[H.A.S.C. No. 109–117]

STANDARDS OF MILITARY COMMISSIONS AND TRIBUNALS

HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES
ONE HUNDRED NINTH CONGRESS
SECOND SESSION

HEARING HELD
JULY 26, 2006

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STANDARDS OF MILITARY COMMISSIONS AND TRIBUNALS

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Wednesday, July 26, 2006.

The committee met, pursuant to call, at 1:05 p.m., in room 2118, Rayburn House Office Building, Hon. Duncan Hunter (chairman of the committee) presiding.

OPENING STATEMENT OF HON. DUNCAN HUNTER, A REPRESENTATIVE FROM CALIFORNIA, CHAIRMAN, COMMITTEE ON ARMED SERVICES

The CHAIRMAN. The committee will come to order. I want to make this very short and sweet so we can get to the substance of our hearing. And we are meeting to receive testimony from witnesses regarding standards and procedures used in international war crimes tribunals as they might relate to the U.S. military commissions for detainees at the U.S. Naval Base at Guantanamo Bay, Cuba. We have gone over it in previous hearings and briefings, the path that led us to this point where we are putting together a new structure that will allow us to fight the war on terrorism expeditiously and nonetheless avail a modicum of rights to the defendants in those prosecutions.

And we have with us today the Honorable Patricia M. Wald, Chief Judge, United States Court of Appeals for the District of Columbia, retired. Judge Wald, thank you for being with us today. We appreciate your presence.

Judge Gerald Gahima—and did I pronounce that correctly, sir? Senior Fellow, United States Institute of Peace, former Deputy Chief Justice and Attorney General of Rwanda.

Mr. Michael P. Scharf, professor of law and director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law. Thank you, Mr. Scharf, for your appearance today.

And Ms. Jennifer Elsea, did I pronounce that correctly, Elsea? Thank you. Legislative attorney, American Law Division for our good old Congressional Research Service, which does such a fine job of helping us to understand very complex issues. We appreciate your attendance, ma'am, being with us today.

So without further ado, let me turn to the distinguished ranking member for any comments he wants to make, and then we will get right to it. And I understand staff has got some side-by-sides of some bodies of law with respect to these tribunals to help to educate our members.

Incidentally, before we do that, I see Brian Bilbray, a wonderful friend and great member, a former member, now a newly re-elected member or newly elected member from California, from San Diego, my old seat-mate, who has joined us as a member of the House Armed Services Committee.

Mr. Bilbray, you are right there where you can look them right in the eye. Thanks for joining the committee. I know you have worked a lot of these issues, and you are coming in at a time when we have a lot on our plate. Great to have you with us and thanks for being on the Armed Services Committee. Appreciate it.

With those brief remarks, let me turn to the distinguished gentleman from Missouri, Mr. Skelton, for any remarks he would like to make, and we will get right to our panel.

STATEMENT OF HON. IKE SKELTON, A REPRESENTATIVE FROM MISSOURI, RANKING MEMBER, COMMITTEE ON ARMED SERVICES

Mr. SKELTON. Mr. Chairman, thank you very much.

This is one of the most important hearings we are going to have this year. I respectfully ask that my statement be put into the record, but let me very, very briefly say we are here as a result of the Hamdan case recently handed down by the Supreme Court. I might also say the world is watching about what we do, and it is good to have outstanding experts on war crimes and war tribunals with us here today. This is just an excellent opportunity for us.

As I understand, three of the panel members have participated actually in war crimes tribunals, and we look forward to your testimony. The laws of war are very important and international law, and consequently, it is important for us to hear from you.

I note that the side-by-side criminal tribunals are reflective of, on the far left, the general court-martial that we have here, the military court order, which is what was handed down as improper by the Supreme Court, then the Nuremberg trials, and then the last one, the far right is the Yugoslav and Rwanda rules that were followed. They are of course more up to date in the international sphere.

So we look forward to your discussion, and I want to thank the CRS very, very much for the outstanding work that you did in helping us compare because we are going to be doing a lot of comparison in the days ahead. Thank you very much. I ask that my statement be put in its entirety.

[The prepared statement of Mr. Skelton can be found in the Appendix on page 49.]

The CHAIRMAN. Without objection, the gentleman's statement will be taken into the record.

Incidentally, to all of our guests, all of your written statements will be taken into the record so you can feel free to summarize your statements. You don't have to follow them exactly. And they will be taken into the record.

I have to go and make a very brief statement on the House floor, but the fine gentleman from Colorado, Mr. Hefley, who has just been in a heck of a bar fight, will want to tell you all about that. Mr. Hefley is leaving this year. We have given him lots of accolades, but he is the greatest rodeo cowboy who ever graced the

halls of Congress. I went up with him to the Casey Tibbs statue there in the Cowboy Hall of Fame and with Casey Tibbs, a great bronc rider on his bucking horse there in bronze outside, and I was reminded that Casey Tibbs told me Joel Hefley was a great cowboy. So if the gentleman will take over. I will be right back.

Mr. HEFLEY [presiding]. I thank the Chairman for his kind words except, as you can see, the horse won in this case. I apologize for that, but that is not why we are here. So shall we start?

Are you finished, Mr. Skelton? Shall we start.

Do you have an order you want to start, or start over here?

STATEMENT OF HON. PATRICIA M. WALD, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, (RET.), AND FORMER JUDGE, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Judge WALD. Thank you, Congressman, committee members. My name is Patricia Wald, and I served for 20 years on the D.C. Circuit Court of Appeals, 5 years as the Chief Judge. After that, I was appointed to be the American judge on the International Criminal Tribunal for the Former Yugoslavia (ICTY) where I served between 1999 to the end of 2001.

I am going to very briefly, as I always make counsel do when I used to be a judge, I am going to very briefly summarize those parts of the rules and practices that I think will have some relevance to the dilemma that you are facing in terms of the proper procedures for military commission.

First of all, I do want to acquaint you with the background of the ICTY, which has 16 judges, 16 permanent judges on it. They are nominated by their member countries. For instance, I was nominated by the United States, and they are elected by the General Assembly.

The requirements for a permanent judge is that he or she possess the qualifications required in their relative countries for appointment to the highest judicial office. I am not quite sure how that translates into practice, but it does mean that the judges have to be in high regard by their countries and that due account has to be taken in the overall composition of the chambers for experience in criminal law, international law and human rights laws.

Very briefly, the ICTY, which has now been in operation since 1993, although its first trial was in 1996, has indicted 161 defendants; 95 proceedings have been completed; 48 are serving or have served their sentences; 34 are awaiting trial; 11 are in trial; and 13 are pending appeal.

First of all, the rules of procedure in the ICTY, there is a basic statute, but it is a very brief one, and the judges themselves in plenary session by a majority decide the rules. There are 125 rules which elaborate greatly on the statutory provisions in the ICTY charter.

This way of promulgating the rules by the judges themselves has allowed a great deal of flexibility for the judges as they move along to use their experience to meet various problems that arise and won't necessarily be contemplated every time.

The actual statute of the ICTY does make certain provisions for rights of defendants, basically that their hearings be public, that

the accused be present at the hearings, there be a right to counsel, appointed if necessary, to examine witnesses, not to be compelled to testify, privilege against self-incrimination and time to prepare a defense.

