized to administer oaths", stating "(1) the signer has personal knowledge of, or reason to believe, the matters set forth therein; and (2) they are true in fact to the best of the signer's knowledge and belief." (Source: <http://www.gpo.gov/fdsys/pkg/BILLS-109s3930enr/pdf/BILLS-109s3930enr.pdf>)

Sworn Charges. Charges which have been sworn by a person subject to the Uniform Code of Military Justice, pursuant to the requirement of the Military Commission Act.

Tactical questions. Questioning of a captured or detained person they are placed in a detention facility to gather for information of immediate tactical value.

Tack. Navy word that means "hyphen" or "dash". E.g., "foxtrot foxtrot tack one" is "FF-1."

Task Force Platinum. Guards at Guantanamo's Camp 7.

TDY (Temporary Duty). TDY orders are used when a person is travelling from their home base on official business for a short period of time. If a person is "TDY" or "on TDY" they are away from their home base. The Navy and Marine Corps use "TAD" standing for "Temporary Additional Duty" and not "TDY".

Temporary Duty (TDY). See TDY.

Tear Line. A physical line contained on intelligence messages or documents separating information which can be released from information that cannot be released. Information "below the tear line" is usually releasable.

Tent City. Another name for "Camp Justice" (or AO Patriot)

Terms of Reference (TOR). A list or statement describing the purpose and background of certain project. An NGO that sends an NGO Observer to Guantanamo Bay to monitor hearings would ordinarily present that NGO Observer with a Terms of Reference explaining what the NGO Observer should do to satisfy the goals of the NGO.

The Agency. Slang or colloquialism referring to the Central Intelligence Agency (CIA).

The Judge Advocate General of the United States Army (TJAG). **See Judge Advocate General of the United States Army.**

Three piece or three-piece suit. Restraint used on Guantanamo prisoners, consisting of handcuffs, leg irons and waist chain (possibly without security boxes to cover key holes on the restraints). (Cf. 4-piece = handcuffs, leg restraints, and a chain around their waists, with security boxes to cover key holes on the restraints)

Tight shot group. Military slang for something done proficiently.

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

Top Secret-Sensitive Compartmented Information (see TS/SCI- TS/SCI). A category of classified information requiring highest level of clearance. According to Executive Order 12958, "top secret" shall be applied to information and "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe." (Source: Executive Order 12958 on Classified National Security Information)

Torture. The definition of "Torture" varies among international human rights law instruments. Pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, an act of torture

is defined by several elements: (1) severity of the pain or suffering inflicted on the victim; (2) intentional infliction of the pain or suffering; (3) the purpose of inflicting the pain or suffering; and (4) infliction by, at the instigation of, or with the consent of a person acting in an official capacity. With regard to U.S. position, 18 U.S.C. §2340 provides that “torture” means “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” (Source: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 18 U.S.C. §2340)

~~**Tracking means “understood.”**~~

Translator. Pursuant to §948s of the Military Commission Act and Rule 308 of the Manual for Military Commissions, the accused shall be informed the charges with the language he or she understands. Office of Military Commission provides services for translation of written legal materials, such as charges, to ensure that the accused informed of relevant information. Translator refers to personnel providing such service. (Source: §948s, Military Commission Act; Rule 308, Manual for Military Commissions)

Trap Neuter Release (TNR). *See* **Trap Neuter Vaccinate Release (TNVR).** A TNR program starts with (1) trapping feral (community) cats, then (2) taking the cats to a veterinarian to get spayed or neutered and receive receive any needed veterinary attention if needed and vaccinations, and (3) releasing these cats back into the community.

Trap Neuter Vaccinate Release (TNVR). *See* **Trap Neuter Release (TNR).**

Treaty. In international law, formal agreement among sovereign states and/or international entities, imposing contractual obligation upon state parties. The general legal rules regulating treaties enforcements are codified in the Vienna Convention on the Law of Treaties.

Trial Counsel. Military prosecutors who are responsible for prosecuting Military Commission cases on behalf of the U.S. (*See* 10 U.S.C. § 949c(a))

Trial Judiciary (TJ). The Trial Judiciary in the Military Commissions consists of military judges nominated by The Judge Advocates General from the military departments, and support staff of those judges. All judges are licensed as attorneys. Military judges preside over each military commission. The TJ includes the staff of the military judges, including clerks and security officers.

