

# APPLYING INTERNATIONAL FAIR TRIAL STANDARDS TO THE MILITARY COMMISSIONS OF GUANTANAMO

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## I. INTRODUCTION

Since their inception in late 2001, the military commissions of Guantanamo have been highly controversial and much-criticized. One area of criticism has been whether the military commissions are consistent with domestic law and American traditions of fairness and due process. Another theme of critics has been whether the military commissions are consistent with relevant international law, particularly international fair trial standards. The first set of military commissions created by executive order of President Bush was invalidated by the Supreme Court because they failed to comply with both domestic and international law.<sup>1</sup> In *Hamdan v. Rumsfeld*,<sup>2</sup> the Court held that Common Article 3 of the Geneva Conventions applied to detainees, and that therefore detainees could only be tried in regularly constituted courts.<sup>3</sup> The Court further held that the President's military commissions did not qualify.<sup>4</sup> The administration then introduced legislation to authorize military commissions—the 2006 Military Commissions Act (MCA).<sup>5</sup> These military commissions were substantially different and much more closely resembled military courts-martial. Although the statute itself proclaimed that military commissions were regularly constituted courts,<sup>6</sup> there were many who questioned this assertion.<sup>7</sup> The Supreme Court has yet to weigh in on these statutorily-created military commissions.

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1. *Factsheet: Military Commissions*, CTR FOR CONST. RIGHTS, <http://ccrjustice.org/learn-more/faqs/factsheet:-military-commissions> (last visited Aug. 6, 2013).
2. 548 U.S. 557 (2006).
3. *Id.*
4. *Id.*
5. Military Commissions Act of 2006, 10 U.S.C. § 948a (2006).
6. *Id.* § 948b(f) (2006). "A military commission established under this chapter is a regularly constituted court . . . for purposes of common Article 3 of the Geneva Conventions." *Id.*
7. See David J. R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315, 366 (2007)

The Military Commissions Act was significantly revised in 2009.<sup>8</sup> Even the most fervent critics of military commissions agree that the 2009 MCA is dramatically improved from earlier iterations. Yet despite the undeniable improvements, questions remain as to whether the military commissions, as currently constituted, comply with international law. Some critics have asserted that military commissions are still not “regularly constituted courts” and therefore are not in compliance with Geneva Convention Common Article 3.<sup>9</sup> Others have opined more generally that the military commissions do not meet international fair trial standards.<sup>10</sup> On the other hand, Brigadier General Mark Martins, the current Chief Prosecutor of the military commissions, has argued that the military commissions do meet or exceed applicable fair trial standards under international humanitarian law.<sup>11</sup>

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[hereinafter Frakt, *Critical Comparison*]. “[T]he commissions created by the M.C.A. do not yet conform to Geneva Conventions requirements.” *Id.*

8. 10 U.S.C. §948a (amended 2009).

9. See, e.g., <http://www.amnestyusa.org/our-work/issues/security-and-human-rights/fair-trials> (“The fact that [military commissions] have undergone multiple statutory and procedural revisions suggests that they fall short of the “regularly constituted court” standard required by Common Article 3 of the Geneva Conventions.”); Jordan J. Paust, *Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit*, 45 CORNELL INT’L L.J. 367, 368 (2012) (“[T]he Obama military commissions are not regularly constituted or previously established in accordance with pre-existing laws and, therefore, they are without jurisdiction under relevant international laws.”); [http://www.constitutionproject.org/pdf/83011\\_hrmag\\_guantanamotenyrsafter911\\_1.pdf](http://www.constitutionproject.org/pdf/83011_hrmag_guantanamotenyrsafter911_1.pdf) (“The Geneva Conventions, international treaties that comprise international law on how to treat individuals engaged in war, require trial for violations of the laws of war before a ‘regularly constituted court.’ The current installment, the third iteration since 2001, of the Guantanamo military commissions does not meet this standard.”).

10. *Military Commissions*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/security-and-human-rights/fair-trials> (last visited Aug. 20, 2013) (“The military commissions set up by Presidents Bush and Obama at Guantanamo do not meet international standards for fairness and must be abandoned.”).

11. Martins argued that

[A]ll three branches of government in the United States now regard military commissions as being bound to comply with the requirement of Common Article 3 of the Geneva Conventions of 1949. The pertinent provision requires that an accused detainee be tried by a “regularly constituted court affording all of the judicial guarantees . . . recognized as indispensable by civilized peoples.” The protections incorporated into the Military Commissions Act of 2009 clearly far exceed this international standard . . . . 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 Gen. Mark Martins, Chief Prosecutor of the U.S. Mil. Comm’ns, Reformed Military Commissions, International Perceptions, and the Cycle of Terrorism, Remarks at Chatham House

In this article, I address the question of whether military commissions under the MCA of 2009 meet applicable international rule of law and fair trial standards as Brig. Gen. Martins asserts. In answering the question, I use a two-pronged analysis. First, I attempt to determine what international laws apply to military commissions conducted by the United States at Guantanamo. Then, I identify the specific fair trial requirements of these laws and analyze whether the rules and procedures, both in theory and in practice, comply with these standards. Before addressing compliance with international law, I first briefly describe the current domestic law governing the military commissions.

## II. DOMESTIC LAW GOVERNING MILITARY COMMISSIONS

The primary source of law for the military commissions is the MCA itself, which became law in October 2006.<sup>12</sup> In 2009, the MCA was updated at the instigation of the Obama Administration.<sup>13</sup> This version of the statute is known as the Military Commissions Act of 2009.<sup>14</sup> The MCA directs the Secretary of Defense to promulgate rules and procedures for the military commissions, in consultation with the Attorney General.<sup>15</sup> The Manual for Military Commissions (MMC) is the primary implementing regulation for the MCA.<sup>16</sup> In Spring 2010, the first edition of the MMC under the 2009 MCA was published.<sup>17</sup> It was slightly revised in August 2012.<sup>18</sup> The MMC includes the Rules for Military Commissions (RMC).<sup>19</sup> This comprehensive procedural guide covers pretrial, trial, sentencing, and appellate procedures and includes such topics as swearing and referral of charges, convening of commissions and selection of court members (jurors), pleas and pretrial agreements (plea agreements), pretrial motions, interlocutory appeals, and methods of obtaining witnesses, evidence, and expert witnesses.<sup>20</sup> Another section of the MMC is devoted to the Military Commission Rules of Evidence (MCRE).<sup>21</sup> The MCREs are modeled on the Military Rules of Evidence, which are in turn derived from the Federal

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in London (Sept. 28, 2012) [hereinafter International Perceptions], *available at* <http://www.lawfareblog.com/2012/09/brig-gen-mark-martins-address-at-chatham-house/>.

12. 10 U.S.C. § 948a.

13. *See generally* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

14. Military Commissions Act of 2009, 10 U.S.C. § 948a (2009).

15. *Id.*

16. MANUAL FOR MILITARY COMMISSIONS (2010 ed.) [hereinafter M.M.C.], *available at* [http://www.mc.mil/Portals/0/2010\\_Manual\\_for\\_Military\\_Commissions.pdf](http://www.mc.mil/Portals/0/2010_Manual_for_Military_Commissions.pdf).

17. *Id.* at IV-2.

18. *Id.*

19. *See id.* at pt. II.

20. *Id.*

21. *See id.* at pt. III.

Rules of Evidence.<sup>22</sup> The MMC also contains the penal code listing the crimes punishable by military commission (war crimes and terrorism crimes) and defining their elements.<sup>23</sup> The MMC was modeled on the Manual for Courts-Martial,<sup>24</sup> the manual used by the United States Armed Forces for the prosecution of crimes committed by service members while on active duty, and much of the content is derived from this manual, although there are several key differences.<sup>25</sup> The Regulation for Trial by Military Commission (RTMC) is another important source of guidance for the military commissions.<sup>26</sup> It contains guidance on many routine functions such as witness funding and travel, expert witness and consultant appointments, depositions, and post-trial and appellate procedures.<sup>27</sup> One chapter focuses on the role of trial counsel<sup>28</sup> and another is devoted to defense counsel.<sup>29</sup> Pursuant to RMC 108, the Chief Judge of the Military Commission Trial Judiciary has promulgated the Military Commission Trial Judiciary Rules of Court,<sup>30</sup> covering such topics as: motion practice, filings with the court, rules governing the appearance and withdrawal of counsel, public access, court security, use of technology, and procedures for classified information.<sup>31</sup> The Court of Military Commissions Review, the first-level appellate court created by the MCA, has also published court

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22. *Id.*

23. *Id.* at pt. IV.

24. Robert M. Gates, *Foreword* to M.M.C., *supra* note 16. “Pursuant to 10 U.S.C. § 949a, the M.M.C. is adapted from the Manual for Courts-Martial.” *Id.*

25. I discussed many of the crucial distinctions in a 2007 article. See Frakt, *Critical Comparison*, *supra* note 7. Note that the 2007 Article analyzed the 2006 M.C.A. and the 2007 M.M.C., which have since been revised in several important respects, particularly with respect to the rules of evidence relating to hearsay and the admissibility of coerced statements. For a list of changes to the M.M.C., see JONATHAN TRACY & MARY WELD, NAT’L INST. OF MIL. JUST., CHANGES TO THE MANUAL FOR MILITARY COMMISSIONS (2010), available at <http://www.wcl.american.edu/nimj/documents/2010ChangestoManualforMilitaryCommissions-finalmay4.pdf?rd=1>. For those more familiar with federal criminal practice, the Congressional Research Service has prepared a report comparing military commissions to federal criminal trials. See JENNIFER K. ELSEA, CONG. RESEARCH SERV., R 40932, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT (2010), available at <http://www.fas.org/sgp/crs/natsec/R40932.pdf>.

26. U.S. DEP’T OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSIONS (2011) [hereinafter R.T.M.C.], available at [http://www.defense.gov/news/Apr2007/Reg\\_for\\_Trial\\_by\\_mcm.pdf](http://www.defense.gov/news/Apr2007/Reg_for_Trial_by_mcm.pdf).

27. *Id.*

28. *Id.* at 32-35.

29. *Id.* at 36-53.

30. U.S. DEP’T OF DEF., MILITARY COMMISSIONS TRIAL JUDICIARY RULES OF COURT (2011), available at <http://www.mc.mil/Portals/0/pdfs/Trial%20Judiciary%20Rules%20Of%20Court%20%288%20Dec%2011%29.pdf>. A cover letter from the Chief Military Commissions Judge included with the rules mandates that “[a]ll counsel practicing before Military Commissions shall become familiar with these Rules and shall comply with them.” *Id.*

31. *Id.*

rules.<sup>32</sup> By analyzing these sources of law,<sup>33</sup> along with the actual experience in the few cases held at Guantanamo to date, I hope to determine whether the military commissions comply with international fair trial standards.<sup>34</sup>

### III. COMPLIANCE WITH INTERNATIONAL RULE OF LAW AND FAIR TRIAL STANDARDS

#### A. International Humanitarian Law vs. International Human Rights Law

There are two general bodies of international law that contain fair trial standards: international humanitarian law (IHL) (also known as the law of war)<sup>35</sup> and international human rights law (IHRL). Although there is significant overlap between IHL and IHRL, as a general matter it is fair to say that fair trial standards are somewhat higher and more detailed under IHRL than IHL. Either by virtue of having ratified various international treaties and conventions, or by virtue of certain standards having become customary international law, the United States is bound to follow these international law standards. Indeed, the U.S. Constitution recognizes treaties, along with the Constitution itself, as the supreme law of the land.<sup>36</sup> But there is disagreement internationally about the contexts in which IHL and IHRL apply.<sup>37</sup> The United States considers the trial of detainees to be governed primarily by IHL and has acknowledged, since 2006, that the Geneva Conventions of 12 August 1949 (or at least Common Article 3 thereof) apply to detainees.<sup>38</sup> Additionally, on March 7, 2011, President Obama indicated that the United States considered Additional Protocol II and Article 75 of Additional Protocol I to the Geneva Conventions to be “two important components of the international legal framework that covers armed conflicts” and stated that the United States would follow these

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32. U.S. DEP’T OF DEF., COURT OF MILITARY COMMISSION REVIEW, RULES OF PRACTICE (2008), available at [http://www.mc.mil/Portals/0/USCMCR\\_Rules\\_\(10\\_Apr\\_08\)\\_\(39\\_pages\)\\_\(2\).pdf](http://www.mc.mil/Portals/0/USCMCR_Rules_(10_Apr_08)_(39_pages)_(2).pdf). These were not updated after the 2009 MCA, as appellate procedures remained the same.

33. All of the key sources of law, both current and historical, can be found online at the official Department of Defense Military Commissions website. *Legal Resources*, MILITARY COMMISSIONS, <http://www.mc.mil/LEGALRESOURCES/MilitaryCommissionsDocuments/CurrentDocuments.aspx> (last visited Aug. 20, 2013).

34. One very open question is whether, and to what extent, the U.S. Constitution applies to detainees and to the military commissions. I do not attempt to resolve that question in this Article.

35. There are actually two different sets of standards under IHL, depending on whether the conflict is an international or non-international armed conflict.

36. U.S. CONST. art. VI.

37. Kevin Jon Heller, *Another Round on IHL and IHRL*, OPINIO JURIS (Jan. 18, 2012), <http://opiniojuris.org/2012/01/18/another-round-on-ihl-and-ihrl/>.

38. *Common Article 3 of the Geneva Conventions*, N.Y. TIMES, <http://www.nytimes.com/ref/us/AP-Guantanamo-Geneva-Conventions.html> (last visited Aug. 6, 2013).

provisions “out of a sense of legal obligation.”<sup>39</sup> The statement from the White House asserted that United States military practice is already consistent with [Additional Protocol II’s] provisions” and that Article 75 of Additional Protocol I “is consistent with our current policies and practice.”<sup>40</sup> However, the United States stopped short of explicitly stating that either treaty or any of the fair trial provisions found therein represented customary international law or that the fair trial standards found in these documents apply to the Guantanamo military commissions. Since Additional Protocol I applies to international armed conflicts<sup>41</sup> and the Supreme Court has found the armed conflict with Al Qaeda to be a non-international armed conflict,<sup>42</sup> there is an argument that the fair trial guarantees of Article 75 do not apply to the Guantanamo military commissions. However, given the United States’ support for this provision, I will assume, for the purposes of this Article, that they do.