Now let me briefly talk about the rules I think do have relevance to your dilemmas. The first would be the rules on interrogation. Here I would remind you that, in the ICTY, the set-up is such that a suspect or an accused is not taken into custody. The ICTY has no police force, so none of the suspects accused are taken into custody until the prosecutor either files an indictment, in the case of an accused, or he asks the court to grant him provisional detention for a short period so that he can question the witness so that a judge has to actually pass before anybody can be brought into custody.

Once he is brought into custody, let's say the suspect, or if there is an indictment, the accused, has to be informed of the right to counsel and his right to an interpreter if he doesn't speak either French or English, which are the languages of the tribunal, and his right to remain silent.

The interrogations, all interrogations by the prosecutor are recorded, and the accused or his counsel gets a copy of it. I note here that the International Criminal Court has an additional provision which forbids any kind of coercion, duress or threat during an investigation.

At the tribunal, we had a provision that required that, while an accused was in detention awaiting trial, he had to be brought before the judge in person every 120 days, and then he was personally asked if he had any problems about his treatment, if he had been in any way abused. You will pardon me a short story, because while I was there for two years, the worst accusation that was brought against detention conditions at the ICTY was that the Serbian prisoners couldn't get Serbian TV; they could only get the Bosnian form of TV.

So I believe that the ICTY has a pretty good record. I know of no accusations of anybody being accused in detention, and in fact, I visited the detention facilities myself.

That is in terms of investigation. Now there is a provision in the rules for the exclusion of evidence that was obtained through means that are not just illegal but are in the words of the rule antithetical to the integrity of the proceedings or unreliable because the means by which they were obtained. That is rule 89(d). I have a complete copy of the rules here which I will gladly give your counsel at the end of these hearings.

The rules tell the judges to exclude evidence even if its probative value is outweighed by the lack of fairness of the trial or the integrity of the proceedings. In other words, I think this is a direct quote, No evidence is admissible if it is obtained by methods which cast substantial doubt on the reliability—on its reliability or if it is antithetical to or would damage the integrity of the court.

Now a defendant in the pretrial period gets from the prosecutor a summary of all of the evidence that the prosecutor is going to use at trial, the names of all the witnesses that the prosecutor will call, a summary of their testimony and whether they will testify live or recorded. The defendant also gets all statements of the prosecution

witnesses, and he can inspect the exhibits, the objects that may be introduced in trial by the witnesses.

There is also an equivalent to our Brady rule, which says that the prosecutor must disclose evidence that militates against the defendant's guilt or is in mitigation of his conduct or affects the credibility of the plaintiff's witnesses.

Now, obviously, in any war crimes tribunal as in military commissions, there will be some kinds of evidence that the prosecutor will not want to disclose. Under rule 66 of the ICTY rules, if the prosecutor thinks that certain evidence in his possession will hurt an ongoing investigation or the security of a particular state—and we had some cases like that, some of the states that have been involved in the Bosnian conflict did have evidence which would be relative to some of the accused but obviously had problems with disclosing that—the prosecutor can go in an *ex parte* hearing before the judges of the tribunal, and he can ask not to have that disclosed.

Several things can come out of that. Either something comparable to our CIPA, Classified Information Protection Act here, that something is worked out whereby a redacted version is put in the record or a summary is put in the record or there is a stipulation as to what the evidence would show. Something that will be protective of the actual classification may result.

The bottom line, however, is that nothing can be put into the trial record if it isn't disclosed to the defendant. In that respect, I just want to comment that a good friend of mine who is the deputy prosecutor at the ICTY—that is the number two person—I wanted to make sure that my reading was correct or that nothing had happened in the ensuing years. I have been away from the ICTY for several years, so I e-mailed him, and I said, am I correct in reporting that nothing can go into the record on which a conviction can be based that has not been disclosed to the defendant, and I got back an e-mail which I would be glad to share which said that is correct.

Now there is another provision in there which says, rule 70, if that somebody gives to the prosecutor confidential information and says, I don't want this put in the record and I don't want my identity disclosed, I am only giving you this so that you can use it to generate your own kind of information, I think around here we call it fruit of the tree or something to that equivalent, then that is a rule, and it is followed insofar as the prosecutor can use that for leads, but that information itself cannot be put in the record if the person who gave it doesn't waive confidentiality and if, in the final analysis, it is not disclosed to the defendant.

Now I will end very briefly. There are many, many witness protection measures. ICTY proceedings are televised, and you can have a person's voice altered. You can have the person's physical identity changed, cubes on the screen, et cetera. You can have pseudonyms used. You can have orders of the trial court saying that the identity can't be disclosed to anybody but the defense team. But the final analysis is the actual identity of the witness must always be disclosed eventually to the defendant.

In the very first case, the court in the Tadic case suggested, in dicta, that was not true if the risk to the witness of being retaliated

against in his or her home village, et cetera, was so great. They didn't actually rule that way. This caused such a furor, mostly in the United States. Monroe Lee, who is a very, very renowned former Americam Bar Association (ABA) person wrote Law Review articles. The American Bar Association took resolutions, et cetera. The result has been that it is not the law in the tribunal. Eventually—it may be delayed, the identity of a prosecution witness, but it can never be actually withheld.

Two things are different in the ICTY, from my experience, and the American courts. That is, there are broader kinds of evidence that can be used. You can, of course, have live witnesses, and that is preferred, but you can also have a video record. I have participated in trials in which the witness was being questioned by video, but the set-up is such that the people in the courtroom, including the judges, the defendant, the prosecutor, have an ability to question back and forth even though the witness may be someplace else. That has proved to be very useful for witnesses who don't have to be brought from far away locations.

There is also provision for depositions. In the United States, a deposition can only be used in a criminal trial if the witness is unavailable. In the ICTY, that is not necessarily true, but the defendant and his counsel have to be available at the deposition. Prior transcripts of the same witness—this very often happens when one witness turns out to be a key witness in several trials—prior transcripts of a witness can be used in a later trial, but only, again, if the defendant or his counsel have had a chance to cross-examine the witness either in the first trial or he becomes available in the second trial.

There are also some provisions on the kind of testimony that can be used in gender or sexual cases, but unless you are specifically interested, I won't go into those here.

My last point is that you will see very often quoted that, in the international trials, the only restraint on evidence is that it must be relevant and probative. There is a rule in the ICTY which says the trial court may listen to any evidence if it is deemed relevant or probative, but that is not the end of the story. There are other rules. The other one I have mentioned already, that if it is found to be antithetical to the integrity of the proceeding or unreliable, the court will and should keep it out.

But there is a very important rule which was arrived at while I was there when I sat on the rules committee, and that is something called rule 92bis, which says, where an attempt is made to put the written testimony, the written statement of a witness into direct evidence as opposed to the witness appearing live, and sometimes that may seem to be necessary, that there is a provision for doing that, but the important thing I think is that that can never be done when the evidence goes to the role or the conduct of the accused as charged in that proceeding.

There are many provisions in that rule which suggest that it could be used for cumulative testimony, for background, political, military background or history for the impact on victims for sentencing, for democratic surveys. Lots of shortcuts that you don't actually have to bring the witness in. But if you get to the core of the accused's role or conduct in the proceedings, you may not use

the written testimony; you have to use one of these forms of live testimony.

The very last point is, there is more indulgence in the ICTY for hearsay as it comes into live testimony. For instance, a witness gets on the stand live but says, well, I was told by 15 people in my detention camp that X was the worst commander or the worst commander of a detention camp and that he committed abuses against people.

There is more hearsay, but I will say this about it: One, the judges are very cautious about that kind of hearsay, and in my experience, they usually question the live witness very carefully about the circumstances in which he or she heard that hearsay.