Trial. “A formal judicial examination of evidence and determination of legal claims in an adversary proceeding.” (Source: Black’s Law Dictionary)

Tribunal.

TS/SCI- TS/SCI (Top Secret-Sensitive Compartmented Information). A category of classified information requiring the highest level of clearance. According to Executive Order 12958, “top secret” shall be applied to information, “the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.” (Executive Order 12958 on Classified National Security Information) (Source: <http://www.fas.org/sgp/clinton/eo12958.html>) TS/SCI is the highest general level of clearance, under which multiple clearance levels of exist for which information is available only for persons cleared to receive that additional information, with a need to know. (See classification table at end of document.)

Technical Surveillance Counter-Measures (TSCM). The process of checking an area for surveillance, or the organization who conducts the sweep.

Temporary Standing Order (TSO). A form of binding guidance issued within the military. May refer to an official written document, for example, an amendment or clarification to an SOP.

Uniform Code of Military Justice (UCMJ). ” governs trial by court-martial. The military commissions are partially based on the UCMJ system, and caselaw on the UCMJ is often used for guidance on interpreting similar or identical language.

Unclassified. Any information which is not classified. At the military commissions, unclassified information that is not free for public dissemination includes FOUO information.

United States Court of Military Commission Review (USCMCR or CMCR). The CMCR is an appellate court that reviews the findings and sentence of each military commission case for legal and factual sufficiency, unless the accused waives the right to appeal review the finding and sentence of military commission case submitted to it. The CMCR consists of one or more panels, including at least three appellate judges, who sit in panels or as a whole. (Source: <http://www.mc.mil/ABOUTUS/OrganizationOverview.aspx>)

Unlawful Enemy Combatant. *See* **Unprivileged Enemy Belligerent.**

Unlawful Influence (UI). Under military law, and the law governing military commissions, military courts are meant to operate wholly independently from non-judicial officials in the U.S. government. Executive branch members,

military members higher ranking than the judges, and other non-judicial officials are not permitted to “coerce or influence” any military judge or military commission member in the performance of their duties. Numerous allegations of unlawful influence have been made a different military commissions, and several military judges have found that unlawful influence did occur. The military judge is permitted to take broad measures to remedy unlawful influence.

Unprivileged Enemy Belligerent. Privileged Belligerent. See Unlawful Enemy Combatant. The Military Commission Act of 2009 (§ 948a(7)) provides that “the term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who— “(A) has engaged in hostilities against the United States or its coalition partners; “(B) has purposefully and materially supported hostilities against the United States or its coalition partners; “(C) was a part of al Qaeda at the time of the alleged offense under this chapter.”

Unsworn Statement. A statement made in open court by a person who does not take an oath. Defendants convicted at a Guantanamo military commission are permitted to make an unsworn statement to the panel (jury) before the panel imposes its sentence on the defendant.

VFM. See Victim Family Member.

Victim Outreach Specialists (VOS)

Victim. [Get Definition in the Military Commission Act]

Victim/Witness Assistance Program. The Office of Military Commissions Victim/Witness Assistance Program (VWAP) is organized as a Directorate under the Office of Military Commissions Chief Prosecutor. According to the Military Commission website, the “Victim/Witness Assistance Program Directorate is committed to making military commissions accessible to victims and their family members, and to providing logistical support for witnesses participating in military commissions.” (<http://www.mc.mil/VICTIMWITNESSASSISTANCE.aspx>) According to the website, the Office of Military Commissions Victim/Witness Assistance Program “is committed to ensuring that victims are: Treated with fairness and respect for the victim’s privacy and dignity; Reasonably protected from the accused offender; Free to confer with the Victim/Witness Assistance Program Director; Afforded an opportunity to speak with the prosecutors assigned to the case; Notified of court proceedings; and Provided information about the conviction, sentencing, imprisonment and transfer of the offender, for the duration of military commission proceedings.” *Id.*

Victim Family Member Families (VFM). [Get definition in the Military Commission Act] The Office of Military Commissions Victim/Witness Assistance Program is committed to ensuring that victims are: Treated with fairness and respect for the victim’s privacy and dignity; Reasonably protected from the accused offender; Free to confer with the Victim/Witness Assistance Program Director; Afforded an opportunity to speak with the prosecutors assigned to the case; Notified of court proceedings; Provided information about the conviction, sentencing, imprisonment and transfer of the offender, for the duration of military commission proceedings. A person designated as a direct victim or a family member of a direct victim of at least one military commission crime.