IHRL also governs the trials of detainees, at least to some extent. Some international human rights treaties (such as the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)) make clear that they apply at all times, even during armed conflict,<sup>43</sup> while others do not. Indeed, the United States has acknowledged that the CAT applies to Guantanamo detainees and to trials at Guantanamo.<sup>44</sup> However, the general U.S. position has been that IHL is *lex specialis*, which supersedes IHRL<sup>45</sup> during periods of armed conflict. In contrast, many of our allies, particularly European countries, take the position that both bodies of law apply—that is, that IHRL

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39. Press Release, White House Fact Sheet: New Actions on Guantanamo and Detainee Policy (Mar. 7, 2011) [hereinafter White House Fact Sheet], available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>. For an analysis of the significance of this announcement, see John Bellinger, *Obama’s Announcements on International Law*, LAWFARE (Mar. 8, 2011, 8:33 PM), <http://www.lawfareblog.com/2011/03/obamas-announcements-on-international-law/>; John Bellinger, *Further Thoughts on the White House Statement About Article 75*, LAWFARE (Mar. 13, 2011, 7:56 PM), <http://www.lawfareblog.com/2011/03/further-thoughts-on-the-white-house-statement-about-article-75/>; Robert Chesney, *Gabor Rona on Article 75 and Additional Protocols I and II*, LAWFARE (Mar. 11, 2011, 3:31 PM), <http://www.lawfareblog.com/2011/03/gabor-rona-on-article-75-and-additional-protocols-i-and-ii/>.
40. White House Fact Sheet, *supra* note 39.
41. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
42. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006).
43. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46, at 82 (Dec. 10, 1984) [hereinafter Convention Against Torture].
44. See generally MICHAEL JOHN GARCIA, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES (2009), available at <http://www.fas.org/sgp/crs/intel/RL32438.pdf>.
45. Professor Oona A. Hathaway et al., *The Relationship Between International Humanitarian Law and Human Rights Law in Armed Conflict*, (Nov. 16, 2011), available at [http://www.law.yale.edu/documents/pdf/cglc/YLSreport\\_IHLandHRLlaw.pdf](http://www.law.yale.edu/documents/pdf/cglc/YLSreport_IHLandHRLlaw.pdf).

complements IHL in situations of armed conflict. Among the most important sources of IHRL which contain standards related to fair trials are the Universal Declaration of Human Rights (UDHR),<sup>46</sup> the International Covenant of Civil and Political Rights (ICCPR),<sup>47</sup> the CAT,<sup>48</sup> and the American Declaration of the Rights and Duties of Man.<sup>49</sup> Another source of standards, although perhaps not binding in a strict legal sense to the same extent as ratified treaties, are the various political commitments related to the rule of law and fair trials made by the United States to the Organization for Security and Cooperation in Europe, of which the United States is a member.<sup>50</sup> These political commitments reference general standards that apply to all criminal trials, without reference to whether they take place in situations of armed conflict.

### B. Applicability of the ICCPR

The most comprehensive listing of fair trial rights under IHRL is found in the ICCPR. Thus, determining the applicability of this treaty to the military commissions is critical in understanding whether the commissions are complying with international fair trial standards.<sup>51</sup>

Professor Jordan Paust has argued that the ICCPR applies wherever the United States exercises jurisdiction or effective control over an individual, including Guantanamo, citing article 2(1) of the ICCPR: “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.”<sup>52</sup>

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46. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

47. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

48. Convention Against Torture, *supra* note 43.

49. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

50. These include the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991), <http://www.osce.org/odihr/elections/14310> [hereinafter Moscow Meeting]; the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), <http://www.osce.org/odihr/elections/14304> [hereinafter Copenhagen Meeting]; and the Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989), <http://www.osce.org/mc/16262> [hereinafter Vienna Meeting].

51. With respect to the ICCPR, this treaty provides, in Article 4, that “in time of public emergency which threatens the life of the nation” a nation may take measures derogating from their obligations under the covenant.” International Covenant on Civil and Political Rights, *supra* note 47, at art. 4. However, such public emergencies must be officially proclaimed through the Secretary General of the U.N. *Id.* The United States has made no such declaration seeking to derogate from the ICCPR.

52. Paust, *supra* note 9, at 370 n.15.

The United States has a long history of denying the extraterritorial application of the ICCPR. In its first, second, and third periodic report to the Human Rights Commission (HRC), the United States took the position that the ICCPR only applied to persons within U.S. territory *and also* subject to its jurisdiction.<sup>53</sup> This position has been widely criticized by human rights groups and questioned by the HRC itself.<sup>54</sup> In 2004, the HRC made General Comment 31, which stated:

States Parties are required . . . to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.<sup>55</sup>

In other words, the HRC has interpreted the “and” in Article 2(1) to mean “or.” In its comments on the last U.S. periodic report in 2006, the Committee recommended that the United States review its approach to interpretation of the Covenant and, in particular, “acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction, but outside its territory.”<sup>56</sup> Clearly, this would apply to detainees at Guantanamo facing trial by military commission. The United States recently submitted its fourth periodic report to the HRC on December 30, 2012.<sup>57</sup> In this report, the United States pointedly declined to adopt the HRC’s recommended interpretation, but also did not restate its previous position.<sup>58</sup> Rather, the United States suggested that it was possibly open to reconsidering its position. In paragraph 510 of the U.S. report, it was stated, “The United States appreciates its ongoing dialogue with the

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53. U.S. DEP’T OF STATE, SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Oct. 21, 2005), *available at* <http://www.state.gov/j/drl/rls/55504.htm>.

54. U.N. Human Rights Comm., International Covenant on Civil and Political Rights: General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), *available at* <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f>.

55. *Id.*

56. U.N. Human Rights Comm., International Covenant on Civil and Political Rights: Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), *available at* <http://www.state.gov/documents/organization/133837.pdf>.

57. U.S. DEP’T OF STATE, FOURTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Dec. 30, 2011) [hereinafter FOURTH PERIODIC REPORT], *available at* <http://www.state.gov/j/drl/rls/179781.htm>.

58. *Id.*

Committee with respect to the interpretation and application of the Covenant, considers the Committee's views in good faith, and looks forward to further discussions of these issues when it presents this report to the Committee."<sup>59</sup> The United States is scheduled to meet with the HRC later this year.

The HRC's interpretation of this clause is the most logical. Those in need of fair trial protections from a state party are those who are subject to be tried by that state party. Thus, in order to have the most comprehensive coverage, the treaty covers not only those within the territory of a state, but those otherwise subject to the jurisdiction of a state party. If the HRC position is correct, then the ICCPR must apply to all trials in all places conducted by parties to the ICCPR. It may well be that this is the most logical reading of the ICCPR; yet, if this was the intent of the parties to the treaty, then the treaty certainly could have stated so much more clearly. The U.S position, while superficially plausible, does not bear scrutiny. The U.S. interpretation would suggest that mere presence in the territory of the United States does not impose any affirmative obligation under the treaty towards a person when there is no jurisdiction over the individual. While this makes some sense, why would the ICCPR need to spell out that a member state has no fair trial obligation to a person over whom it has no jurisdiction to try anyway?

Although the applicability of the ICCPR remains uncertain, the United States has suggested that the military commissions are in compliance with the fair trial guarantees of the ICCPR, claiming in the Fourth Periodic report that it complies with the fair trial provisions of Additional Protocol II to the Geneva Conventions which are "modeled on comparable provisions in the ICCPR"<sup>60</sup> "as well as with Article 75 of Protocol I, including the rules within these instruments that parallel the ICCPR."<sup>61</sup> Regardless of the U.S. position on the applicability of the ICCPR, the international community will not recognize any criminal justice system that does not comply with the ICCPR as legitimate. Thus, for the purposes of this article, I will analyze the military commissions for compliance with the ICCPR.

### C. Applying International Fair Trial Standards to the Military Commissions

The changes to the 2009 MCA were driven in large part by the desire to comply with international fair trial standards. In this section, I identify

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59. John Bellinger, *Administration Submits ICCPR Report, Punts on Extraterritorial Application*, LAWFARE (Jan. 19, 2012, 10:46 AM), <http://www.lawfareblog.com/2012/01/administration-submits-iccpr-report-punts-on-extraterritorial-application/>.

60. FOURTH PERIODIC REPORT, *supra* note 57, ¶ 507.

61. *Id.* ¶ 509.

several of the key concepts covered by international fair trial standards and analyze the compliance of the military commissions with these rights. Under this improved legislation, the military commissions are now meeting the vast majority of these standards. Yet certain problematic areas remain where full compliance is questionable, and in a few areas, the military commissions are clearly falling short. This Article will highlight these problematic areas while noting areas of compliance.

### 1. *The Right of Equality*

The concept of equality under the law for all persons is central to international fair trial standards and is reflected in all major international treaties. For example, ICCPR Article 14 (1) states, “All persons shall be equal before the courts and tribunals.”<sup>62</sup> Article 10 of the UDHR also references equality: “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.”<sup>63</sup> The American Declaration of the Rights and Duties of Man discusses equality in Article II: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”<sup>64</sup> And of course, equality is enshrined in the U.S. Constitution through Amendment XIV’s Equal Protection Clause: “No state shall . . . deny any person within its jurisdiction the equal protection of the laws.”<sup>65</sup>

At first glance, the military commissions would seem to violate the principle of equality. The MCA subjects a specific group of non-citizens (“alien unprivileged enemy belligerents”) to the jurisdiction of military commissions, which offer clearly inferior rights compared to domestic criminal courts.<sup>66</sup> Although written in gender, racial, and religious-neutral language, in reality, only Muslim men have been and are likely to be subjected to the jurisdiction of the military commissions, as only Muslim men have been detained at Guantanamo, and only Muslim men are likely to be members of Al Qaeda or the Taliban.<sup>67</sup> This apparent discrimination has been one of the principle criticisms of the military commissions. According to Professor Jordan Paust, use of military commissions by the United States “would violate several multilateral and bilateral treaties that require equal

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62. International Covenant on Civil and Political Rights, *supra* note 47, at art. 14(1).

63. Universal Declaration of Human Rights, *supra* note 46, at art. 10.

64. American Declaration of the Rights and Duties of Man, *supra* note 49, at art. 2.

65. U.S. CONST. amend. XIV, § 1.

66. *US: Revised Military Commissions Remain Substandard*, HUM. RTS. WATCH (Oct. 28, 2009), <http://www.hrw.org/news/2009/10/28/us-revised-military-commissions-remain-substandard> [hereinafter *Substandard*].

67. *Id.*

protection of the law and equality of treatment more generally.”<sup>68</sup> Human rights NGOs have also voiced concern over the inherent inequality of military commissions. According to Joanne Mariner of Human Rights Watch, “[T]he fact that only non-US citizens were subject to trial in military commissions raised serious concerns about fairness and discrimination.”<sup>69</sup> “The overt discrimination codified in the new military commissions law will offend US allies.”<sup>70</sup> “If the commissions are too unfair to be used on US citizens, they’re too unfair to be used on anyone.”<sup>71</sup> Mason Clutter of The Constitution Project also criticized the military commissions on these grounds, describing them as “an unequal parallel ‘system of justice’ to try foreign national civilians.”<sup>72</sup> The Center for Constitutional Rights (CCR) has raised similar concerns, having stated that “military commissions, which serve as a secondary system of justice for the Arab and Muslim men subject to them[,] . . . have been repeatedly discredited.”<sup>73</sup>

Of course, the United States would likely respond that non-citizen enemies of the United States are not entitled to the identical rights and privileges granted to U.S. citizens and that any disparate impact on male Muslims is unintentional. Repeated efforts by defense counsel in the military commissions to raise Equal Protection Clause arguments have all have been rejected by the military commission judges.<sup>74</sup> In essence, the judges have found that it is permissible to distinguish between unlawful enemy combatants and all others, and that this does not raise equal protection concerns.<sup>75</sup> Thus, the fact that Americans like John Walker Lindh,<sup>76</sup> Ali al-Marri,<sup>77</sup> and Jose Padilla,<sup>78</sup> even if identified as enemy

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68. Paust, *supra* note 9, at 368.

69. *Substandard*, *supra* note 66.

70. *Id.*

71. *Id.*

72. Mason C. Clutter, *Guantanamo: Ten Years After 9/11*, HUM. RTS., Winter 2011, at 2, 4, available at [http://www.americanbar.org/content/dam/aba/publications/human\\_rights\\_magazine/human\\_rights\\_2011\\_winter\\_issue.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/human_rights_magazine/human_rights_2011_winter_issue.authcheckdam.pdf).

73. Press Release, Center for Constitutional Rights, CCR Condemns President Obama’s Embrace of Military Commission System (Jan. 20, 2011) [hereinafter CCR Condemns], available at <http://www.ccrjustice.org/newsroom/press-releases/ccr-condemns-president-obama’s-embrace-of-military-commission-system>.

74. See Lee Gelernt, *Judge Issues More Guantanamo Decisions in Hamdan Case*, ACLU (July 18, 2008), <http://www.aclu.org/blog/national-security/judge-issues-more-guantanamo-decisions-hamdan-case>.

75. *Id.*

76. *John Walker Lindh Profile: The Case of the American Taliban*, CNN.COM, <http://www.cnn.com/CNN/Programs/people/shows/walker/profile.html> (last visited Aug. 6, 2013).

77. Phil Hirschkom, *Who is Ali al-Marri?*, CBSNEWS.COM (Apr. 8, 2010), [http://www.cbsnews.com/8301-503543\\_162-20002094-503543.html](http://www.cbsnews.com/8301-503543_162-20002094-503543.html).