There is also—they follow some decisions of the European Court of Human Rights which say you cannot base a conviction on that kind of hearsay. There must be live or more direct testimony outside of that kind of hearsay on which you are basing the conviction, and of course, it can be thrown out if it is unreliable.

The judges generally operate on a continental mode, which says that a judge can let in more testimony including some hearsay but then has to move very carefully in terms of the weight that is given it. This follows a continental mood and is based upon the notion that here in the States, we have juries and lay people that supposedly—although I have never been entirely convinced of this—lay people don't have the same kind of experience or astuteness in picking the truth from the nontruth that professional judges do.

So the bottom line I would say is the differences between our system as I experienced it here and the ICTY. The defendant must be present at all point in the proceeding and allowed to challenge the evidence except for the two exceptions I gave you, background kind of evidence under 92bis, which doesn't go to role or conduct of the accused.

There is provision made for exclusion of evidence that is obtained by methods which are considered antithetical to the integrity of the proceeding. There is more room for alternative methods of proof like depositions, video records, that kind of thing so long as the defendant has a right to challenge the proceeding and to be there.

And I think I will leave it there. Thank you.

[The prepared statement of Judge Wald can be found in the Appendix on page 52.]

Mr. HEFLEY. Thank you very much, Judge Wald.

Judge Gahima.

STATEMENT OF JUDGE GERALD GAHIMA, SENIOR FELLOW, U.S. INSTITUTE OF PEACE, FORMER JUDGE, WAR CRIMES CHAMBER OF THE COURT OF BOSNIA HERZEGOVINA, AND FORMER DEPUTY CHIEF JUSTICE AND ATTORNEY GENERAL OF RWANDA

Judge GAHIMA. Thank you, Mr. Chairman, members of the committee for inviting me to participate in this hearing.

Mr. HEFLEY. Would you pull the microphone a little closer? Make sure it is turned on there.

Judge GAHIMA. Thank you. I would at the outset wish to clarify that the views I express are my own and do not reflect the views of the United States Institute of Peace.

My experience, I have previously been involved in supervising prosecutions of the Rwanda genocide and supporting the work of the International Criminal Tribunal for Rwanda (ICTR) in that regard. I have also worked with states like Belgium, Switzerland, Canada in their efforts to investigate crimes arising from the Rwanda genocide. And I have been involved in the establishment of the War Crimes Chamber of the Court of Bosnia.

The problem that Congress seeks to address is how to reconcile the right to a fair trial with the necessity for protecting the rights of witnesses and protecting national security in the context of the war on terror. So I will address this issue from three perspectives. I will address the need for compliance with fair trial guarantees, the need to safeguard national security, and the issue of protection of witnesses.

The right to a fair trial is a fundamental norm of international human rights law. This right starts from the time the state takes—starts taking action against a suspect, and that right continues from the investigation stage up to the end of the trial.

During trial, a suspect's right to a fair trial involves a right to a fair hearing: The hearing has to be public, a right to the exclusion of evidence which is received as a result of torture or other compulsion, a right for a person to defend himself in person or through counsel, and a right to be present during trial.

I realize of course that these rights cannot be considered from the context of the war on terror that is ongoing.

I would like to discuss, for example, the issue of the right of an accused person to be present during trial. There is no absolute prohibition on trials in absentia in international law, but it is very clear that trial in absentia would compromise the ability of an accused person to exercise other rights, such as the right to defend oneself, to prepare a defense, the right to communicate with counsel, the right to examine witnesses and other issues.

The statutes of the Rwanda tribunal and the Yugoslav tribunals prohibit trials in absentia, so subject to possibly very rare exceptions, it is difficult to consider how there would be a fair trial in the absence of an accused person.

The other issue that arises with regard to the right to a fair trial is the question of hearsay evidence. Here, the common law systems like the U.S. defer markedly from civil law systems where by and large hearsay evidence is not prohibited. It is admissible. It is just a question of reliability. And as Judge Patricia Wald has indicated, it is always evidence that is admitted with caution, but it is admissible.

In my view, the greater threat to a defendant's right to a fair trial is not the admissibility of hearsay evidence but rather the risk that some evidence may be used which has been obtained illegally.

In the context of the war on terror, a lot of defendants and witnesses who may be testifying against them will have passed through the hands of state agencies in many different countries where torture may have been practiced, so I think really what people ought to focus on when considering evidence in these cases is whether the evidence was voluntary and appropriate and not obtained illegally.

The other issue that I wish to discuss is the question of national security and whether it can have a bearing on curtailment of the rights of a defendant to a fair trial as they exist under many legal systems. The jurisprudence of the ICTR, the one of the Yugolsav tribunals recognizes that there are legitimate security concerns for states when they are dealing with courts. The rules of the two courts permit the conduct of proceedings in camera and restriction of submission of such certain types of evidence, and there have been cases, especially like the Blaskic case, where some limitations of the right to full disclosure have been entertained by the two courts, and again, these are not blanket exclusions of evidence.

My point is that they are legitimate concerns which may lead to curtailment of disclosure of evidence that ordinarily would have been given in open court.

The third issue that I will address is the issue of witness protection. The dangers that witnesses face cannot be underestimated. Under civil law systems, there are different ways that may be used to protect the witnesses. Again, it is more of an exception than a rule, but it is possible under some legal systems of the civil law tradition to reduce the disclosure to the defense, not exclude evidence totally, but, for example, limit the time within which the defense may have that evidence.

For example, at the ICTR, they must—the prosecution must disclose every information at least 21 days before trial. So as my colleague has mentioned, there are opportunities for preserving the anonymity of an accused person, but again, this is under very stringent conditions.

In conclusion, and, again, as I indicated, the views I express are my own, but I believe that, first, on the right to be present, the exclusion of defendants from proceedings violates clearly the right to a fair trial. It is difficult to conceive where you could have a fair trial without the presence of an accused in the hearing of his or her own case.

Two, I think hearsay evidence of probative value should continue to be admissible subject to appropriate safeguards to ensure that it has not been obtained through torture or compulsion.

Three, I think this legal system should consider the possibility of using affidavit evidence, which is admissible in other jurisdictions.

Four, I think that consideration should also be given to making use of appropriate mechanisms for protection of witnesses, such as in camera proceedings and, in rare cases, preserving the anonymity of witnesses.

Five, I think the current rules relating to disclosure could be reviewed to minimize risks posed to witnesses or to national security while providing defendants with enough information to enable them to answer the charges they face.

Six, I also think that the rules of procedure—rules of procedure ought to be developed to discourage and minimize attempts by defendants to abuse proceedings or to abuse the criminal justice process in general, as has been the case in some war crimes tribunals.

Again, Mr. Chairman, thank you for providing me with this opportunity to discuss these matters. Thank you.

[The prepared statement of Judge Gahima can be found in the Appendix on page 63.]

Mr. HEFLEY. Thank you, Judge.
Mr. Scharf.

STATEMENT OF MICHAEL P. SCHARF, PROFESSOR OF LAW AND DIRECTOR OF THE FREDERICK K. COX INTERNATIONAL LAW CENTER, CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

Mr. SCHARF. Mr. Chairman, thank you. I am Michael Scharf, Professor at Case Western Reserve University School of Law and director of its International Law Center. I have been asked to testify today as an expert on the Nuremberg and Tokyo tribunals as well as the modern international tribunals which you have been hearing about.