Victims’ Advocate.

Victims’ Families (See Victims and Victims’ Families (VFM)).

Video Tele Conference. (See VTC)

Vienna Convention on the Law of Treaties (VCLT). The treaty adopted in 1969, setting out the law and procedure for making, operating and terminating treaties. It is generally, the rules contained in the treat are constitute customary international law regarding treaties. Rules contained in the VCLT bind states whether or not they are parties to the VCLT. For example, even though the United States has not ratified the VCLT, it still “considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.” (Source: U.S. State Department < <http://www.state.gov/s/l/treaty/faqs/70139.htm>>

VTC (Video Tele Conference). Conduct of a video conference allowing people in two geographical locations to communicate by simultaneous two-way video and audio transmissions. In Guantanamo, VTC has been used for witness testimony and communication between detainees and families. (Source: (<https://www.icrc.org/eng/resources/documents/news-release/2011/saudi-arabia-news-2011-02-16.htm>))

Walsh Report. A report ordered by President Obama to review conditions of confinement at Guantanamo, conducted by Adm. Patrick M. Walsh. This report was completed in February of 2009.

Warno. A Warning Order, or communication from the Trial Judiciary that a military judge is preparing to issue an order.

Warning Order. See Warno

Warrant Officer.

Weapons of Mass Destruction (WMD).

WHS (Washington Headquarters Service). WHS provides information technology support and other logistical services throughout the National Capital Region including the Pentagon and the Office of the Secretary of Defense, and including the military commissions. (Source: <http://www.whs.mil>)

Wire diagram. A military command or organizational chart that shows the chain of command.

With Prejudice. Barring a party's further action upon certain claim. If a party's claim is dismissed "with prejudice", then that party is barred from bringing that claim again in the future.

Withdrawn Charge(s). Prosecution's taking back a formal accusation of offense(s) against the defendant.

Withdrawn Plea. Defendant's taking back of a formal response of "guilty" or "not guilty".

Without Prejudice. Not affecting a party's legal rights upon a certain claim.

Witness. A person called upon by a party to give testimony before the court or jury in a legal proceeding.

Work Product. See Privilege, Work Product. Written or oral materials prepared by an attorney or under the direction of an attorney in the course of a legal representation in anticipation of litigation. A privilege is attached to work product and the other party to an action cannot compel the party possessing the work product to turn it over.

Written communications order. An order issued by a military judge regarding how defense counsel and defendants are to communicate.
www.hqmc.marines.mil/Portals/137/Docs/Security%20Programs%20Info%20Mgt/SecurityBook%5B1%5D.pdf

Zero Dark Thirty (ZD30). Something that commences well before sunrise. Also a 2012 movie that depicted Guantanamo detainees being waterboarded and subjected to other enhanced interrogation techniques / torture.

[Page Intentionally Blank]

DRAFT



Schematic [OBSOLETE!!] of Guantanamo Bay Courtroom # 2 (For trials involving classified information. The seating Chart below is from the 9/11 Case)

		Court Security Officer (CSO)		Military Judge		Witness Stand
				Court Reporters	Podium for Speaker	
Khalid Shaik Mohammad (KSM)	Interpreter	Counsel - Major Derek Poteet (DMC) & Gary Sowards	Learned Counsel – David Nevin		Aisle between the defense & Prosecution	Chief Prosecutor Brigadier General Mark Martins (At times – Special Trial Team – Compamor Sanchez)
Walid bin Attash	Interpreter	Counsel - Michael Schwartz & Major Matthew Seeger	Learned Counsel – Cheryl Bormann	bin Attash has declared that he no longer wants his counsel to represent him, and his counsel have been sitting in the last row - Row 6		Other prosecution team members Mr. Robert Swann, Mr. Clayton G. Trivett, Jr., Mr. Edward Ryan, Ms. Nicole Tate, Ms. Danielle Tarin, Capt. Christopher Dykstra, Capt. Jennifer Jameson, and Capt. Matthew Reed
Ramzi bin al Shibh	Interpreter	Counsel - Major Alaina Wichner (DMC) & Commander Tri Nhan (DMC)	Learned Counsel – James Harrington			
Ali Abdul Axix Ali (aka Ammar al Baluchi or "Triple A" or "AAA")	Interpreter	Counsel - Lt. Col. Sterling Thomas (DMC)	Learned Counsel - James Connell III	Kim Lanoue-Chapman (paralegal)		
Mustafa al Hawsawi	Interpreter	Counsel - Lt. Col. Jennifer Williams (DMC), Lt. Col. Sean Gleason (DMC), & Suzanne Lachelier	Learned Counsel - Walter Ruiz	Dr. Mitch Robinson		
(DMC = Detailed Military Counsel) Tables for Other Defense Staff						
Double-paned glass partition separating the "well" of the courtroom from the Observation Gallery.						
Press sits in reserved seats in the front row of the gallery, behind the double-paned glass. NGO Observers have 14 seats allocated to them, beginning in the second row. Others visitors (including U.S. government officials, service persons stationed at GTMO, JTF-GTMO personnel) are permitted to take the few remaining seats in this section.				Small aisle between the two parts of the Gallery.		The Victims' & Victims' Families (Section can be cordoned off with a curtain)