78. *Profile: Jose Padilla*, BBC NEWS (Aug. 16, 2007), <http://news.bbc.co.uk/2/hi/2037444.stm>.

combatants from the same conflict, have been tried in federal court with greater rights, has been found to be irrelevant.

There is nothing in international law that prohibits specialized military tribunals for offenses under the law of war. Limiting the personal jurisdiction of such a tribunal to captured foreign enemies is logical and consistent with historic practices and is not clearly discriminatory in intent. Thus, while it is troubling that unlawful alien enemy combatants are being tried in a separate legal system with less robust due process protections than those received by Americans, the military commissions do not violate the general international law principle of equality.

## *2. Right to a Hearing by a Competent, Independent, and Impartial Tribunal Established by Law*

The concepts of independence, impartiality, competency, and proper legal establishment of a tribunal are reflected in several important international instruments. In Additional Protocol I of the Geneva Conventions, Article 75(4), it is stated:

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.<sup>79</sup>

ICCPR Article 14(1) contains similar language: “Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>80</sup> These principles are also reflected in the UDHR<sup>81</sup>, in the American Declaration of the Rights and Duties of Man,<sup>82</sup> and in Common Article 3 of the Geneva Conventions.<sup>83</sup> The United States recommitted to these principles in the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow 1991:

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79. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75(4), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], available at <http://www.icrc.org/ihl/INTRO/470>.

80. International Covenant on Civil and Political Rights, *supra* note 47, at art. 14(1).

81. Universal Declaration of Human Rights, *supra* note 46, at art. 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.” *Id.*

82. American Declaration of the Rights and Duties of Man, *supra* note 49, at art. 26. “Every person accused of an offense has the right to be given an impartial and public hearing.” *Id.*

83. Common Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. “[T]he following acts are and shall remain prohibited at any time: . . . (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Id.*

## (19) The participating States

(19.1) – will respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including, *inter alia*, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;

(19.2) – will, in implementing the relevant standards and commitments, ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary . . . .<sup>84</sup>

Unlike the military tribunals created by Executive Order of President Bush shortly after 9/11, the military commissions currently ongoing at Guantanamo are established by law. The Military Commissions Act of 2009 was enacted by Congress and signed by the President, as was the predecessor Military Commissions Act of 2006. Nevertheless, questions have been raised as to whether the military commissions qualify as “regularly constituted courts” within the meaning of the Geneva Conventions.<sup>85</sup> Critics have also questioned the independence and impartiality of the military commissions, especially of military commission judges.

There are four criteria commonly applied to determine the independence of a tribunal:

- (a) The manner in which judicial officers are appointed;
- (b) The security of tenure of judicial officers, i.e., the duration of their term of office and the general principle that they should not be subject to removal;
- (c) The existence of adequate guarantees protecting the tribunal and its members from external pressures; and

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84. Moscow Meeting, *supra* note 50.

85. The ICRC, in its study on customary IHL, states that a “regularly constituted court” is one which has been “established and organized in accordance with the laws and procedures already in force in a country.” *Customary IHL: Rule 100. Fair Trial Guarantees*, ICRC, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter32\\_rule100](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule100) (last visited Mar. 8, 2013). The U.S. government asserts that the MCA was enacted by Congress and signed by the President pursuant to pre-existing Constitutional and statutory authority and therefore the military commissions meet this standard. *See generally Factsheet: Military Commissions*, CTR. FOR CONST. RTS., <http://ccrjustice.org/learn-more/faqs/factsheet:-military-commissions> (last visited Aug. 6, 2013).

(d) An outward appearance that the tribunal is independent.<sup>86</sup>

Military commission judges are nominated by the Judge Advocates General of each of the military services.<sup>87</sup> They are qualified military trial judges with the same qualifications and training required under Article 26, UCMJ, for military judges in general courts-martial.<sup>88</sup> They are provided on loan or temporary assignment.<sup>89</sup> The Secretary of Defense or his designee appoints one military judge to serve as Chief Trial Judge.<sup>90</sup> By regulation, the Chief Trial judge must be a highly experienced military judge at the rank of Colonel or Navy Captain.<sup>91</sup> As experts in military justice, the law of war, evidence law, and trial practice, there is no basis to question the competence of these judges. In an effort to protect their independence, the regulations state that military commission judges may not be evaluated on their effectiveness, fitness, or efficiency by the Convening Authority or anyone else in the military commission's chain of command.<sup>92</sup>

One possible concern is that military judges may be changed by the Chief Trial Judge, without cause, prior to assembly of the commission (before the jurors are assembled). Thus, in the midst of pretrial proceedings, judges may be substituted;<sup>93</sup> indeed, this has occurred more than once. In May 2008, the judge who presided over the Mohammed Jawad and Ali Hamza al Bahlul arraignments was replaced prior to the next pretrial hearing in both cases. Judges were also swapped out during the pretrial motion phase of the abortive 9/11 trial in 2008. Once the jury has been empanelled, judges may only be changed by the Chief Trial Judge for good cause.<sup>94</sup> The parties are permitted to question the military judge to determine their degree of independence and impartiality, and either party may challenge the military judge for cause. Judges are directed to recuse themselves in any proceeding in which their impartiality might reasonably be questioned,<sup>95</sup> although the judge alone makes this determination.<sup>96</sup>

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86. OSCE, LEGAL ANALYSIS: INDEPENDENCE OF THE JUDICIARY 13, (2009), available at <http://www.osce.org/skopje/67584>.

87. 10 U.S.C. § 826(c) (2012).

88. R. MIL. COMM'NS 502(c).

89. 10 U.S.C. § 826(b).

90. *How Military Commissions Work*, MILITARY COMMISSIONS, <http://www.mc.mil/ABOUTUS.aspx> (last visited Mar. 20, 2013).

91. R. MIL. COMM'NS 503.

92. 10 U.S.C. § 948j (2012).

93. R. MIL. COMM'NS 505(e)(1).

94. For the definition of good cause in this context, see *id.* at r. 505(f).

95. *Id.* at r. 902(d).

96. *Id.*

Although there are some protections of judicial independence, military commission trial judges have no security of tenure.<sup>97</sup> Unlike federal judges, who, pursuant to the U.S. Constitution, are appointed for life,<sup>98</sup> they are subject to military reassignment at any time, with no fixed term of judicial office.<sup>99</sup> Despite the appearance of potential susceptibility to pressure from their military superiors, there has been no evidence thus far that the trial judges have been acting in anything other than a highly independent manner. Commission judges have dismissed charges, suppressed evidence, and ruled in favor of the defense on hotly disputed issues. In *United States v. Jawad* and *United States v. Hamdan*, for example, the trial judges rejected the government's theory that the status of being an unlawful combatant was an independent violation of the law of war.<sup>100</sup> Over strenuous objection by the prosecution, and despite the lack of specific authority in the rules, the trial judge in *Hamdan* awarded pretrial confinement credit to the defendant for time he served in detention.<sup>101</sup> In January 2013, the judge in the 9/11 trial ordered outside government agencies, presumably the CIA, to stop interfering with ongoing court proceedings after an incident where someone described as the Original Classification Authority cut-off the public audio feed during a pretrial hearing.<sup>102</sup>

The independence of the prosecution is another critical component of a legal system's independence. Despite the provisions in the Military Commission Act designed to protect prosecutorial independence, such as the rule prohibiting any attempt to coerce or apply unauthorized influence to the exercise of professional judgment by the prosecution,<sup>103</sup> there have been repeated events which have cast doubt on the extent of prosecutorial

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97. Military Judges on the U.S. Court of Military Commission Review have some restrictions on reassignment, but do not have fixed terms on the court. Eugene R. Fidell, *Military Judges and Military Justice: the Path to Judicial Independence*, 74 JUDICATURE 14, 14 (June-July 1990). The Military Commissions website claims that USCMCR judges have statutory tenure, but I have found no support for this claim in the MCA, MMC, or RTMC. *U.S. Court of Military Commissions Review (USCMCR) History*, MILITARY COMMISSIONS, <http://www.mc.mil/ABOUTUS/USCMCRHistory.aspx> (last visited Mar. 20, 2013).

98. U.S. CONST. art. III, § 1.

99. R.T.M.C., *supra* note 26, at 102.

100. *United States v. Jawad*, No. D-007, slip op. at 3 (Military Comm'n Guantanamo Bay, Cuba Sept. 24, 2008) (ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction (D-007)), available at [http://www.defense.gov/news/RULING%20D-007%20\(subject%20matter%20jurisdiction\)%20\(2\).pdf](http://www.defense.gov/news/RULING%20D-007%20(subject%20matter%20jurisdiction)%20(2).pdf); Transcript of Record at 3823, *United States v. Hamdan* (Military Comm'n Guantanamo Bay, Cuba Aug. 1, 2008), available at <http://www.defense.gov/news/20-21-Hamdan-1 Aug and 4 Aug 08-FINAL-3648-3890 Redacted.pdf>.

101. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1260 (C.M.C.R. 2011).

102. Charlie Savage, *Judge Stops Censorship in Sept. 11 Case*, N.Y. TIMES (Jan. 31, 2013), [http://www.nytimes.com/2013/02/01/us/politics/9-11-judge-orders-end-to-outside-government-censors.html?\\_r=0](http://www.nytimes.com/2013/02/01/us/politics/9-11-judge-orders-end-to-outside-government-censors.html?_r=0).

103. 10 U.S.C. § 949b (2012).

independence.<sup>104</sup> Former Chief Prosecutor Colonel Morris Davis resigned from his position in 2007 in protest over what he considered to be unlawful influence by the DoD General Counsel and the Legal Advisor to the Convening Authority.<sup>105</sup> His resignation was perhaps the most notorious of a spate of resignations by prosecutors from 2006 to 2008. The prosecutors cited a variety of reasons, including ethical considerations, for their resignations. Another high-profile prosecutor to resign was Lieutenant Colonel Darrel Vandeveld in September 2008.<sup>106</sup> Although the current Chief Prosecutor, Brigadier General Mark Martins, has not complained of anyone attempting to exert improper influence over him, there is a lingering perception that the military commissions remain highly politicized.<sup>107</sup> Recently, the limitations of the Chief Prosecutor's independence were highlighted in the 9/11 case when the Chief Prosecutor tried to dismiss a charge against the 9/11 co-conspirators and was overruled by the Convening Authority.<sup>108</sup> The Chief Prosecutor also apparently does not have independent discretion on appellate strategy. The Chief Prosecutor's views on the appropriate course of action in the appeal of *United States v. Al Bahlul* were overruled by the Justice Department.<sup>109</sup> It is hard to claim that the Chief Prosecutor is fully independent when the Attorney General of the United States has appeared to be personally involved in approving cases for the prosecution in the military commissions, including the 9/11 case.<sup>110</sup>

The independence of the jury is another critical aspect of the independence of a tribunal. The jury selection process in military commissions creates a serious perception of unfairness and lack of independence. The panel members (jurors) for military commission juries are all active duty military officers handpicked for the duty by the military commission Convening Authority.<sup>111</sup> Thus far, this official has selected

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104. CLIVE STAFFORD SMITH, *EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTANAMO BAY 92* (2007) (noting there were three prosecutorial resignations in military commissions); Jess Bravin, *The Conscience of the Colonel*, WALL ST. J., Mar. 31, 2007, at A1 (noting the refusal of Lt. Col. V. Stewart Crouch to prosecute).

105. Morris Davis, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, at 15, available at <http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story?coll=la-opinion-rightrail>.

106. Jerome Tuccille, *Prosecutor Darrel Vandeveld Resigns Over Fairness of Guantanamo Trials*, EXAMINER (Sept. 25, 2008), <http://www.examiner.com/article/prosecutor-darrel-vandeveld-resigns-over-fairness-of-guantanamo-trials>.

107. See Davis, *supra* note 105.

108. Charlie Savage, *Military Prosecutor Battles to Drop Conspiracy Charge in 9/11 Case*, N.Y. TIMES (Jan. 18, 2013), [http://www.nytimes.com/2013/01/19/us/pentagon-wont-drop-conspiracy-charge-against-khalid-shaikh-mohammed.html?\\_r=0](http://www.nytimes.com/2013/01/19/us/pentagon-wont-drop-conspiracy-charge-against-khalid-shaikh-mohammed.html?_r=0).

109. *United States v. Al Bahlul*, CMCR 09-001, 2011 WL 4916373 (Sept. 9, 2011).

110. *Attorney General Announces Forum Decisions for Guantanamo Detainees*, U.S. DEPARTMENT OF JUST. (Nov. 13, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html> (remarks of U.S. Attorney General Eric Holder).

111. 10 U.S.C. § 948i (2012).

only relatively senior military officers (mostly Lieutenant Colonels and Colonels) to serve in this role. Each of these officers has been on active duty continuously since before 9/11. Having served throughout the entire Global War on Terror fighting Al Qaeda, the Taliban, and associated groups, it is reasonable to ask whether such officers can serve impartially in trials of individuals already determined to be enemy combatants. Of course, the defense does have the opportunity to voir dire the jurors, both as a group and individually, and to challenge for cause any officer who appears to be biased.<sup>112</sup> The defense is also granted one peremptory challenge.<sup>113</sup> The limited evidence available indicates that military commission juries are capable of acting independently. There has been only one contested military commission trial, the 2008 commission of Salim Hamdan.<sup>114</sup> In that case, the jury not only acquitted Mr. Hamdan of the most serious charges but also gave him a far shorter sentence than the prosecutor sought, effectively sentencing him to five months of confinement, accounting for credit for time served.<sup>115</sup>

Despite the seemingly fair trial for Mr. Hamdan, the military commissions clearly suffer from a perception problem. This may simply be due to the fact that they are special military tribunals created within the Executive Branch.<sup>116</sup> The international human rights community strongly disfavors special military tribunals for civilians.<sup>117</sup> The U.N. Human Rights Commission has commented that there must be objective and reasonable grounds for specially constituted courts or tribunals established for the determination of certain categories of cases. Any distinctions between such tribunals and ordinary courts require clear justification.<sup>118</sup> The reasons offered in support of the military commissions do not meet this standard. The military commissions have frequently been justified by their supporters

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112. *Id.* § 949f.