During the first Bush and Clinton Administrations, I served in the Office of the Legal Advisor at the State Department and was assigned the job of helping to draft the statutes and rules of the Yugoslavia tribunal, the first international tribunal since World War II.

Since leaving the State Department, I have authored seven books about international tribunals, including two that have won national book awards. And the Case Western Reserve University School of Law War Crimes Research Office, which I established several years ago, currently provides research assistance to five international tribunals, including the Yugoslavian Tribunal, the Rwanda Tribunal, the Special Court for Sierra Leone, the International Criminal Court, and the new Iraqi High Tribunal.

I want to thank you for the opportunity to address the committee on the international standards of due process that are required for military commissions under international law. Last month, as we all know, the Supreme Court ruled that the Uniform Code of Military Justice had conditioned the President's use of military commissions on compliance with the rules and precepts of the Laws of Nations, including the due process guarantees of Common Article 3 of the Geneva Conventions, and also noted in that opinion were the guarantees of Article 75 of Additional Protocol 1 to the Geneva Conventions.

Now, the Supreme Court held that military commissions specifically violated these required international rules by first of all authorizing the exclusion of the defendant from his own trial; second, by permitting unreliable evidence such as hearsay and evidence gained through unlawful coercion; third, by permitting anonymous witnesses; and finally, by using a review procedure that did not amount to an appeal to an independent higher tribunal.

Now the government's witnesses before both the Senate Judiciary Committee a couple of weeks ago and this committee have drawn on the precedence of Nuremberg and Tokyo and also of the modern international tribunals to argue that these military commission practices are actually permitted or at the very least not clearly prohibited under international law. They paint a misleading picture, and my main purpose today is to clarify this point.

They point to Nuremberg and Tokyo, which tried some defendants in absentia, admitted unsworn affidavits and hearsay, and granted no rights of appeal. And let me say, I am a fan of the Nuremberg Tribunal because, considering the alternative 60 years ago

of having a firing squad for the Nazis, I think they did a very good job of bringing some justice to a very difficult time without any precedent.

And on my own faculty, we have Henry King who was, at age 25, the youngest prosecutor at Nuremberg and, at 87, the oldest member of our law school still teaching.

But we have to recall that Nuremberg was severely criticized for these procedural shortcomings. Supreme Court Justice William O. Douglass called the trials, "unprincipled," and his colleague, Chief Justice Harlan Fiske Stone, characterized them as a, "high-grade lynching party."

In the years following Nuremberg, the United States led the efforts to address the procedural deficiencies of the world's first international war crimes tribunals, and this resulted in the creation of Common Article 3 of the Geneva Conventions, Article 75 of Additional Protocol 1, which although the U.S. has not signed, has declared to be representative of customary international law, and these were elaborated in the statutes of the Yugoslavia tribunal and the other tribunals.

Now the story of the drafting of the Yugoslavia tribunal and the Rwanda tribunal is interesting to show that the United States' fingerprints and influence is in all of these international standards. When we were asked to provide suggestions for the rules of procedure of the Yugoslavia tribunal, the United States was the only country that gave them a hundred page draft full of annotations, and ultimately, the rules that the judges adopted were based 99 percent on the model that the United States provided.

When the Rwanda tribunal was created a year later, it used the same rules of procedure, with minor modifications, same, too, with the Sierra Leone tribunal, the International Criminal Court in 1998, and even the Iraqi high tribunal uses these basic fundamental procedures that the United States insisted on because we said these were the baseline due process rights that any war crimes proceeding had to consist of.

The international tribunals themselves have held that international law requires certain minimum due process guarantees for any international or domestic war crimes trial, specifically including the right to be present during the trial, the right of confrontation, the right to disclosure of exculpatory evidence, and the right to appeal to an independent higher court, the very things that the Supreme Court pointed out were wrong with the U.S. military commissions. And even the Iraqi high tribunal prosecuting Saddam Hussein guarantees these fundamental rights.

Thus, recourse to Nuremberg and Tokyo's experience cannot today be used to justify departure from these rights. The law has evolved in the last 60 years, and there is no doubt that the United States is bound by it.

But what about the Yugoslavia tribunal's use of anonymous witness? Judge Pat Wald mentioned this a few moments ago. She called it dicta. The story is a little bit more complicated. It is not actually dicta. What happened was, in the very first case, the Tadic case, they did not have an operational system for protecting witnesses, and in a very controversial 2–1 decision, they decided that

one witness, witness K, would have his identity not disclosed to the defendant or the defense counsel.

There was a strong dissent in that case by Judge Stephens of Australia who cited the case law of the European Court of Human Rights which had consistently held this was a violation of due process. His dissent said: The right to examine or cross-examine witnesses guaranteed under international law cannot be effective without the right to know the identity of adverse witnesses.

Ultimately, the same Yugoslavia tribunal panel rescinded the decision to protect the identity of witness K, allowed the defendant to know who the identity of that witness was, therefore Pat Wald describes it as dicta, and the tribunal said they would never again try to protect the identity of a witness from the defense.

In fact, in the case of Blaskic, the tribunal made clear a year later that witness anonymity was only appropriate during the pretrial phase and that a witness's identity must always be disclosed to the defendant a reasonable time before testifying.

Now that doesn't mean that it has to be disclosed to the world. You have heard that there are all sorts of protections to keep the witnesses' identity from the public, but for a fair trial, the defendant needs to know who it is that is confronting them.

Thus, the Yugoslavia tribunal precedent does not in fact support the use of anonymous witnesses in the military commissions but rather supports the Supreme Court's conclusion that this practice is in violation of international law.

You have heard today about the international tribunal's use of hearsay evidence. The government witnesses have similarly misled the committee about the Yugoslavia tribunal's use of hearsay, describing it as everything goes. In the Kordic case, the tribunal adopted a standard that was actually similar to our own Federal Rules of Evidence Number 804(b)(5) requiring before any hearsay evidence could come in that the tribunal assess the, quote, "indicia of reliability," and the tribunal says that such hearsay evidence is always to be considered with caution and substantially discounted.

What the tribunal actually does, speaking with judges and clerks, is literally they take a different colored pen in these cases and highlight the evidence that was hearsay evidence and the evidence that was direct testimony, and in the recent Semanza case, the tribunal actually described some evidence as coming in as hearsay evidence, and therefore it was discounted.

Now the tribunals feel that they can allow hearsay evidence to come in because the judges are not lay jurors; they are people with a lifetime of judicial experience, like Judge Wald, and therefore they understand the frailties and the susceptibility of hearsay evidence.

In contrast, the military commissions are made up of military officers who are not usually even legally trained, let alone seasoned judges, and therefore hearsay evidence should, I think, be used with utmost caution, if at all.

Let me turn to the issue of torture evidence. The prohibition against the use of evidence obtained by torture but also lesser forms of inhumane treatment, including water boarding, is one of the, quote, judicial guarantees which are recognized as indispen-

sable by civilized people for purposes of Common Article 3 of the Geneva Conventions.

As Pat Wald described, the rules of procedure of the Yugoslavia tribunal but also every other modern international tribunal and even the Iraqi high tribunal provide for the exclusion of such evidence. A clear statement by Congress rejecting the use of such evidence by military commissions would, I believe, first remove a stain clouding the legitimacy of these important trials in the eyes of the world and, second, deter practices that are abhorrent to both American values and international law.