This Chart is obsolete -- It will be updated!!

NB: This scale is not drawn to scale. Names of additional persons will be added.



[Page Intentionally Blank]

DRAFT



Guantanamo Bay Fair Trial Manual

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

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

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

Volume I – Main Manual (pages 1 – 344)

I. Preface.....7

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

III. Acknowledgements.....17

IV. Abbreviations.....19

V. What is the Right to a Fair Trial?.....23

 A. “Rights” v. “Interests”23

 B. Briefing on this chapter of the *Guantanamo Bay Fair Trial Manual*.....23

 C. Who are the Military Commission stakeholders? Who is entitled to a fair trial?.....24

 D. International law as binding source in US Courts (including the Military Commissions).....24

 E. Substantive areas of law binding on the U.S.....25

 F. International Humanitarian Law as a source of law for fair trials.....26

 i. Treaty Law – International Humanitarian Law.....27

 ii. Customary International Law – International Humanitarian Law.....28

 G. International Human Rights Law as a source of law for fair trials.....30

 i. Treaty Law – International Human Rights Law.....30

 ii. Customary International Law – International Human Rights Law.....27

 H. Domestic U.S. law & the right to a fair trial.....31

 I. Rights not covered in this *Guantanamo Bay Fair Trial Manual*.....32

VI. Roles & Responsibilities of NGO Observers.....33

 A. The why and how of NGO Observers.....35

 B. Responsibilities of NGO Observers.....36

 C. NGOs should be true to yourselves!.....39

 D. NGO Observers serve an extremely important role for *all* stakeholders.....40

VII. Background & Brief History of U.S. Military Commissions at Guantanamo Bay, Cuba.....41

 a. The 9-11 attacks and the immediate aftermath.....41

 b. Law governing U.S. Military Commissions.....43

 c. Who can be tried at by a Guantanamo Bay Military Commission?.....43



- d. Active Guantanamo Bay Military Cases.....44
- e. U.S. Military Commissions are “War Crimes Tribunals” not “Terrorism Tribunals”.....45
- f. Torture.....46
- g. Periodic Review Boards (PRBs).....46
- h. Closing Guantanamo Bay.....48