113. *Id.*

114. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1254 (C.M.C.R. 2011).

115. *Id.* at 1260.

116. 10 U.S.C. § 948b.

117. Marjorie Cohn, *Human Rights: Casualty of the War on Terror*, 25 T. JEFFERSON L. REV. 317, 357-58 (2003).

118. U.N. Human Rights Comm., International Covenant on Civil and Political Rights: General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, ¶ 14, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter Right to Equality], available at <http://www.refworld.org/docid/478b2b2f2.html>. Further, in its concluding observations to the United Kingdom, concerning the use of the 'Diplock court system' (which allowed trial without jury), the Human Rights Committee stated that the United Kingdom should ensure that in every case of an individual who is subjected to that exceptional court system, objective and reasonable grounds must be provided. U.N. Human Rights Comm., International Covenant on Civil and Political Rights: Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, ¶ 18, U.N. Doc. CCPR/CO/73/UK (Dec. 6, 2001), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.73.UK%3BCCPR.CO.73.UKOT.En](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.73.UK%3BCCPR.CO.73.UKOT.En).

on the basis that the “terrorists are war criminals, not ordinary criminals,” and that the military has special competency and expertise in prosecuting law of war violations.<sup>119</sup> An analysis of the charges demonstrates that there have been very few actual war crimes charged. In fact, no detainee has yet been convicted of a traditionally recognized war crime, casting doubt on this rationale. The bulk of the charges referred to trial by military commission have been terrorism charges that are readily prosecutable in federal court.<sup>120</sup> As revealed in a study prepared by former prosecutors for the NGO Human Rights First, hundreds of individuals have been convicted in federal court on terrorism charges similar to those prosecuted in the military commissions over the last decade.<sup>121</sup>

In 2009, the Obama Administration announced their policy preference to use federal criminal courts for prosecuting detainees (“where feasible, referred cases will be prosecuted in an Article III court”), while keeping military commissions available as a secondary option, especially for law of war violations.<sup>122</sup> The recognition that federal courts were an available option to try detainees undermined the official justification for military commissions. The Justice Department and the Office of Military Commissions-Prosecution developed a “protocol” to determine which cases would be referred to which forum.<sup>123</sup> The protocol shed little light on how cases were to be selected for each forum. Although the protocol listed factors to be considered, including “legal or evidentiary problems that might attend prosecution in the other jurisdiction,”<sup>124</sup> no weight or priority was given to any particular factor and the protocol did not indicate which factors supported trial in either forum. This lack of specificity left the impression that the primary criteria for forum selection was ease of obtaining a conviction. Many critics concluded that military commissions were a second-class legal system that would only be utilized where the

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119. Alasdair Palmer, *Ordinary Criminal Law Can't Deal with Terrorists*, TELEGRAPH (Nov. 11, 2007), <http://www.telegraph.co.uk/comment/3643944/Ordinary-criminal-law-cant-deal-with-terrorists.html>.

120. RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 21-28 (2008), *available at* <https://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf>; RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS—2009 UPDATE AND RECENT DEVELOPMENTS 5-12 (2009) [hereinafter ZABEL, 2009 UPDATE], *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf>.

121. *See* ZABEL, 2009 UPDATE, *supra* note 120, at 5-12.

122. Press Release, The White House, Remarks by the President on National Security (May 21, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

123. Joint Protocol of the Department of Justice and Department of Defense, Determination of Guantanamo Cases Referred for Prosecution, *available at* <http://www.justice.gov/opa/documents/ta-ba-prel-rpt-dptf-072009.pdf>.

124. *Id.*

prosecution felt it could gain an advantage from the more permissive rules of evidence.<sup>125</sup>

Under this protocol, it was announced in late 2009 that the 9/11 case would be transferred to federal court, as the Attorney General voiced confidence in the ability of the U.S. Attorney's office to win convictions in the case.<sup>126</sup> Subsequently, the 9/11 defendants were actually indicted in the Southern District of New York.<sup>127</sup> However, in the face of mounting political opposition, the Justice Department shelved the plan to prosecute in federal court; the 9/11 case was subsequently referred back to the military commissions.<sup>128</sup> These forum decisions were wholly unrelated to the merits. The Justice Department's belief that they could prosecute the 9/11 case in federal court strongly undermined any claim that military commissions were necessary. Regrettably, the federal court option was foreclosed by legislation after one federal trial of a former Guantanamo detainee. Ahmed Khalfan Ghailani was transferred from Guantanamo to the United States to face terrorism charges related to the Embassy Bombings in Kenya and Tanzania. Ghailani had previously been charged in the military commissions on similar charges, but those charges were dismissed. After Ghailani was acquitted of all but one charge, Congress passed legislation (a provision of the Fiscal Year 2011 National Defense Authorization Act) blocking the Administration from transferring any more detainees to the United States to be prosecuted in federal court, leaving military commissions as the only available prosecution option.<sup>129</sup> Although Ghailani was convicted of material support to terrorism and received a sentence of life in prison, his acquittal of the majority of the charges against him, coupled with the fact that coerced evidence was suppressed by the federal judge, galvanized Congressional opponents of trying detainees in federal court.<sup>130</sup> The restriction against detainee transfers to the United States to face trial was renewed in the 2012 and 2013 National Defense Authorization Act, despite President Obama's threat to veto any legislation

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125. Morris Davis, *Combatant Immunity and the Death of Anwar al Awlaqi*, JURIST (Oct. 17, 2011), <http://jurist.org/forum/2011/10/morris-davis-anwar-al-awlaqi.php>; David Frakt, *Double Standards in the War on Terror*, JURIST (Apr. 12, 2012), <http://jurist.org/forum/2012/04/david-frakt-targeted-killings.php>.

126. *Id.*

127. *Accused 9/11 Plotter Khalid Sheikh Mohammed Faces New York Trial*, CNN.COM (Nov. 13, 2009), <http://www.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/>.

128. *US: Military Commission Trials for 9/11 Suspects a Blow to Justice*, HUM. RTS. WATCH (Apr. 4, 2011), <http://www.hrw.org/news/2011/04/04/us-military-commission-trials-911-suspects-blow-justice>.

129. Judd Legum, *Obama Signs Defense Authorization Bill*, THINKPROGRESS (Dec. 31, 2011), <http://thinkprogress.org/security/2011/12/31/396018/breaking-obama-signs-defense-authorization-bill/>.

130. Benjamin Weiser, *Detainee Acquitted on Most Counts in '98 Bombings*, N.Y. TIMES (Nov. 17, 2010), [http://www.nytimes.com/2010/11/18/nyregion/18ghailani.html?\\_r=0](http://www.nytimes.com/2010/11/18/nyregion/18ghailani.html?_r=0).

which included such a restriction.<sup>131</sup> Thus, military commissions remain the only lawful option for the trial of Guantanamo detainees at the current time.

It has been suggested that the more permissive evidentiary rules in the military commissions are necessary because much of the evidence was acquired through “battlefield interrogations” or gathered in a war zone by the military where a proper law enforcement style chain of custody was not utilized. However, there is scarce evidence to substantiate these assertions, nor is there evidence that federal courts could not properly account for such factors in weighing the admissibility of such evidence if it in fact existed.<sup>132</sup> The more plausible reason for the existence of military commissions is the fact that, by utilizing illegal and abusive interrogation techniques in the early years of the War on Terror, the United States acquired evidence which could not be admitted in a federal criminal court.<sup>133</sup> The military commissions were created in order to have a forum in which at least some of this evidence could be utilized by the prosecution.<sup>134</sup> The legitimacy of a legal system that was created to accommodate unlawful government conduct will likely always remain open to question. Despite efforts of the current administration to reform the military commissions and to persuade the international community that the reformed military commissions are fair and legitimate,<sup>135</sup> no compelling justification has been advanced for the necessity of utilizing military commissions, and, in my opinion, none exists.<sup>136</sup> There are simply no objective and reasonable grounds for the existence of military commissions.

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131. Connor Adams Sheets, *Why Did Obama Sign the 2013 NDAA After Threatening a Veto?*, INT’L BUS. TIMES (Jan. 3, 2013), <http://www.ibtimes.com/why-did-obama-sign-2013-ndaa-after-threatening-veto-992860>.

132. The majority of detainees were not captured on or near a literal battlefield, so this justification is inapplicable to many. See David Cole, *Military Commissions and the Paradigm of Prevention*, in GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE AND POLICY PERSPECTIVES (Oren Gross & Fionnuala D. Ni Aolain eds., 2013).

133. *Id.*

134. See *The Military Commissions and the Abandonment of the Rule of Law: Prepared Testimony to the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the Comm. on the Judiciary, U.S. H.R.*, 111th Cong. (2009) [hereinafter *Prepared Testimony*] available at <http://judiciary.house.gov/hearings/pdf/Frakt090730.pdf> (statement of David J.R. Frakt, Lead Defense Counsel, Office of Military Commissions).

135. See *International Perceptions*, *supra* note 11.

136. *But see id.*, in which the principle arguments in favor of utilizing military commissions, particularly those advanced by current Chief Prosecutor Brigadier General Mark Martins, are presented.

### 3. *Right to a Public Hearing*

A basic concept of international law is that a fair trial is a public trial. This is reflected in several major treaties. ICCPR, Article 14(1), is a good example:

“[E]veryone shall be entitled to a . . . *public hearing* . . . . 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 . . . .”<sup>137</sup>

The public hearing standard is also present in the UDHR<sup>138</sup> and the American Declaration of the Rights and Duties of Man.<sup>139</sup> The U.S. Constitution, Amendment VI, guarantees the right to a public trial: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and *public trial* . . . .”<sup>140</sup> In 1990, at the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE, the United States committed to expand upon the right to a public trial to allow international observers and representatives of NGOs at criminal trials.<sup>141</sup>

The military commissions generally afford the right to a public trial, with some caveats. RMC 806 states that military commissions shall be publicly held, which shall include access to the press, representatives of national and international organizations, and members of the military and

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137. International Covenant on Civil and Political Rights, *supra* note 47, at art. 14 (emphasis added).

138. Universal Declaration of Human Rights, *supra* note 46, at art. 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.” *Id.* (emphasis added).

139. American Declaration of the Rights and Duties of Man, *supra* note 49, at art. 26. “Every person accused of an offense has the right to be given an impartial and *public hearing*.” *Id.* (emphasis added).

140. U.S. CONST. amend. VI (emphasis added).

141. Copenhagen Meeting, *supra* note 50.

(5.16) – in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing . . . .

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(12) The participating States, wishing to ensure greater transparency in the implementation of the commitments undertaken in the Vienna Concluding Document under the heading of the human dimension of the CSCE, decide to accept as a confidence-building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law; it is understood that proceedings may only be held in camera in the circumstances prescribed by law and consistent with obligations under international law and international commitments.

civilian communities.<sup>142</sup> Military commissions are presumptively open and can only be closed upon a specific finding by the military judge that such closure is necessary to “protect information the disclosure of which could reasonably be expected to damage national security, including intelligence or law enforcement sources, methods, or activities; or ensure the physical safety of individuals.”<sup>143</sup> As the MMC acknowledges, “Access to military commissions may be constrained by location, the size of the facility, physical security requirements, and national security concerns.”<sup>144</sup> One of the principal constraints is that the military commissions are held at Guantanamo Bay Naval Station, Cuba, a military base accessible only by very limited military air service.<sup>145</sup> Because of the limited number of seats available to fly to Guantanamo, which are strictly controlled by the Office of Military Commissions, those wishing to attend a trial or pretrial hearing must apply for permission well in advance, pay their own costs of the flight, and be prepared to stay at Guantanamo for several days.<sup>146</sup> These constraints have not prevented the press and the human rights community from maintaining a robust presence at virtually every military commission proceeding to date. Generally, there have been at least three reporters (from the Miami Herald/McClatchy News Service, the Associated Press, and Reuters) and frequently there have been many more journalists in attendance, particularly for higher profile cases such as the 9/11 case. The New York Times, Wall Street Journal, USA Today, and the Los Angeles Times have all frequently sent reporters to cover military commission proceedings. National Public Radio and television networks, such as CNN, have also covered many of the proceedings (although cameras and recording equipment are not permitted in the courtroom). Many foreign journalists, particularly from the United Kingdom, Spain, France, and Germany, have attended hearings on occasion. Military commission rules permit up to ten trial monitors from human rights NGOs, civil rights NGOs, and other similar organizations to attend each session at Guantanamo (more can attend via closed circuit broadcasts in the United States). Typically, there have been at least four or five such observers at each session, most commonly from Human Rights First, Human Rights Watch, the American Civil Liberties Union, the National Institute for Military Justice, and Amnesty International. Several other organizations and individuals have also participated as trial observers. There is a special office within the

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142. R. MIL. COMM’NS 806(a).

143. *Id.* at r. 806(b)(2)(B)(i).

144. *Id.* at r. 806(a).

145. *Services*, MILITARY COMMISSIONS, <http://www.mc.mil/FACILITIESSERVICES/Services.aspx> (last visited Mar. 26, 2013).

146. *Travel*, MILITARY COMMISSIONS, <http://www.mc.mil/FACILITIESSERVICES/Services/Travel.aspx> (last visited Mar. 23, 2013).