I understand that some of the members of this committee may favor the idea of responding to the Hamdan decision by simply enacting legislation that would give congressional authorization to the President's existing military commission system without actually changing any of its provisions. And it is absolutely true that the Supreme Court has recognized that Congress can override the requirements of international treaties, including the Geneva Conventions, if it enacts a later-in-time statute that manifests a clear intent to violate these venerable international humanitarian law treaties.

But Congress has always been very cautious and reluctant about using this special power as it renders the United States in breach of our international obligations with often serious international legal and diplomatic consequences. Do we really want to be the only country in the world to go on record as abrogating the Geneva Conventions?

If we try detainees in violation of the internationally required fair trial procedures, we increase the risk that our own troops and those of our allies, such as Israel, will be subject to similar mistreatment at the hands of others.

The international due process standards that I have been discussing today do not rise to the panoply of rights afforded in a U.S. domestic criminal court proceeding. They do, however, provide enough protections to remedy the deficiencies in the existing military commissions.

The internationally required standards may make it somewhat harder to obtain convictions in some cases, however, in the broader scheme of things, we lose far more than a few trials if we insist on departing from the due process rights required by the Geneva Conventions and international law.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Scharf can be found in the Appendix on page 76.]

Mr. HEFLEY. Thank you very much, Mr. Scharf.

Ms. Elsea.

STATEMENT OF JENNIFER ELSEA, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE

Ms. ELSEA. Good afternoon, Mr. Chairman and members of the committee. My name is Jennifer Elsea, and I serve as a legislative attorney at the Congressional Research Service. My work over the last five years includes coverage of many topics that may have a

bearing on today's hearing, including military commissions, war crimes, tribunals, military justice and the Geneva Conventions.

I am honored to have the opportunity to participate as a part of this panel. I don't have a prepared statement as such. Instead, I have prepared for the committee a chart comparing the procedural safeguards available in courts-martial with the rules provided in the Department of Defense Military Commission Order Number 1 and subsequent orders and instructions pursuant to the President's Military Order of 2001.

The chart also provides information about international criminal tribunals, including the charter and rules controlling the post-World War II International Military Tribunal Convened at Nuremberg.

The last column summarizes the relevant procedural rules for The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, which are nearly identical.

I have made a couple of last minute revisions to the chart to reflect the role of the presiding officer under the Military Commission Order Number 1, and I ask that a revised chart be placed in the record.

This chart is a result of two CRS products that I have prepared for Congress——

[The information referred to can be found in the Appendix on page 87.]

The CHAIRMAN [presiding]. Without objection, we will take it into the record. Go right ahead.

Ms. ELSEA. This chart is the result of two products that I prepared for Congress in connection with issues surrounding the treatment of detainees. The first report compares procedural rules in Federal courts, courts-martial, military commissions as they had been previously established, and the Rome Statute of the International Criminal Court.

The second, which I have updated in light of the Supreme Court's Hamdan decision, compares courts-martial, military commissions under the President's Military Order, and some legislative proposals for authorizing military commissions.

The chart I have provided for the committee is organized around a basic set of rights emanating from the U.S. Constitution which correspond roughly with the basic rights recognized as indispensable by most societies and the international community as a whole. The terminology does not always match up perfectly, but analogous concepts can usually be found, although there may be some overlap.

The chart is necessarily incomplete. What is not included fills many hefty volumes, as Professor Scharf's students can no doubt attest. Procedural rules are not inflexible and can often give rise to multiple exceptions to be applied in the interest of justice.

Finally, I have not undertaken here to provide a complete analysis of structural factors that may have a bearing on how a particular tribunal operates.

Despite these limitations, I hope the committee will find the chart useful for today's deliberations and during its subsequent work on this issue. I will be happy to add rows or columns the

members believe may be useful, and I am happy to answer any questions within the scope of my knowledge. Thank you.

The CHAIRMAN. I thank the gentlelady for her comments.

And folks, thank you for your testimony.

I want to thank Mr. Hefley for sitting in here. I will reserve my questions until the end here.

Mr. Skelton.

Mr. SKELTON. Needless to say, I am concerned we need to be tough on terrorists and those who violate international law. I am also concerned about how our soldiers might be treated if captured. I will limit my questions to Professor Scharf, if I may. I must thank you, Ms. Elsea, for the excellent job and side-by-side. That is, frankly, very helpful to our committee.

Professor Scharf, I hand you a blank sheet of paper. In light of the Hamdan case, would you tell us how you would instruct a body, a commission or tribunal to try these people who allegedly have committed crimes against the law of war?

Mr. SCHARF. Thank you, Congressman.

To answer that, what we have to recognize is that the different systems of justice that we have been discussing today fall on a spectrum. On the one side is the U.S. Federal District Court proceedings, and I do not think that those are appropriate for trial of the al Qaeda detainees. It would be very difficult, if not impossible, to get convictions under those standards.

Next to that is the court-martial proceedings, and I know that there have been witnesses both before the Senate Judiciary Committee and here that have made the argument that we could just use the court-martial proceedings for al Qaeda, and I think actually with some minor changes that that probably would be workable. What I have been talking about are the international tribunal standards and in particular those that are deemed most fundamental, and what I would suggest is that you could take the current model that the President has and just make four minor changes and bring those up to the standards of international criminal procedures, those very things that the Supreme Court identified and which I have been talking about today, and you could make that a workable model.

Then at the lowest level is the current procedures that the military commissions employ, which have been held by the Supreme Court to violate the Geneva Conventions; and although you have do have the option to approve those, what you would be doing is sending a signal to the world that the United States does not care about the Geneva Conventions, the first country to ever publicly do that.

Mr. SKELTON. What, quickly, would those four exception be?

Mr. SCHARF. First of all and most importantly, the defendant has to be present at his trial. And I know that Senator Specter over on the other side of the road has proposed that something similar or identical to the Classified Information Protection Act be used so that when you have a situation involving sensitive sources of methods the judge of the trial can decide if the evidence is clearly relevant and exculpatory. If that is the case, then the trial can only go on if the prosecutor agrees either to allow the defendant and defense counsel to see that evidence, to be present and confront those

witnesses, or if they will make a stipulation of fact which is an alternative that makes it harder to get a conviction but is successful in protecting sources and methods.

All right, the second thing is the right of appeal. The military commissions do not have a right of appeal to an independent court system. International law has deemed this very important. We do have the U.S. Court of Military Appeals just down the street. A former colleague of mine is one of the judges there. I think it would be very appropriate if the final decisions of the military commissions both in terms of facts, as the case may be a miscarriage of justice, but more importantly in terms of the law were appealable to an independent judicial body. So that is the second most important thing.

Third, when we talk about the kinds of evidence that are excluded, the current system allows hearsay to just come in without any restrictions. The international tribunals have allowed hearsay in, as I have said, but created a lot of restrictions. I think it would probably be most appropriate for the military commissions, because they are not seasoned judges, to have a stricter hearsay rule something like the UCMJ has, but at a minimum they should have the rules that the international tribunals have which properly characterized only allowed hearsay in with caution and with special indicia of reliability and only use those in the strictest sense and discount their probative value.

Then, finally, and very important as well, is the so-called torture evidence. Although the military commissions said on the eve of the hearing before the Supreme Court that they would not allow torture evidence in, they didn't make a similar finding for evidence that does not fall into the definition of torture but would in fact fall into the definition of inhumane or degrading treatment; and the international tribunals do not make that distinction. If it is going to be something that has been coerced out of you through water boarding or some other heinous practice, even if it does not technically cross the threshold of torture, the international tribunals will exclude it and so, too, should the military commissions.