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

- IX. General Categories of Rights of Guantanamo Bay, Cuba, Military Commission Stakeholders.....57
 - A. Right to be Presumed Innocent; Right to Have the Burden of Proof on the Prosecution...59
 - B. Freedom from Retroactive Application of Criminal Laws (No Ex Post Facto Laws).....59
 - C. Freedom from Double Jeopardy (Ne Bis in Idem).....67
 - D. Right to Trial by Competent, Independent and Impartial Tribunal.....71
 - E. Right to Effective Assistance of Counsel.....73
 - F. Right to Information & Access to Information.....89
 - G. Rights Related to Classified Information.....101
 - H. Rights to Adequate Time & Facilities to Prepare a Defense.....97
 - I. Right to Prompt Judicial Proceedings.....107
 - J. Right to Trial Without Undue Delay, Within a Reasonable Time, or to Release; Right to Speedy Trial.....133
 - K. Right to Liberty and Security of Person, including Freedom from Arbitrary Detention and Right to Review of Lawfulness of Detention.....137
 - L. Freedom from Torture, and Cruel and Inhuman Treatment or Punishment.....145
 - M. Right to Humane Treatment & Humane Conditions of Detention.....165
 - N. Freedom from Incommunicado & Solitary Confinement; Right to Access to the Outside World.....167
 - O. Rights to Interpreter / Translator.....177
 - P. Right to Public Proceedings.....189
 - Q. Freedom from Self-Incrimination; Right Not to be Compelled to Testify Against Oneself or to Confess Guilt.....199
 - R. Right to Equality of Arms; Equality Before the Courts; Equal Protection of the Law...207
 - S. Right to be Present at or Absent From Pre-Trial Hearings.....213
 - T. Right to be Defend Oneself in Person or Through Counsel of His Own Choosing.....221
 - U. Right to Examine and Cross-Examine Witnesses.....227
 - V. Right to Exclusion of Illegally Obtained Evidence.....233
 - W. Right to Exclusion of Hearsay.....235
 - X. Rights of Detainees Who Were Juveniles When Taken to Guantanamo Bay.....239
 - Y. Right to Appeal (Interlocutory, Conviction, Sentence).....241
 - Z. Rights to a Remedy (Victims, Detainees, Defendants).....245

- X. Rights of Victims & Victims’ Families.....247

- XI. Rights / Interests of the Prosecution.....257

- XII. Rights of the Press.....265

- XIII. Rights Related to Witnesses (Expert and Fact Witnesses).....277

- XIV. Rights / Interests of Joint Task Force-GTMO.....281



XV. Rights / Interests of the U.S. public.....289

XVI. Rights / Interests of the international community.....291

XVII. Rights / Interests of NGO Observers.....293

XVIII. Conclusion (forthcoming).....302

Glossary.....303

Bibliography329

Index.....341

Observation / Monitoring Note Pages.....343

Volume II – Appendices (pages 345 – 612)

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

XIX. Appendices.....351

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

1. International Humanitarian Law Treaties.....355

 a. Geneva Conventions of 1949, Common Article 3.....357

 b. Protocol Additional I to the Geneva Conventions of 1949, article 75.....559

 c. Protocol Additional II to the Geneva Conventions of 1949, article 6.....361

 d. Third Geneva Convention (Prisoners of War) (Excerpt).....363

2. International Human Rights Law Instruments.....365

 a. Universal Declaration of Human Rights.....367

 b. International Covenant on Civil & Political Rights, Article 14.....369

 c. United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (excerpts).....371

 d. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.....373

 e. List of Additional Non-Treaty International Instruments that Incorporate Rules of Customary International Law.....377

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

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

1. U.S. Non-Military Instruments.....383

 a. United States Constitution (excerpts).....385

2. U.S. Military & Military Commission Law.....387

[Eds--The Military Commission sources of law below will be re-arranged]

a. Uniform Code of Military Justice (UCMJ) (Excerpts).....389



- b. Military Commissions Act of 2009 (excerpts).....391
- c. Rules of the Military Commission (United States) (14 August 1012) (excerpts)...395
- d. Regulations for Trial by Military Commissions (2011 Edition)(excerpts).....399
- e. Military Commissions Trial Judiciary Rules of Court (24 April 2012, as amended 4 June 2013)(excerpts).....405
- f. Military Commission Rules of Evidence (MCRE).....407
- g. Department of Defense Media Ground Rules for Guantanamo Bay, Cuba (GTMO) (10 September 2010) (excerpt).....409

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

- a. International Human Rights Law Treaties.....415
- b. Non-Treaty International Human Rights Law Instruments Incorporating Customary International Human Rights Law Norms.....416
- c. Historical and Other International Humanitarian Law, International Criminal Law Instruments.....418
- d. U.S. Federal Law (U.S. Constitution).....420
- e. U.S. Military Commission Law; International Humanitarian Law Instruments..421

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

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

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

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

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

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

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

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

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

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

Appendix M: United States of America and Cuba (No. 50 of 2014); Opinion of the United Nations Working Group on Arbitrary Detention (WGAD), UN Doc. No. A/HRC/WGAD/2014 (10 February 2015) (Advanced Unedited Version).....533

Appendix N: Ruling on Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary (9/11 Case) (Judge Pohl) (25 February 2015).....545

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

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

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

Observation / Monitoring Note Pages.....609