Office of Military Commissions responsible for arranging the attendance of victims of the alleged crimes.<sup>147</sup> Because the interest in attending the proceedings is high, the number of victims is large (particularly in the 9/11 case), and the available spectator space is very limited, the Office of Military Commissions Victim/Witness Assistance Program holds a lottery to determine which victims will be offered the opportunity to attend.<sup>148</sup> Military personnel stationed or on leave at Guantanamo and their dependents (civilians) may attend military commission proceedings.<sup>149</sup> To accommodate the great public interest in viewing the military commissions, the Office of Military Commissions has, for recent sessions, broadcast the proceedings via closed circuit television to a site at Fort Meade, Maryland, near Washington D.C. This has significantly increased the opportunity to observe military commissions, while substantially reducing the cost and inconvenience of doing so. It should also be noted that the hearing schedule is published well in advance and is readily viewable on the military commissions homepage.<sup>150</sup> Another example of the openness of the military commissions is that members of the prosecution and defense typically participate in a press conference at the end of each day of military commission proceedings.<sup>151</sup>

Despite the efforts of the military commissions to offer greater transparency and openness, the commissions have still been criticized for lack of openness.<sup>152</sup> Spectators who attend military commissions in the larger courtroom are placed in a soundproof viewing gallery. Although spectators can view the proceedings through a large plate glass window, they must listen to the hearings through an audio feed that is on a forty-second delay. This delay gives court security officials the opportunity to censor the proceedings if there is an inadvertent release of sensitive information by one of the participants in the hearing. This creates an awkward viewing experience for attendees, regardless of whether the mute button is actually used. Representatives of the media and of the NGO community have also complained about the overuse (or potential overuse) of the national security exception to close proceedings which are of great

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147. *Victim/Witness Assistance Program*, MILITARY COMMISSIONS, <http://www.mc.mil/VICTIMWITNESSASSISTANCE.aspx> (last visited Mar. 23, 2013).

148. Ben Fox, *Sept. 11 Case Returns to Guantanamo War Crimes Court*, USA TODAY (Oct. 15, 2012), <http://www.usatoday.com/story/news/nation/2012/10/15/911-brooklyn-terrorism/1633893/>.

149. *Observers*, MILITARY COMMISSIONS, <http://www.mc.mil/FACILITIESSERVICES/Services/Travel/Observers.aspx> (last visited Mar. 23, 2013).

150. *Id.*

151. Kathleen T. Rhem, *First Military Commission Hearing Ends in Continuance for Defense*, U.S. DEP'T OF DEF. (Aug. 25, 2004), <http://www.defense.gov/News/NewsArticle.aspx?ID=25460>.

152. Dina Temple-Raston, *A Prosecutor Makes the Case for Military Trials*, NPR (Apr. 3, 2012), <http://www.npr.org/2012/04/03/149866004/a-prosecutor-makes-the-case-for-military-trials>; see also Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 716 (2002).

public interest.<sup>153</sup> For example, the prosecution has repeatedly advanced the view that the experiences of detainees in the CIA detention program, including any abuses that detainees may have experienced, are classified matters of national security and cannot be discussed in open court.<sup>154</sup> The defense, the press, and the NGO community have argued that the government should not be able to classify the memories and experiences of individuals and that many details of the detention program are already in the public domain, so the detainees should be able to speak openly about their experiences in public sessions.<sup>155</sup> This matter has recently been the subject of pretrial litigation in the 9/11 case.<sup>156</sup> The military judge ruled that the forty-second delay was a reasonable accommodation of national security needs and did not unnecessarily infringe on the right of a public trial or the public's right to information.<sup>157</sup> The court also ordered that the observations and experiences of the accused during their detention and interrogation by the CIA remained classified and subject to a classified order, meaning that such issues could not be disclosed in open session of the court.<sup>158</sup> Of course, the right to a public trial is not an absolute right; it is a qualified right.<sup>159</sup> Restrictions in the interests of national security in a democratic society are a legitimate basis to close proceedings. However, such restrictions must be necessary and proportionate. While the forty-second delay is perhaps defensible, it is highly debatable whether the judge has struck a reasonable balance by ordering that sessions be closed to protect the details of a detention program which ended over six years ago, many of the details of which have already been publicly released. This ruling has provided additional fodder to those who criticize the military commissions for lack of openness and transparency and casts doubt on whether commissions may properly be considered public trials when a potentially significant portion of the pretrial proceedings will have to be conducted in secret closed sessions.

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153. See Paul R. Rice & Benjamin Parlin Saul, *Is the War on Terrorism a War on Attorney-Client Privilege?*, CRIM. JUST. MAG., Summer 2002, available at [http://www.americanbar.org/publications/criminal\\_justice\\_magazine\\_home/crimjust\\_cjmag\\_17\\_2\\_privilege.html](http://www.americanbar.org/publications/criminal_justice_magazine_home/crimjust_cjmag_17_2_privilege.html).

154. See Cora Currier, *Still Classified: Terror Suspects' Own Accounts of Their Abuse*, PROPUBLICA (Oct. 10, 2012), <http://www.propublica.org/article/still-classified-terror-suspects-own-accounts-of-their-abuse>.

155. Petitioner's Reply Brief at 13-14, *In re Am. Civil Liberties Union & Am. Civil Liberties Union Found. v. United States*, U.S.C.M.C.R. No. 13-003 (C.M.C.R. Mar. 18, 2013), available at [http://www.aclu.org/files/assets/cmcr\\_aclu\\_reply\\_brief.pdf](http://www.aclu.org/files/assets/cmcr_aclu_reply_brief.pdf).

156. See Ruling on Government Motion To Protect Against Disclosure of National Security Information at 4, *United States v. Mohammad*, AE 01310 (M.C.T.J. Dec. 6, 2012), available at <http://www.lawfareblog.com/wp-content/uploads/2012/12/KSM-2.pdf>.

157. *Id.*

158. See Protective Order #1 To Protect Against Disclosure of National Security Information at 4-6, 10, *United States v. Mohammad*, AE 0130 (M.C.T.J. Dec. 6, 2012), available at <http://www.lawfareblog.com/wp-content/uploads/2012/12/KSM-1.pdf>.

159. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

#### 4. *Right to a Public, Reasoned, and Timely Judgment*

Closely related to the right of a public trial is the right to a public judgment, found in both IHL, as reflected in AP I of the GC,<sup>160</sup> and IHRL, reflected in ICCPR Article 14(1): “any judgment rendered in a criminal case or in a suit at law shall be made public.”<sup>161</sup>

Military commissions definitely comply with the requirements for a public and timely judgment. The jury begins to deliberate immediately after the close of evidence and continues until a verdict is reached. The verdict is then immediately announced in an open session of the court with the accused present. Because the actual verdict of the jury on guilt or innocence is a general verdict with no specific written or oral explanation given, one could argue that the “reasoned” judgment requirement is not met. However, the purpose of the reasoned judgment requirement is to ensure that the legal and factual basis for the judgment can be determined and reviewed on appeal. This purpose is clearly satisfied by military commission procedures. The jury is given detailed instructions on the law and procedures to be followed during deliberations in an open session of the court. The jurors are advised of the elements of each offense and the burden of proof. The propriety of these instructions can be challenged on appeal. Furthermore, pre-trial motions are generally ruled upon in writing by the military judge with detailed findings of fact and discussion of the law. Occasionally, less complicated motions may be ruled upon orally, but this will be done so in an open session of the court and become part of the written record of trial. Virtually all rulings of the judge are also subject to review on appeal. All filings related to the case become part of the official record of trial along with a verbatim transcript of all court sessions, so there is ample information available for appellate review.

#### 5. *Right To Be Presumed Innocent and Right to Silence/Privilege Against Self-Incrimination*

The closely related rights of the presumption of innocence and the right of the accused to remain silent are firmly entrenched in both IHL and IHRL, including in AP I of the Geneva Conventions,<sup>162</sup> the ICCPR,<sup>163</sup> the

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160. Protocol I, *supra* note 79, at art. 75(4) (“(i) anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised”).

161. International Covenant on Civil and Political Rights, *supra* note 47, at art. 14(1).

162. Protocol I, *supra* note 79, at art. 75(4) (“(d) anyone charged with an offence is presumed innocent until proved guilty according to law; . . . (f) no one shall be compelled to testify against himself or to confess guilt”).

UDHR,<sup>164</sup> and the American Declaration of the Rights of Man.<sup>165</sup> The right against self-incrimination is also reflected in the Article 15 of the U.N. Convention Against Torture.<sup>166</sup>

The presumption of innocence is a long-honored principle in Anglo-American law and the right against self-incrimination is enshrined in the Fifth Amendment of the U.S. Constitution: “No person . . . shall be compelled in any criminal case to be a witness against himself . . .”<sup>167</sup> The United States joined many nations in recommitting to these principles in 1990 at Copenhagen.<sup>168</sup>

#### a. Presumption of Innocence

The accused in a military commission is entitled to a presumption of innocence.<sup>169</sup> The court members are advised of this repeatedly by the judge in preliminary instructions and instructions prior to closing for deliberations.<sup>170</sup> The burden of proof is on the prosecution to prove each and every element of each charged offense beyond a reasonable doubt.<sup>171</sup> Military commission jurors who express a definite opinion as to the guilt of the accused are not eligible to serve.<sup>172</sup> However, some commentators have argued that the presumption of innocence is rather weak in military commissions because in order to establish personal jurisdiction of the commission, the commission must already have made a determination that the accused is an unprivileged enemy belligerent—that is, someone who: “(A) has engaged in hostilities against the United States or its coalition

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163. International Covenant on Civil and Political Rights, *supra* note 47, at art. 14(2). “Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.” *Id.* at art. 14(3). “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . 14(3)(g) Not to be compelled to testify against himself or to confess guilt.” *Id.*

164. Universal Declaration of Human Rights, *supra* note 46, at art. 11(1). “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 defence.” *Id.*

165. American Declaration of the Rights and Duties of Man, *supra* note 49, at art. 26. “Every accused person is presumed to be innocent until proved guilty.” *Id.*

166. Convention Against Torture, *supra* note 43. “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” *Id.*

167. U.S. CONST. amend V.

168. Copenhagen Meeting, *supra* note 50. “The participating States solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following: . . . (5.19)—everyone will be presumed innocent until proved guilty according to law.” *Id.*

169. R. MIL. COMM’NS 920(e)(5)(A).

170. *Id.*

171. *See generally id.* at r. 920(e)(5)(D).

172. *Id.* at r. 912(f)(1)(M).

partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense.”<sup>173</sup> Because the United States has asserted that any attack on U.S. or coalition forces or military property is a war crime<sup>174</sup> and that any support of hostilities or membership in Al Qaeda can be construed as providing material support to terrorism,<sup>175</sup> the claim that a person over whom the military commissions has asserted jurisdiction is presumed innocent may be viewed as something of a legal fiction. Furthermore, it is clear to the military jurors that those accused are Guantanamo detainees who have had multiple administrative reviews to determine their eligibility for release. Thus, their continued presence at Guantanamo strongly suggests the U.S. government’s official position, presumably supported by evidence, that the detainee was, at the time of capture, and remains an enemy of the United States. Another concern is the fact that there have been numerous public statements by the Secretary of Defense, U.S. Attorney General, and the President that have undermined the presumption of innocence, particularly with respect to Khalid Sheikh Mohammed.<sup>176</sup> Under such circumstances, the presumption of innocence may have little force. Yet the presumption of innocence is a concept deeply ingrained in the American conscious and one which educated professional military officers may be expected to take seriously, despite the circumstances (including the presence of armed security personnel in the courtrooms guarding the accused). Although military officers may be expected to give some weight to the determination to detain an individual, the jurors are very likely aware that scores of detainees have been found to be wrongfully detained and ordered released. Thus, it is unfair to assume that a military juror would be unable to apply a presumption of innocence. Indeed, in the only contested trial to be held at Guantanamo, *United States v. Hamdan*, the accused was acquitted of the most serious charges,<sup>177</sup> suggesting that military juries will hold the government to their standard of proof.

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173. 10 U.S.C. § 948a(7) (2012).

174. See David J. R. Frakt, *Direct Participation in Hostilities as a War Crime: America’s Failed Efforts to Change the Law of War*, 46 VAL. U. L. REV. 729, 739 (2012) [hereinafter Frakt, *Failed Efforts*].

175. *Id.* at 740-41.

176. Cynthia Kouril, *Gibbs: Khalid Sheikh Mohammed Likely to be Executed – Why Even Have a Trial?*, FDL (Jan. 31, 2010), <http://firedoglake.com/2010/01/31/gibbs-khalid-sheikh-mohammed-likely-to-be-executed-why-even-have-a-trial/>.

177. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1260 (C.M.C.R. 2011).

## b. Right Against Self-Incrimination

The MCA includes the right against self-incrimination at trial. The military judge informs the accused of this right at the arraignment.<sup>178</sup> The accused cannot be compelled to be a witness against himself at trial, or to testify at all.<sup>179</sup> The jury is instructed that they may not draw any adverse inference from the accused's election to remain silent; the prosecution is likewise prohibited from commenting on the silence of the accused.<sup>180</sup> The right against compelled self-incrimination extends to the use of statements obtained from the accused prior to trial but which are offered against him at trial.<sup>181</sup> In this area, there is some concern that the accused's rights in a military commission are not as robust as they could or should be. The MCREs permit the introduction of involuntary statements under limited circumstances.<sup>182</sup> Although statements obtained directly from the use of torture, or by cruel, inhuman, or degrading treatment are never admissible against the accused, thereby satisfying the U.S. obligations under the CAT, evidence derived from such statements (and other excludable statements of the accused) may be admitted where the judge finds that use of such evidence would be consistent with the interests of justice.<sup>183</sup> Involuntary statements "made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement" may also be admitted if the judge determines the interests of justice would be served.<sup>184</sup> Unfortunately, little guidance is given to judges as to how to determine the interests of justice.<sup>185</sup> Because no military commission trials have yet been held under the 2009 MCA, it is difficult to estimate the extent to which the current evidentiary rules might infringe on the right against self-incrimination. However, given that highly coercive techniques were admittedly employed against many detainees to elicit self-incriminating statements,<sup>186</sup> there is legitimate reason for concern that such statements might be offered into evidence. Indeed, it is the view of many commentators that the more permissive rules of evidence regarding self-incriminating statements are one of the primary reasons that the military commissions exist.