Mr. SKELTON. Thank you so much.

The CHAIRMAN. The gentleman from Colorado, Mr. Hefley.

Mr. HEFLEY. I will pass, sir.

The CHAIRMAN. Dr. Snyder, the gentleman from Arkansas.

Dr. SNYDER. Thank you, Mr. Chairman. Thank you for getting yet another group of people with their varied perspectives on this challenge before the Congress and the American people.

I have two questions. With the exception of our friend from the Congressional Research Service, you all are here today because of your expertise in international tribunals. Let me phrase this how I want to phrase it. We are not creating an international tribunal. We are creating an extension of U.S. law for dealing with captured detainees controlled by the United States on a U.S. military facility. This is not a U.N. Operation or a NATO operation or an international operation. These are people who are to be tried under whatever law as conceived by the U.S. Congress without sign-off by anyone else.

Now does that—maybe I will just leave that as a comment and ask my question, if you all want to comment on that. Because it

seems like we are in a different posture when multiple nations are deciding to prosecute war criminals from any country, yet they have to come together because they are not going to just choose one nation's law if there are 50 nations involved. They are going to create an international tribunal. That seems like a little different situation than what we are doing here.

My question is this, and it has to do with, I guess, this bundle of sticks that we call rights or protections; and it seems like there is two approaches to it. Approach number one is what I will call more the Lindsey Graham approach, which is we start with a big bundle of sticks that all our men and women in the United States military uniform have, start with that big bundle of protections under the law and then take some of them away and say, these few sticks here we are going to modify somewhat in order to deal with the detainees that are not U.S. citizens.

The other way to go is to start with no sticks in the bundle and say, here is stick number one, the right to challenge the accused, here is stick number two, and come up with those sticks that we think are most important and say, here is the bundle of sticks, of protections that we are going to give to the detainees.

I would like you-alls thoughts if you think that is an accurate description in the pros or cons of those two different ways of looking at it. Judge Wald.

Judge WALD. Initially, Congressman, let me say that when the President's first order came down very soon after 9/11 which established the military commissions, and subsequently there were several other orders which defined the crimes that would be tried by the military commissions and the elements of those crimes and later on the rules and practices, it was very clear in those instructions that what the military commissions were being set up to do was to try persons for violations of international law, not for violations of our national law.

If one goes back to look at those orders, you will see that that the jurisdiction of the military commissions are crimes of war—well, it is all crimes of war. There are one or two additions, and I think one or two might have some roots of the subsidiary ones in national law, but the basic core of crimes that are being tried are not crimes emanating from our national criminal code or our national laws. They are crimes emanating from international law as defined in the way, sometimes frustrating, that international law is defined.

So I think that having been established, there is also in some of those instructions, if I recall correctly, an admission that the way that they will be interpreted will in turn be based upon international law, which would include at least as part of that the way in which international crimes have been construed and interpreted by international tribunals but other forms of evidence as well.

So I think your question, which is a very good one, raises the second question, if these commissions are set up to enforce international law as they say they are doing—in other words, they are crimes of war, war crimes, under the conventions that we signed and under customary international law which binds all nations, are we at liberty—well, we certainly—Congress can do whatever it wants, but let's say should Congress take the substance of these

international crimes and more or less relegate or abandon the parts of international humanitarian law which lay down certain rights in the conventions, most of which we have signed, that say what the rights and the procedures should be in trying those crimes.

Judge GAHIMA. I am of the opinion that we do not need to go to the drawing board to reinvent the wheel. Basically, the international human rights mechanisms that exist have provided for these rights. This country is a party to many treaties that make provisions on the rights that defend us in criminal proceedings, are entitled to treaties like the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights. Many of the provisions of these treaties have been declared to be reflective of customary international law, and I believe that that complies with these rights, is an obligation that this country has, and such compliance or division from these obligations should be an exception rather than a rule, in fact, like the International Covenant on Civil and Political Rights provides that there are certain rights that you cannot derogate from and there is a procedure for derogation.

So, in conclusion, I do not think that we really ought to reinvent the wheel. There are obligations that this country has under international law, and those obligations ought to be respected to the greatest extent possible.

Thank you.

Mr. SCHARF. I would like to just add briefly, because this is a very important question, that in the Hamdan decision the Supreme Court considered this and noted that historically there have been recognized three types of military commissions: those that govern crimes of our own troops—that is not this—those that govern crimes in an occupied territory—again, that is not this situation—and then the final category which this does constitute are war crimes under international law. And there the Geneva Conventions provide both the substantive crimes and the required procedural protections.

Therefore, if this Congress were simply to say, well, we define this as not covered by the Geneva Conventions, it is just a domestic issue, it would nonetheless be seen in the eyes of the rest of the world as an abrogation of the Geneva Conventions.

Dr. SNYDER. May I ask a follow-up?

The CHAIRMAN. Go right ahead.

Dr. SNYDER. The inventing of the wheel, it seems like we have two wheels already invented. That is what I was trying to get at, Mr. Scharf. Wheel number one is the international tribunal of which our military lawyers that are going to be doing these cases, both prosecuting and defending, have probably almost no experience; and wheel number two is working under the Manual for Courts-Martial under the UCMJ, which they have an abundance of experience. Both of them I think have the appropriate number of bundles of sticks in the bundle; and I am trying to figure out which wheel is the direction that we should go, because we have two wheels invented, do we not?

I am with you. We should not be—a lot of this is the value of sending a message to the world that we are going to protect our country, but we are going to do it in such a way that we are re-

spectful of the international rights of these people. But it seems there are two different basic ways to go, is there not?

Mr. SCHARF. In fact, there is more than two ways. I think that when it comes to war crimes the world has recognized that is not a one-size-fits-all phenomenon. They have the international tribunals created by the Security Council, the hybrid tribunals created by the United Nations and the individual countries. They have internationalized domestic tribunals as in Bosnia and Iraq. There are military commissions of various guises.

So, yes, we have two traditional models that we are getting a lot of experience with, but that does not mean we are stuck in those two models. It does not mean that we cannot borrow some of the sticks and share. And, in fact, there is a lot of that going on in the international community.

Dr. SNYDER. Thank you, Mr. Chairman, for your indulgence.

Mr. CHAIRMAN. I thank the gentleman.

The gentleman from Michigan, Dr. Schwarz.

Dr. SCHWARZ. Welcome to the distinguished members of the bar who are here. I am not a member of the bar, distinguished or otherwise. I am by trade a physician and surgeon.

I have been to Guantanamo Bay twice, once with the distinguished chairman of this committee, another time at the request of the Office of the Secretary of Defense to determine whether or not the hunger strikers were being treated appropriately and humanely and whether our reaction to their reaction was the correct one. I believe in fact the insertion of the nasogastric tube and the tube feeding was appropriate and wrote such in a report.

So I can make a judgment on those things medical, those things where it has to do with the physical well-being of the people who are detained at Guantanamo. I cannot make a judgment—I am not qualified to make a judgment as to what type of tribunal we should establish to deal with the 350 or so who will be remaining at Guantanamo and may require some sort of action. I need to know from you as a Member of Congress but a nonattorney but one who will have a vote equal to the votes of the scores of attorneys in the Congress precisely how this should be handled.