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178. R. MIL. COMM'NS 910(c)(3).

179. 10 U.S.C. 948r(b) (2012).

180. MIL. COMM'N R. EVID. 301(g).

181. *Id.* at r. 301(f)(3).

182. *Id.* at r. 304(b).

183. *Id.* at r. 304.

184. 10 U.S.C. § 948r(c)(2)(A).

185. There is some non-binding discussion to the rule in the Manual for Military Commissions but it offers no meaningful guidance to the judges on how to exercise their discretion under the rule. R. MIL. COMM'NS 304.

186. DAVID K. SHIPLER, RIGHTS AT RISK: THE LIMITS OF LIBERTY IN MODERN AMERICA 30 (2012).

### 6. *The Right to a Fair Hearing and Equality of Arms*

There are several widely-recognized components to a fair trial, including the equal opportunity of the prosecution and defense to obtain evidence and present witnesses and the provision of equal resources to the prosecution and defense. This concept is known in international law as “equality of arms.” Other components of a fair trial include adequate notice of the charges, adequate opportunity and resources to mount a defense, the right to a trial within a reasonable time, the right to be present at one’s trial, and the right to counsel of one’s choosing (including the right to free counsel for the indigent). These fair trial rights are enumerated in detail in major international treaties, including AP I of the GC<sup>187</sup> and the ICCPR.<sup>188</sup>

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187. Protocol I, *supra* note 79, at art. 75(4), (7):

- (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
- (b) no one shall be convicted of an offence except on the basis of individual penal responsibility; . . .
- (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
- (e) anyone charged with an offence shall have the right to be tried in his presence; . . .
- (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; . . .
- (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
- (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised. . . .

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

- (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; . . .

188. International Covenant on Civil and Political Rights, *supra* note 47, at art. 14:

- (1) 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 . . . hearing . . .
- (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

Many of the contemporary requirements of a fair trial have evolved directly from the U.S. Constitution, particularly the Fifth Amendment, which guarantees “due process of law” and the Sixth Amendment, which guarantees to the accused the right to “be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.”<sup>189</sup> The right to a fair hearing was reiterated in 1989 in Vienna<sup>190</sup> and 1990 in Copenhagen.<sup>191</sup>

The Guantanamo military commissions unquestionably afford many of the rights to a fair trial and provide near equality of arms. The trial procedures are largely consistent with the procedures used in general courts-martial and U.S. federal criminal courts, with some minor and subtle differences. The principle of equality of arms means that the procedural conditions at trial and sentencing must provide a “fair balance” for all parties.<sup>192</sup> Each party must be given a reasonable opportunity to present the case under conditions that do not place the party at a substantial disadvantage vis-à-vis the opponent.<sup>193</sup> Although not providing perfect equality, the military commissions overall do achieve a reasonable balance, with a few limitations which warrant comment.

The MCA clearly provides 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.<sup>194</sup> The military commissions provide the right to at least one free defense counsel and a second learned civilian counsel in capital cases.<sup>195</sup> In practice, however, military commission defendants have typically been provided additional defense counsel at government expense, without regard to their ability to

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(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court . . . .

189. U.S. CONST. amend. VI.

190. Vienna Meeting, *supra* note 50 (“the right to a fair . . . hearing . . . , including the right to present legal arguments and to be represented by legal counsel of one’s choice”).

191. Copenhagen Meeting, *supra* note 50:

(5) The participating States solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.16)—in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair . . . hearing . . .

(5.17)—any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

192. Geert-Jan Alexander Knoops, *The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective*, 28 *FORDHAM INT’L L.J.* 1566, 1567 (2004).

193. *Id.* at 1583.

194. 10 U.S.C. § 948a (2012); *id.* § 948s; *id.* § 949a(2)(B)-(C).

195. *Id.* § 949a(C).

pay. In a non-capital case, an accused could hire a civilian counsel at his own expense. All of these rights are explained to the defendant at the arraignment. Due to the glacial pace of the military commissions, the defense has generally had more than sufficient time to prepare for trial. The facilities provided to defense counsel are generally adequate and suitable to their purpose.<sup>196</sup> The accused have the right to communication confidentially with their legal counsel,<sup>197</sup> although there have been some complaints about the ability to effectively exercise this right, both because of JTF-Guantanamo rules relating to inspection of documents provided to detainees and because of concerns about eavesdropping on attorney-client meetings.<sup>198</sup> The difficulties of communicating with their clients, and the overly intrusive and unevenly enforced restrictions imposed by JTF-Guantanamo, especially on those considered High-Value Detainees (HVDs), has been a constant source of complaints from defense counsel for several years and has recently been the subject of pretrial litigation in the 9/11 case.<sup>199</sup>

One area of concern is that detainees do not have a completely unfettered right to the lawyer of their choice. Several detainees, especially loyal Al Qaeda members, have expressed objection to being represented by the military counsel appointed to them, but have been given no real choice because the MCA specifies that a military counsel must be appointed. Another limitation on the right to counsel is that only U.S. citizens can serve as civilian defense counsel in military commissions.<sup>200</sup> Since only non-U.S. citizens are subject to the jurisdiction of military commissions, this ensures that an accused will be unable to choose a counsel of his own nationality. Even foreign counsel who are admitted to practice in a U.S. jurisdiction are barred from serving as defense counsel, although an accused is entitled to have a foreign attorney serve as a consultant and be present at the counsel table.<sup>201</sup> Although present in the courtroom, these consultants are not permitted to speak on behalf of the accused, rendering them of limited usefulness.<sup>202</sup> If the accused is willing to be represented by

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196. There have been some recent complaints about the cleanliness of some of the defense facilities, but from my experience, the office facilities provided are adequate. However, if the accused elects to represent himself, there are serious questions about the adequacy of the facilities available to him.

197. 10 U.S.C. § 949c(b)(7).

198. Martha Neil, *Lawyer Sues Over New Gitmo Policy Requiring Review of Attorney Mail to Detainees*, A.B.A. J. (Feb. 10, 2012), [http://www.abajournal.com/news/article/lawyer\\_sues\\_over\\_new\\_gitmo\\_policy\\_requiring\\_review\\_of\\_attorney\\_mail\\_to\\_detainees/](http://www.abajournal.com/news/article/lawyer_sues_over_new_gitmo_policy_requiring_review_of_attorney_mail_to_detainees/).

199. Charlie Savage, *9/11 Case is Delayed as Defense Voices Fears on Eavesdropping*, N.Y. TIMES (Feb. 11, 2013), [http://www.nytimes.com/2013/02/12/us/9-11-case-is-delayed-as-defense-voices-fears-on-eavesdropping.html?\\_r=0](http://www.nytimes.com/2013/02/12/us/9-11-case-is-delayed-as-defense-voices-fears-on-eavesdropping.html?_r=0).

200. R. MIL. COMM'NS 502(d)(3).

201. *Id.* at r. 506(e).

202. Rules for these consultants are found in the R.T.M.C., *supra* note 26, § 9-6.

a military counsel, they have the right to request a specific military defense counsel. There have been no publicized examples of an accused attempting to exercise this right.

Similar to modern war crimes tribunals like the ICC and ICTY, the military commissions utilize simultaneous translation to ensure that non-English speaking defendants can follow what is going on in the courtroom. Court interpreters are present during all military commission hearings and the accused can listen to the proceedings in his native language using headphones. Unfortunately, however, the quality of the translation has been uneven, and at times, inadequate, due to the shortage of highly skilled interpreters with appropriate security clearances. On occasion, when the accused has refused to wear the headphones, the military judge has ordered the interpretation to be broadcast into the courtroom to ensure that the accused hears what is being said. Upon request, the defense team may be provided an interpreter who is a confidential member of the defense team. This interpreter facilitates communication between the defense team and the accused during attorney-client meetings and in courtroom consultations. The accused is provided a copy of the charges translated into his native language, but not every documentary item of evidence is translated. The prosecution is obligated to disclose exculpatory evidence to the defense.<sup>203</sup>

The Rules for Military Commission prescribe that the defense is entitled to a *reasonable* opportunity to obtain witnesses and other evidence.<sup>204</sup> This rule has been criticized because it departs from the court-martial rule, which states that the defense shall have an *equal* opportunity to obtain witnesses and evidence.<sup>205</sup> The 2009 MCA was revised in an effort to address this criticism. Section 949j of the MCA now states that “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.”<sup>206</sup> Unfortunately, the procedures devised for the defense to obtain witnesses requires the defense to provide a detailed written list of the witnesses the defense wants to the trial counsel, along with a synopsis of the expected testimony,<sup>207</sup> requiring the defense to reveal its strategy to the prosecution well in advance. In the 9/11 case, defense counsel has complained that these requirements are not comparable to procedures in federal court, and there has been an effort to modify the rules, at least with regard to defense requested expert witnesses.

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203. R. MIL. COMM'NS 701(e).

204. *Id.* at r. 703(a).

205. *Analysis of Proposed Rules for Military Commissions Trials*, HUM. RTS. FIRST, 6, available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/07125-usls-hrf-rcm-analysis.pdf> (last visited Oct. 1, 2013).

206. 10 U.S.C. § 949j (2012).

207. *See* R. MIL. COMM'NS 703(c)(2).

The trial counsel can also refuse to produce a requested witness, forcing the defense to seek relief from the military judge.<sup>208</sup> (This procedure is the same as the one used in general courts-martial, but is not the same as the procedure used in federal criminal trials.)<sup>209</sup> One example of the inequality of arms is that the prosecution has subpoena power and the defense does not.<sup>210</sup> The accused has the right to cross-examine all witnesses.<sup>211</sup> However, the more permissive hearsay rules potentially create the opportunity for testimony to be introduced without the opportunity for confrontation of the witness.<sup>212</sup>

The defense has the right to the assistance of experts and to call expert witnesses for the defense.<sup>213</sup> Such requests are initially presented to the Convening Authority for funding authorization.<sup>214</sup> If the Convening Authority denies a request, the defense may appeal to the military judge.<sup>215</sup> Under the previous Convening Authority, there were frequent defense complaints that expert requests were arbitrarily denied.

It is debatable whether military commissions afford the right to be tried without “undue delay.” Once charges against the accused are referred to trial, *then* there is a right to be tried without undue delay, but there is no right to be charged or released within a reasonable time.<sup>216</sup> According to the United States, detainees are not pre-trial detainees, but rather have the status of detained enemy combatants held pursuant to the law of war. There are no bail hearings for military commission defendants. Indeed, the United States’ position is that detainees can be held indefinitely without charge for the duration of the conflict in which they are alleged to have participated. As a result, all of the detainees charged in the military commissions to date had already been detained for several years at the time charges were referred to a military commission. Some detainees have now been held for a decade or longer.<sup>217</sup> Even though all of the detainees planned to be prosecuted were identified years ago,<sup>218</sup> only a small fraction

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208. *See generally id.* at r. 703.

209. *See id.* at r. 102; FED. R. CRIM. P. 26.

210. R. MIL. COMM’NS 703(e)(2)(C).

211. *Id.* at r. 502(d)(7)(C).

212. *See generally* MIL. COMM’N R. EVID. 801-807.

213. *Id.* at r. 703(d).

214. *Id.*

215. *Id.*

216. *See* R. MIL. COMM’NS 801(a). “The military judge is responsible for ensuring that military commission proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources.” *Id.*

217. *See, e.g.,* Adam Baron, *Yemen Begins Push to get Citizens out of Guantanamo Detention*, McCLATCHY (Apr. 5, 2013), <http://www.mcclatchydc.com/2013/04/05/187885/yemen-begins-push-to-get-citizens.html#.UguK8I5pJUQ>.

218. The Obama Administration’s Guantanamo Detainee Task Force identified thirty six detainees potentially subject to trial by military commission by January 2010. DEP’T OF JUST. ET AL., FINAL

of those identified have been charged or are planned to be prosecuted. Since there is no statute of limitations under the MCA, the United States is not under any pressure to move promptly to initiate a prosecution. A detainee captured in 2002 or 2003 and charged in 2013 or 2014 would have a plausible argument that their right to be tried without undue delay has been violated.

### 7. *The Right to Fair Notice and the Principle of Non-Retroactivity/Legality*

Under both IHR and IHRL, the accused has the right not to be tried for acts which were not clearly established as criminal offenses at the time the acts were committed. Penalties for crimes may also not be retroactively increased. AP I of the GC<sup>219</sup> and the ICCPR<sup>220</sup> contain nearly identical provisions reflecting these standards. The 1990 Copenhagen document specifies that no one will be charged with, tried for, or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision.<sup>221</sup> This idea is also expressed very simply in the Ex Post Facto Clause of the U.S. Constitution.<sup>222</sup>

For a conviction to be valid, the offense with which the person is charged must have constituted a criminal offense under national or international law at the time when the act was committed. Crimes that are recognized by civilized nations or offenses under customary international law satisfy this requirement. The inclusion of several non-law of war offenses in the list of crimes punishable by military commission under the

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REPORT: GUANTANAMO REVIEW TASK FORCE 9-10 (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

219. Protocol I, *supra* note 79, at art. 75(4)(c), states:

[N]o one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby . . . .

220. International Covenant on Civil and Political Rights, *supra* note 49, at art. 15, states:

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

*See also*, Universal Declaration of Human Rights, *supra* note 46, at art. 11(2).

221. Copenhagen Meeting, *supra* note 50, at art. 5.18.

222. U.S. CONST. amend V, § 9, cl. 3. “[N]o . . . ex post facto Law shall be passed.” *Id.*

2009 MCA has raised serious concerns about whether the military commissions comply with the principle of legality or rather are seeking to retroactively punish conduct which was not legally punishable by the United States at the time it was committed.<sup>223</sup> Indeed, this is probably the single greatest source of criticism of the military commissions since 2009.

Joanne Mariner of Human Rights Watch has critiqued this aspect of the law:

Among the most troubling aspects of the new military commissions legislation is its inclusion of offenses that are not considered violations of the laws of war. Although the administration had insisted that “providing material support for terrorism” was not a law of war violation, the legislation allows military commissions to try such cases.

“Providing material support for terrorism is not a war crime,” Mariner said. “It is a criminal offense that should be tried in US federal courts.”<sup>224</sup>

This concern is shared by Professor Jonathan Hafetz, an experienced national security lawyer now teaching at Seton Hall Law School, who states, “Since Hamdan, Congress has twice authorized the use of military commissions, which continue to prosecute terrorism suspects for various offenses, including some, such as material support for terrorism, that are generally not recognized as war crimes under international law.”<sup>225</sup> HRF echoes these concerns: “[T]he manual, consistent with the 2009 Military Commissions Act, continues to permit defendants to be tried ex-post facto for conduct not considered to constitute a war crime at the time it was committed, such as material support for terrorism.”<sup>226</sup> A spokesperson for the Constitution Project has made the same point: “[T]he legitimacy of the crimes triable before a military commission remains at issue, as the crimes of conspiracy and material support for terrorism are not traditionally considered war crimes under international law.”<sup>227</sup>

According to the Center for Constitutional Rights (CCR):

[T]he current military commission statute includes “conspiracy” and “material support” as war crimes, contradicting the Obama

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223. Hamdan v. United States, 696 F.3d 1238, 1247 (D.C. Cir. 2012).

224. Laura Pitter, *Why Take the Risk at Guantanamo?*, HUM. RTS. WATCH (Oct. 24, 2012), <http://www.hrw.org/news/2012/10/24/why-take-risk-guantanamo>.

225. Jonathan Hafetz, *Military Detention in the “War on Terrorism”*: Normalizing the Exceptional After 9/11, 112 COLUM. L. REV. SIDEBAR 31, 38-39 (2012).

226. *Military Commissions*, HUM. RTS. FIRST, <http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions/> (last visited Aug. 14, 2013).

227. Clutter, *supra* note 72, at 2, 4, 24.

administration's prior position that they did not qualify as offenses triable by military commission."

Any commission prosecutions of current Guantanamo detainees would inevitably pose a retroactivity problem by dint of the fact that "conspiracy" and "material support" were never traditionally-recognized war crimes. Since almost all the Guantanamo prisoners were captured after the original 2006 MCA was passed, application of these new "war crimes" would violate the ex post facto prohibition on retroactive criminal laws in the Constitution. Because, however, such claims might only come to the federal courts after trials and military appeals were complete, it might be years before any such convictions were thrown out.<sup>228</sup>

In 2012, the U.S. Court of Appeals for the District of Columbia proved CCR's criticism prescient, reversing the 2008 conviction of Salim Hamdan (under the 2006 MCA) for material support to terrorism and casting considerable doubt on all of the other military commission convictions obtained to date.<sup>229</sup> The Justice Department has now conceded that material support, conspiracy, and solicitation are not recognized international war crimes in the case of *United States v. Al Bahlul*, but continues to argue that these offenses are still prosecutable in military commissions because they are part of the U.S. domestic common law of war.<sup>230</sup> This argument was criticized by Professor Stephen Vladeck.<sup>231</sup> The D.C. Circuit rejected the Justice Department's arguments and vacated Mr. Al Bahlul's conviction,<sup>232</sup> but subsequently agreed to rehear the case *en banc*.<sup>233</sup> Thus, the question of what charges are permissible in a military commission remains open.

The Military Commissions Act of 2009 indicates that its purpose is to "establish procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war *and other offenses triable by military commission*."<sup>234</sup> This phrase has proven to be very problematic because of the potential for retroactive criminal punishment, in violation of both international law (i.e. ICCPR Article 15)

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228. See CCR Condemns, *supra* note 73.

229. See David J. R. Frakt, *Military Commissions: A Failed Experiment*, JURIST (Oct. 23, 2012), <http://jurist.org/forum/2012/10/david-frakt-hamdan-commissions.php> (noting that all seven of the convictions obtained in military commissions to date included a conviction for material support to terrorism).

230. *Id.*

231. See Steve Vladeck, *The Merits of DOJ's Supplemental Brief in Al Bahlul*, LAWFARE (Jan. 10, 2013), <http://www.lawfareblog.com/2013/01/the-merits-of-doj-s-supplemental-brief-in-al-bahlul/>.

232. *Al Bahlul v. United States*, 11-1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013).

233. *Id.*, *reh'g en banc granted*. For the order granting the rehearing, see <http://www.lawfareblog.com/wp-content/uploads/2013/04/Bahlul-DC-En-Banc-Order.pdf>.

234. 10 U.S.C. § 948b(a) (2012) (emphasis added).

and the U.S. Constitution. Prior to the MCA, the only offenses other than law of war offenses expressly authorized to be tried by military commission were spying and aiding the enemy. The MCA attempted to expand the list of offenses punishable by military commission. The list of offenses in the MCA may generally be categorized as recognized violations of the laws of war and “other offenses.”<sup>235</sup> The MMC provides expanded definitions, elements, and explanatory commentary for the offenses.<sup>236</sup>

The most widely accepted law of war offenses are those that are listed in recognized codifications of the law of war such as the Geneva Conventions themselves, the Rome Statute of the ICC, the statutes of the ICTY and International Criminal Tribunal for Rwanda, and the U.S. War Crimes Act. These crimes include: murder of protected persons, attacking civilians, attacking civilian objects, attacking protected property, pillaging, denying quarter, taking hostages, employing poison or similar weapons, using protected persons or property as a shield, torture, cruel or inhuman treatment, treachery or perfidy, improperly using a flag of truce or distinctive emblem, intentionally mistreating a dead body, and mutilating or maiming a protected person.<sup>237</sup> Rape and sexual assault, “in the context of hostilities,” are also punishable under the MCA.<sup>238</sup> Although fairly new, rape is clearly now a recognized international war crime. Very few of these traditional war crimes have been among the offenses charged in the military commissions to date.

The MCA also lists hijacking or hazarding a vessel or aircraft as a punishable offense.<sup>239</sup> Although hijacking and piracy are clearly international crimes, it is not clear that they are considered to be war crimes. This is of particular significance in the 9/11 case, where the hijacking of civilian aircraft was a central aspect of the crime. Given that the hijacked aircrafts were then used as illegal weapons of war in further attacks on civilian targets, I believe it is appropriate to consider these particular hijackings to be war crimes. Less clear is whether the attempted hijackings of vessels on the high seas would qualify as a war crime.

The MCA also lists several offenses which sound like they might be legitimate offenses under the law of war, but which have been interpreted to make any fighting by an unprivileged enemy belligerent against U.S. or coalition forces punishable, potentially in violation of the principle of

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235. Some of these offenses might potentially be punishable consistent with international law, even if not recognized as offenses under the law of war, so long as the offense was based on conduct that was a crime under international law at the time it occurred. International Covenant on Civil and Political Rights, *supra* note 47, at art. 15(2).

236. Gates, *supra* note 24.

237. M.M.C., *supra* note 16, at xxi-xxv.

238. *Id.* at IV-17 to -18.

239. JENNIFER K. ELSEA, THE MILITARY COMMISSIONS ACT OF 2009 (MCA 2009): OVERVIEW AND LEGAL ISSUES 1, 10 (2010), available at <http://www.fas.org/sgp/crs/natsec/R41163.pdf>.

lenity, which requires that ambiguous penal provisions be construed strictly, in the manner most favorable to the accused, rather than broadened retrospectively.<sup>240</sup> According to the MMC, the offenses of murder in violation of the laws of war, destruction of property in violation of the law of war, and intentionally causing serious bodily injury, as well as attempts to commit these three offenses, do not actually require a violation of the international law of war and include any hostile act by an unprivileged belligerent.<sup>241</sup> This effort to dramatically expand the concept of a war crime has largely been rejected by the judges in the military commissions. However, one defendant, Omar Khadr, pled guilty to murder in violation of the law of war for throwing a lawful weapon (a hand grenade) at a lawful combatant (a U.S. soldier in uniform) during a pitched battle in an active zone of conflict in Afghanistan.<sup>242</sup> Several of the prosecution filings in his case made clear that the government's sole theory of a law of war violation was Khadr's status as an unprivileged belligerent.<sup>243</sup> The mere participation of civilians (or "unlawful combatants") in hostilities, including acts or attempts of violence against the military personnel or military objectives, is not considered criminal under international humanitarian law.<sup>244</sup> Any criminal liability for such acts can only exist under validly enacted, non-retroactive domestic law.<sup>245</sup>

Since Khadr's plea, the prosecution has charged several more defendants with murder in violation of the law of war, but in each case the charges specified a violation of the law of war beyond mere status of the actor.<sup>246</sup> Thus, it appears that the prosecution may be backing away from their status-based theory.

The MCA also lists spying and wrongfully aiding the enemy, crimes historically triable in U.S. military commissions, as punishable offenses.<sup>247</sup> While spying is not a recognized war crime, international law does recognize the right of the capturing country to try a spy captured in war and not to treat him as a POW,<sup>248</sup> so its inclusion in the MCA is defensible.

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240. See U.N. Human Rights Comm., International Covenant on Civil and Political Rights: General Comment No. 29: States of Emergency (article 4), ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

241. M.M.C., *supra* note 16, at I-1, IV-11 to -14.

242. See Frakt, *Failed Efforts*, *supra* note 174.

243. This plea could potentially still be challenged on appeal on the ground that an accused cannot waive the right to appeal a jurisdiction matter such as pleading guilty to a non-existent offense. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576 (2006).

244. INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2008) [hereinafter GUIDANCE], available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf>.

245. See Frakt, *Failed Efforts*, *supra* note 174, at 732-34; see GUIDANCE, *supra* note 244.

246. See Frakt, *Failed Efforts*, *supra* note 174, at 746.

247. M.M.C., *supra* note 16, at IV-20 to -22.

248. See Protocol I, *supra* note 79, at art. 46.

One military commission defendant, Omar Khadr, has already pled guilty to spying. Aiding the enemy is not a recognized international law of war offense, and its inclusion in the MCA makes little sense. As defined in the MCA, aiding the enemy is limited to those persons with an allegiance or duty to the United States, and thus is unlikely to be applicable to those who are subject to the personal jurisdiction of the military commissions, who by definition are enemies.<sup>249</sup>

Finally, the MCA lists several offenses which have not previously been recognized as violations of the law of war and were not previously authorized to be tried by military commission under federal law: terrorism,<sup>250</sup> providing material support for terrorism, conspiracy, and solicitation of another to commit an offense triable by military commission. The U.S. Department of Justice, in *United States v. Al Bahlul*, has recently acknowledged what many experts (including myself<sup>251</sup>) have said: Material support to terrorism, solicitation, and conspiracy are not internationally recognized offenses under the international law of war.<sup>252</sup> However, the Justice Department has asserted that such offenses may nevertheless be tried in military commissions because they constitute offenses under the U.S. domestic common law of war. It now seems likely that this controversial assertion will have to be resolved by the U.S. Supreme Court, assuming that the Court agrees to hear the case. This is a critical issue for the viability of the military commissions, because these offenses are the ones that have been utilized the most by the prosecution to date. Indeed, it could be argued, based on the charges filed to date, that the military commissions are not really war crimes tribunals so much as special terrorism tribunals being administered by the U.S. military.

The domestic common law of war theory is not widely accepted by international law of war scholars. If this theory is approved by the Supreme Court, it will further harm the perception of the military commissions. If, on the other hand, the Supreme Court affirms the view of the D.C. Circuit,

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249. Nevertheless, on August 29, 2012, charges were sworn against Ahmed al-Darbi. These charges include a charge of "Aiding the Enemy" at Charge VI. It is not clear what the government's theory is that Mr. al Darbi, an alleged "alien unprivileged enemy belligerent," owed a duty of allegiance to the United States. The charges have not been referred to a military commission by the Convening Authority.

250. There has been no internationally agreed definition of the crime of terrorism. The definition of terrorism in the MCA is "intentionally killing or inflicting great bodily harm on one or more protected persons, or intentionally engaging in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct." M.M.C., *supra* note 16, at IV-19 to -20.

251. See *Prepared Testimony*, *supra* note 134.

252. Supplemental Brief for the United States at 13-14, *Al Bahlul v. United States*, 820 F. Supp. 2d 1141 (C.M.C.R. 2011) (No. 11-1324), available at <http://www.lawfareblog.com/wp-content/uploads/2013/01/Government-Supplemental-Brief-Al-Bahlul.pdf>.

or allows the decision to stand, thereby limiting the military commissions to offenses which were recognized international war crimes at the time they were committed (or in October 2006, whichever is earlier), then this will largely remove the ex post facto/retroactivity concerns and significantly enhance the acceptability of the military commissions.

The Chief Prosecutor, Brigadier General Mark Martins, has attempted to resolve the retroactivity problem by choosing not to pursue charges unless he is convinced that they are legitimate law of war offenses. Thus, in the 9/11 case, he sought to dismiss the stand-alone conspiracy charges against the alleged co-conspirators, requesting the Convening Authority to withdraw the charge. When the Convening Authority refused to do so, the Chief Prosecutor directed his prosecutors not to oppose a defense motion to dismiss the charge. The Chief Prosecutor has also apparently revised the list of detainees that he plans to prosecute in order to focus on those who have committed traditional law of war offenses, as opposed to terrorism offenses. While admirable, so long as non-war crimes remain potentially prosecutable in military commissions, it will be difficult for the government to argue that military commissions fully comply with international fair trial standards.