I am a veteran. I am aware of the UCMJ. I am aware of what the Common Article 3 of the Geneva Convention says. But I need to know in language that a poor country doctor from out in the Midwest can understand how the Congress should handle this in light of the Hamdan decision.

Judge WALD. My humble advice to you, Congressman, would be, based on what I have read and seen, that if one started off with the Uniform Military Code, you would have a framework that your people are familiar with and that your military are familiar with, and that is the place to begin. Then, if there are some deviations, that the government, for instance, would be able to make a case for distinguishing such as—and I am not saying that they could make this case—but such as perhaps some more indulgence for hearsay or perhaps some of the modes of proof such as we had video recording. So that somebody who is in Afghanistan does not have to come back to Guantanamo for the military commission, or by deposition. There are some ways such as that that you would not have to discombobulate necessarily the setup, that those should

be given serious consideration but that in effect the case would be made by the government. And I am sure in some cases it might be able to do this, that they absolutely need those kinds of what I would call not tinkering but not cutting into the basic rights of the defendants.

But I think the Uniform Military Code is respected throughout the world. I traveled widely in Europe, Eastern Europe and in Africa. It is widely respected, and I think you start off with that. If you have to pull back in one or two places that do not go to the four basic rights that Professor Scharf talked about, okay, that may be possible, but that is where I think we do not throw away what we have got that is good.

Mr. SCHARF. I would just add that the Hamdan decision provides a fairly detailed road map. So as long as Congress legislates the military commissions and as long as it makes it consistent with the fundamental due process guarantees of article 3 and article 75 of additional Protocol 1 to the Geneva Conventions as described in the Hamdan decision, then this body would be doing a great justice for both the efforts to combat terrorism and to ensure due process.

Dr. SCHWARZ. Judge Gahima or anybody else?

Judge GAHIMA. I defer to my colleagues. I am not familiar with the U.S. legal system.

Dr. SCHWARZ. Thank you, Mr. Chairman.

I would say to Judge Wald, "discombobulate" is a word we do not like to use in the operating room either. So that one I understand.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

The gentlewoman from California, who has worked this issue very extensively, Ms. Sanchez.

Ms. SANCHEZ. Thank you, Mr. Chairman; and thank you all for being before us.

I really think one of the reasons that we are trying to see what the international community does is we want to make sure that whatever the Congress puts forward is viewed by the international community as fair. Certainly in the last two years, three years now, that I have been looking at this, not only did I think what the President had done was not gaining us friends outside of this country but even our own Supreme Court said, you know, Congress, get to work and constitute a real court for this.

So I believe that is why we are trying to look, not that we want to necessarily adhere to other laws or what-have-you, but that we want to make sure that the international community understands why we came up with the system that we are working on.

So thank you for being here.

It is also true that there is something called comparative legal studies in the academic world, which basically says that justice can be derived in a court system even though there can be diverse legal systems; and I think it would be true to say that only an ethnocentric American lawyer would say that you can only get fairness in the United States court.

So, with that in mind, I think that we can have fair trials and reliable verdicts even if what we fashion is not directly adherent to the U.S. Constitution. Because in a sense we have said what we want to make sure is that these people have human rights, that

they have a fair trial, that the international community is accepting of it, but that they are not necessarily U.S. citizens, that we do not want to try them that way.

Now some of my colleagues are concerned at the lack of judicial precedence when using special tribunals for war crimes trials. The concern is that judges in such tribunals such as the ICTY have no body of judicial opinion to rely on when applying the rules of the tribunal to the trial of specific cases. Judge Wald, could you comment on that problem in light of your experience on the ICTY? How do judges address that problem? Do you resolve problems of this kind—how do you resolve that issue?

Do, for example, European judges approach the problem differently than American judges would, for example? And should the lack of judicial precedence be of concern to us as we contemplate the creation of military commissions or would military judges simply resolve such problems by drawing analogies from other American systems and rules?

Judge WALD. Thank you for the question, Congresswoman Sanchez.

Let me start out by saying that because the ICTY, with which I am most familiar, has been in operation now for ten years or so there actually is a lot of precedent. In fact, when I made an attempt in the last few days to try to bring myself up to snuff on just the amount of law that has come about since I left——

Ms. SANCHEZ. But, in the beginning, when you first got on and there were less cases——

Judge WALD. But there are a lot of cases out there now. Virtually every aspect of the definitions of crimes of war, also crimes against humanity, but they don't come into war crimes commissions, and that is only one tribunal. There is actually some precedence out of the ICJ. That is not a criminal tribunal, but it does deal with states and international law, and some of the concepts cross over——

Ms. SANCHEZ. The reason I am asking the question is that there are some who believe and I think we have a Cadillac system in the court-martial process in our military. I also believe that if we use that system without changing it significantly we probably wouldn't be able to prosecute and win trials of these maybe dozen people we are really talking about with respect to the Hamdan verdict.

I have my own bill which I have proposed that says let's use the UCMJ and let's build basic building blocks from the international community standards and have some exceptions, as the good doctor here discussed, the professor, about hearsay and other issues.

But some of my colleagues are saying, oh, my God, this would be something new. We do not have any precedent here. We do not have cases tried under something that we would start, that would be new. What do you say to them?

Judge WALD. If I can just follow through. No matter what system you set up, whether or not it is the military code system or whether it is not as the President's original order from several years ago, you have the same problem. You do not get more precedent from setting up the different system than the military code system. In fact, from the military code system, since our military has been using disciplinary provisions of its own for hundreds of years

based—not hundreds but almost a hundred years—based on the Geneva Convention, they in effect have some of their own body of law.

But this is the same law, as I said before, that it is international law which you now have quantities and quantities of precedent not just from us but from the ICTR and from hybrid tribunals and even from some other national tribunals, too.

So I do not think, having spent 20 years on the D.C. Circuit, there are a lot of areas in which you, Congress, will sometimes pass a statute and it will be brand new to us, brand new to us, and we will not have any precedent on which to base it. To a certain degree, it is part of the game that there may always be some new twist that nobody anticipated, that a judge simply has to walk in. But I think here you have probably got more precedent now on what war crimes mean as defined than in many, many other areas of international law.

Mr. SCHARF. Just to add, in the early years of our own judicial history, the Supreme Court referred much more frequently than it does now to foreign judgments because we had such few judgments of our own to utilize. The students that work with me doing work for five international tribunals are often faced with this very issue, and the very first day of class I explain to them what the precedent is and how to find it. Nowadays, it is all electronically available, which is wonderful. But the first thing I tell them to go to is the Geneva Conventions and their negotiating record. The Pictet Commentary is a very detailed history of how these laws of war are supposed to be interpreted as their founders meant.

Second, there are so many international decisions in the last ten years since the creation of the Yugoslavia tribunal, the Rwanda tribunal, the Sierra Leone tribunal, the Special Court for Sierra Leone and East Timor, and the International Criminal Court has even begun to generate precedence. There are over a thousand cases that have been decided. It is a huge body of law again available electronically.

There is also, as far as due process goes, the decisions of human rights bodies like the European Court of Human Rights and the Inter-American Court of Human Rights.

And then, finally, there are decisions of foreign courts, in particular the Privy Council, the House of Lords of the United Kingdom or the Supreme Court of South Africa and other very well-respected courts that have been dealing with the laws of war and the due process that is required.

So it is not like you have to start from scratch. You do not have to work on a blank slate in this area anymore.

Ms. SANCHEZ. Mr. Chairman, may I ask one very quick question?