#### 8. *Post-Acquittal and Post-Conviction Rights*

The concept of double jeopardy enshrined in the U.S. Constitution<sup>253</sup> has been adopted by the international community as a basic fair trial standard both under IHL and IHRL. The IHL standard is set forth in AP I of the GC, in Article 75(4), which states “no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure[.]”<sup>254</sup> The IHRL standards are reflected in Article 14 of the ICCPR, and goes even further in protecting acquitted persons, not only providing protection against double jeopardy, but also providing a right to compensation to some wrongfully convicted persons:

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

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253. U.S. CONST. amend. V, § 2.

254. Protocol I, *supra* note 79, at art. 75(4)(h).

(7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.<sup>255</sup>

Post-conviction rights are one area where the military commissions meet IHL, but do not meet IHRL. While the military commissions do provide clear protection against double jeopardy,<sup>256</sup> neither the MCA nor its implementing regulations provide for any opportunity for compensation for someone convicted in military commissions whose conviction was later reversed based on newly discovered evidence.

### 9. *The Right to Appeal*

Another area of post-conviction rights is the right to appeal. This right is elucidated in ICCPR Article 14(5): “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”<sup>257</sup> In the 1989 Vienna Document, the United States and other members of the OSCE reaffirmed “the right of the individual to appeal to executive, legislative, judicial or administrative organs” and agreed that an accused should also have:

the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.<sup>258</sup>

The MCA includes robust rights of appeal which meet or exceed international fair trial standards. The accused is notified orally and in writing of his rights to appeal at the conclusion of the military commission. Appellate counsel is made available free of charge to anyone convicted by a military commission. The rules for appeals and the nature and scope of the appeals are clearly set forth in RMC 1201 and 1205.<sup>259</sup> In addition to the regular appeals, a person convicted by military commission has the opportunity to submit legal and equitable matters to the Convening Authority and seek clemency from him or her, including sentence relief and setting aside the convictions.<sup>260</sup> If a person convicted by military commission exercises his right to appeal, the judgment of the appeals courts

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255. International Covenant on Civil and Political Rights, *supra* note 47, at art. 14(6)-(7).

256. R. MIL. COMM’NS 907(b)(2)(B).

257. International Covenant on Civil and Political Rights, *supra* note 47, at art. 14(5).

258. Vienna Meeting, *supra* note 50, at art. 13.9.

259. R. MIL. COMM’NS 1201, 1205.

260. *Id.* at rr. 1105(a)(4), 1210(c)(3).

will be published in a detailed written opinion fully explaining the factual and legal basis for the decision. Thus far, there have been two convictions by juries in military commissions.<sup>261</sup> Both convictions were appealed to the Court of Military Commission Review. The Court of Military Commission Review (CMCR) held oral arguments on the appeals, which were open to the public. Subsequently, the CMCR issued detailed opinions affirming the convictions. These opinions are readily available on the military commissions' website.<sup>262</sup> These rulings were then appealed to the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit also holds oral arguments sessions which are open to the public. The D.C. Circuit has ruled on two military commissions' appeals, reversing the ruling of the CMCR and vacating the convictions in the Hamdan and Al Bahlul cases.<sup>263</sup> In both cases, the Court provided written opinions explaining the Court's ruling. Federal circuit opinions are readily available online and in the Federal Reporter.

A possible area of concern under IHRL is the length of time it takes to conclude an appeal. Salim Hamdan was convicted in August 2008 and it took over four years for his conviction to be reversed. Ali al Bahlul was convicted in November 2008 and the D.C. Circuit Court ruled in February 2013 (then vacated its decision and granted an en banc rehearing for Fall 2013). However, it must be noted that this was actually the second appeal in both cases, as the convictions had previously been upheld at the CMCR. Furthermore, given the novelty and complexity of the legal issues involved, and the heavy caseload of the D.C. Circuit, the delays in ruling on military commission appeals are not clearly unreasonable. Indeed, appellate delays of this length are consistent with the delays experienced by criminal defendants tried in both federal courts and courts-martial.

#### *10. Rights of Juvenile Persons/Child Soldiers*

International law provides special protections for juveniles, including suspected child soldiers. For example, ICCPR, Article 14(4), states: "In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."<sup>264</sup> With regard to child soldiers the Convention on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Article 6(3), requires that:

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261. *Id.* at r. 908(d)(2)(B)(iv).

262. MILITARY COMMISSIONS, <http://www.mc.mil/> (last visited Aug. 15, 2013).

263. Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012); Al Bahlul v. United States, No. 11-1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013) *rehearing en banc granted, order vacated* (2013).

264. International Covenant on Civil and Political Rights, *supra* note 47, at art. 14(4).

States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.<sup>265</sup>

The military commissions failed to meet the United States' international obligations to provide special procedural protections for juvenile defendants and to afford appropriate assistance for the psychological recovery and social reintegration of detainees suspected to be child soldiers. There is no age limit for the personal jurisdiction of the military commissions, and two minors (at the time of their alleged offenses) have been charged (Mohammed Jawad and Omar Khadr) and one convicted (Khadr) in military commissions. The MCA and the MMC provide no specialized or required procedures for defendants who were juveniles at the time of their alleged offenses. The United States has claimed that the Convening Authority, at several stages, and the military commission jury, in sentencing, may take into account the age of the defendant, but neither the Convening Authority nor the jury are explicitly required to do so. Moreover, there is no punishment option available in military commissions other than incarceration (or death, although the two juveniles charged were not referred to capital commissions); thus, there is no option for a commission to promote rehabilitation. Although the failure to comply with IHL and IHRL standards for juveniles has been a cause of great concern, this issue is currently moot. There are currently no detainees captured as juveniles at Guantanamo since Omar Khadr was transferred to Canada in late 2012 to complete his sentence, pursuant to the terms of his plea agreement.<sup>266</sup> However, the possibility remains that more juveniles could be captured in the future and subjected to trial by military commission. The MCA or MCM should be amended to bring the law into conformity with international standards related to minors.

### 11. *The Right to Life/Capital Cases*

Because of the extreme and irreversible nature of the death penalty, there are heightened standards for due process in a capital case. As the Supreme Court has repeatedly recognized, "death is different," requiring special

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265. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989), available at <http://www1.umn.edu/humanrts/instree/k2crc.htm>.

266. Colin Perkel, *Omar Khadr's Transfer to Canada Infuriates U.S. Soldier Blinded in Firefight*, NAT'L POST (Oct. 5, 2012), <http://news.nationalpost.com/2012/10/05/omar-khadrs-transfer-to-canada-infuriates-u-s-soldier-blinded-in-firefight/>.

safeguards in capital cases.<sup>267</sup> This principle is also reflected in IHRL, but has not been explicitly incorporated into IHL instruments. The primary treaty reflecting international standards related to capital criminal trials is the ICCPR, Article 6:

(1) Every human being has the inherent right to life. This right shall be protected by the law. No one shall be arbitrarily deprived of his life

(2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant. . . [The death] penalty can only be carried out pursuant to a final judgement rendered by a competent court

(4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. . . .<sup>268</sup>

The United States has acknowledged the heightened restrictions for the use of the death penalty in its commitments to the OSCE.<sup>269</sup>

The two current military commissions in progress, the 9/11 case and Al-Nashiri, have both been referred to capital military commissions, and many consider the death penalty to be a very likely outcome for some, if not all, of the defendants.<sup>270</sup> Thus, compliance with international standards for capital punishment is of critical importance. The ICCPR strictly prohibits imposition of the death penalty in cases where other ICCPR rights have been violated. Thus, all of the fair trial guarantees of the ICCPR must be observed in order for a capital sentence to be valid under international law. According to the HRC:

In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the

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267. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

268. International Covenant on Civil and Political Rights, *supra* note 47, at art. 6.

269. See Vienna Meeting, *supra* note 50. “In participating States where the death penalty has not been abolished, sentence of death may only be imposed . . . not contrary to their international commitments.” *Id.*; Copenhagen Meeting, *supra* note 50, at art. 17.3 (participating States “note the restrictions and safeguards regarding the use of the death penalty which have been adopted by the international community, including article 6 of the International Covenant on Civil and Political Rights”).

270. See Adam Hudson, *Contention and Confusion in Guantanamo Pre-Trial Hearings for Al-Nashiri Military Commissions*, TRUTHOUT (June 18, 2013), <http://truth-out.org/news/item/17038-guantanamopre-trial-hearings-for-al-nashiri-demonstrate-issues-with-use-of-military-commissions>.

provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant).<sup>271</sup>

Thus, the fact that the military commissions substantially comply with the ICCPR, as set forth in this Article, is insufficient to authorize the imposition of the death penalty.

The MCA permits the death penalty for a number of offenses.<sup>272</sup> The Economic and Social Council in 1984 published “Safeguards Guaranteeing the protection of the Rights of Those Facing the Death Penalty.”<sup>273</sup> This document states that only intentional crimes with lethal or other extremely grave consequences should be death-eligible.<sup>274</sup> All of the death eligible offenses, with the exception of spying, seem to meet these criteria. The offense of spying, as defined in the MCA, does not require that any actual harm occur.<sup>275</sup>

The ICCPR also prohibits retroactive imposition of the death penalty, so to the extent that offenses under the MCA are eligible for the death penalty which were not clearly eligible for the death penalty at the time the offenses were committed, this would also be problematic.<sup>276</sup> There are at least two offenses which are potentially in this category: “intentionally causing serious bodily injury” and mutilation or maiming. Even though the death penalty is limited for these offenses to situations where someone died as a result of intentionally causing serious bodily injury or intentional mutilation, under the UCMJ, such an offense would be considered at most a second-degree murder, which would clearly not be eligible for the death penalty.<sup>277</sup> In contrast, under the U.S. War Crimes Act, 18 U.S.C. Section 2441 of 1996, any war crime (including intentionally causing serious bodily injury and maiming) in which the victim dies is death-eligible.<sup>278</sup> However,

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271. Right to Equality, *supra* note 118.

272. Murder of protected persons; attacking civilians (resulting in at least one death); taking hostages (resulting in at least one death); employing poisonous or other similar weapons (resulting in at least one death); using protected persons as a shield (resulting in at least one death); torture (resulting in at least one death); cruel or inhuman treatment (resulting in at least one death); intentionally causing serious bodily injury (resulting in at least one death); mutilation or maiming (resulting in at least one death); murder in violation of the law of war; treachery or perfidy (resulting in at least one death); hijacking or hazarding a vessel or aircraft (resulting in at least one death); terrorism (resulting in at least one death); spying (death); conspiracy (resulting in at least one death). 10 U.S.C. § 950t (2012).

273. U.N. Econ. and Soc. Council, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, U.N. Res. 1996/15, 45th plenary meeting (July 23, 1996), *available at* <http://www.un.org/documents/ecosoc/res/1996/eres1996-15.htm>.

274. *Id.*

275. 10 U.S.C. § 950t.

276. *See generally* INT’L BAR ASS’N, THE DEATH PENALTY UNDER INTERNATIONAL LAW: A BACKGROUND PAPER TO THE IBAHRI RESOLUTION ON THE ABOLITION OF THE DEATH PENALTY (May 2008).

277. *Id.*

278. 18 U.S.C. § 2441 (1996).

this law was amended by the 2006 MCA to include crimes committed in non-international armed conflicts.<sup>279</sup> Thus, there is a good argument that the U.S. War Crimes Act did not apply to the armed conflict which was occurring between the United States and Al Qaeda prior to 2006.

There are special procedural safeguards in capital cases which must be satisfied before capital punishment may be imposed. These rules are primarily found in RMC 1004. Before a death penalty may be adjudged, the case must be referred as capital by the Convening Authority, there must be advance notice to the defense of aggravating factors the government intends to prove, the accused must be found guilty by unanimous concurrence of all members, there must be at least 12 members, and the jury must find unanimously that one or more aggravating factors exist and that the extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances. These protections are substantially identical to those utilized in capital general courts-martial under the UCMJ.

Consistent with IHRL, there are two separate opportunities for a death penalty to be commuted. The Convening Authority may commute a death penalty, and the President of the United States may also commute the death penalty or grant a pardon. The death penalty may only be carried out if expressly approved by the President of the United States, ensuring that a pardon will be considered if any defendant is sentenced to death.<sup>280</sup>

#### IV. CONCLUSION

The MCA of 2009 substantially improved the overall fairness of military commissions and brought them more closely into compliance with international fair trial standards. A credible, if not airtight, argument can now be made that the current military commissions meet the definition of a regularly constituted court within the meaning of the Geneva Conventions, Common Article 3. While military commissions arguably now comply with international humanitarian law, they still fall short, at least on paper, of meeting the more robust fair trials standards found in international human rights law. While current military commission rules and procedures are in substantial compliance with these standards, significant concerns remain about the potential for the admissibility of evidence obtained by coercive means, the retroactive prosecution of non-war crimes in what is ostensibly a war crimes tribunal, and the openness of the process. As the trials at Guantanamo unfold, the international legal community will be closely observing whether the military commissions violate these standards. For

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279. Military Commissions Act of 2006, 10 U.S.C. §§ 948a-950w (2006).

280. R. MIL. COMM'NS 1207.

any military commission resulting in an affirmed verdict of death, the United States can expect heightened scrutiny from human rights observers. Where the potential for imposition of the death penalty exists, substantial compliance is insufficient; strict compliance with all the fair trial requirements of the ICCPR must be observed. Revelations in the 9/11 trial of secret microphones in attorney-client meeting rooms and of clandestine monitoring by unnamed government agencies have done little to enhance public confidence in the fairness of the proceedings. Although the current Chief Prosecutor seems sincerely committed to providing fair trials, mere assertions by senior U.S. government officials of a commitment to fair trials are unlikely to convince a skeptical international community. But while the laws and regulations on the books do not currently guarantee a trial meeting all international fair trial standards, I believe it is possible for a military commission trial to meet these standards if the Convening Authority, military judge, and prosecutors are all committed to go beyond the minimum requirements of the law in an effort to protect the rights of the accused. For the sake of the accused, and for the sake of America's reputation, I hope that they are.