The laws of war, what if we want to use these commissions or tribunals to expand the subject matter? We are in a different kind of war. The President has deemed it the war on terrorism. It may be ongoing and long. What about things like hijacking, material support to terrorism, conspiracy? Should we grant power to try these kinds of offenses when committed in furtherance of international terrorism? Just a quick question.

Mr. SCHARF. My own stab at that would be to note that the military commissions who are staffed by members of the military who

have experience in the laws of war are best suited for war crimes and crimes under the laws of war. If you are going to go into new areas of terrorism you might want to create new types of tribunals which you do have the ability to do, things like the FISA court itself, the Foreign Intelligence Surveillance Act court, and that might be an important venue if you are going to be looking at things like hijacking crimes.

But usually those kinds of crimes are appropriate for ordinary trial in Federal District Court and that it is the specialized area that involves al Qaeda and its military efforts against the United States that makes that right for the military commissions.

Ms. SANCHEZ. So would conspiracy in the furtherance of international terrorism by an al Qaeda—under the existing systems we have, let's say, would we try that in the Federal court system or if we set up a commission under the UCMJ that would do war crimes, would that be better placed with the military?

Mr. SCHARF. Yeah, I mean, the Supreme Court ruled that you could not prosecute someone merely for conspiracy if it was not an aiding and abetting situation under the laws of war.

Ms. SANCHEZ. So it would go under the laws of war?

Mr. SCHARF. Right, so that's, I understand, what you are reaching.

Ms. SANCHEZ. I am asking because my bill does include things of that type where we would not be capable of doing that under the Federal system at this moment, to my knowledge.

Mr. SCHARF. It actually is a difficult question, whether a military commission would be the right venue for that, whether you need a new specialized court or whether you are stuck with just the Federal district courts.

On the one hand, you could say, all right, we will authorize the military commissions to have this extra responsibility. But what that means is, to the extent they are using universal jurisdiction based on the Geneva Conventions, they have expanded it to an area that is not recognized outside the United States and the United Kingdom to the area of conspiracy which is a uniquely American and British construct, and so that may be problematic. So it is definitely one of those kinds of issues that I would assign a student to look at for six months or more before I could give a definitive answer.

Ms. SANCHEZ. You might want to start that.

Do any of you have a quick comment?

Judge WALD. I have a quick comment on it.

It is clear that Congress could do that. Certainly Congress has the power. In fact, I think there were one or two additional crimes that were in the President's original order including, if my memory serves me correctly, terrorism or something that is not usually encompassed within the international definition of crimes of war. But, like Professor Scharf, I think it is something that ought to be thought through very carefully before you do it.

For instance, in the area of conspiracy, as I am sure you know, conspiracy was one of the counts of the original Nuremberg indictment. But our allies who were on the Nuremberg tribunal with us were so suspicious of the whole notion of conspiracy because it is not one that is common in other countries that they were very re-

luctant and they finally limited it only to the so-called crimes against peace or the equivalent of aggressive war.

Even Ambassador Biddle, who was our particular person on the Nuremberg tribunal, he said, based on his American experience, he was very suspicious of conspiracy because, depending on how you define it, you can encompass he said the entire German nation. Subsequently, no one of the international tribunals to my knowledge has ever put conspiracy into the mix because generally it does not have an international recognition to do it.

So it is one of those things I think that you have got the power to do it, certainly, but that you would think about very carefully before you did.

Ms. SANCHEZ. Judge, did you have a comment?

Thank you.

The CHAIRMAN. I thank the gentlewoman.

The gentleman from Tennessee, Mr. Cooper.

Mr. COOPER. Thank you, Mr. Chairman; and I thank the witnesses.

First, as I read the Constitution, article one, section eight, says that Congress shall set rules for capture on land and sea. So I think it is about time that we had hearings like this. I am sorry so few of my colleagues are able to attend.

Second, with asymmetric war you get asymmetric justice. A lot of my folks back home see Americans who are captured by the enemy and are given no justice whatsoever. The enemy does not even keep records. They come back dead, tortured, beheaded. Now we should be held to a higher standard, but I think there is a popular frustration.

It seems to me that this debate will boil down largely to whether we will do military commissions plus four, as Professor Scharf has suggested, or a courts-martial maybe minus three, six, eight, whatever procedures you want to diminish them by, or perhaps by an entirely new approach such as my colleague, Ms. Sanchez, has suggested.

Any of those procedures must pass Geneva Convention muster, however, because that has always been U.S. policy; and until, as I understand it, reading this book *Guantanamo* by Professor Margoles and seeing some of the previous testimony both before this committee and in the Senate, that was the standard until President George W. Bush overruled our military commanders. Because, as I understand the history, General Tommy Franks said we would comply with Geneva when we first went into Afghanistan. That was the policy until first, initially, Secretary Rumsfeld started overruling it, and then, with a few memos from the Justice Department, then there was an executive order issued that basically allowed us to depart from Geneva.

Dean Harold Coe of the Yale Law School in his testimony before the Senate said that that Presidential order, at least according to a press account, was issued without the knowledge or consultation of the Secretary of State, the National Security Advisor or her legal counsel, the General Counsel of the CIA, the Assistant Attorney General for the Criminal Division or any of the top lawyers in the military's Judge Advocate General's Corps and we all know, according to him, it was done without congressional consultation.

That is a pretty amazing departure, an unprecedented departure, especially in view—and I would ask Judge Wald this—settled Constitution law was pretty much the Youngstown Steel case, was it not, especially as envisioned by Justice Jackson's concurrence where the President is at the zenith of his war-making powers when he not only exerts his power as Commander-in-Chief but also confers with Congress. And for the President to deliberately not want to confer with Congress and therefore not be at the zenith of his powers is a pretty amazing situation. If you believe, as I do, we are in a genuine not just war but series of wars, you want a President to be fully capable.

So we were in a curious situation not only on these grounds but also on the fact that Guantanamo is a unique location on the planet.

Are any of you aware of another location in the world that is, at least according to some Justice Department lawyers, not fully subject to U.S. law, not subject to international law either, and not subject to local law? Because Cuba in theory may have sovereignty, but it has no practical force or effect. Is that not the precise reason why Guantanamo was chosen to be extra legal, sort of no man's land? That itself creates a situation that is at best anomalous.

The President himself said that we should shut down Guantanamo, but it is still there creating this reoccurring at least image problem for the United States, if not a deeper problem than that. Because terrorism is not only a series of crimes in its own right. It is also making use of publicity for advantage. And we are not doing as well as we should on the publicity side of things.

So those are some of my concerns. I would be interested in your enlightenment on this.

There are several issues we have not even touched on. For example, none of us know where Khalid Sheikh Mohammed is, and prisoners of war like that, what circumstances he is enduring. So these are deep and heavy matters, and I think it is going to take the full attention of the committee and of the Congress to begin solving them in a manner consistent with prudent U.S. and international standards.

Judge WALD. I just make one comment, because much of what you have said is very cogent to the problem, and that is my understanding is that the military commission order originally proposed by the President or put into effect by the President deals with the Guantanamo situation. And certainly the Detainee Treatment Act that—or at least the status and the commissions also deal with the Guantanamo situation.

But Congress, now that it has entered the field, and the standards under the Steel seizure case will be somewhat different than when the President was occupying it alone. I think it certainly behooves Congress to think about whether or not they want to establish a framework and rules that can have residence in the other situations you talk about. There may come a time indeed when somebody who is not held at Guantanamo but is held at some other—detained at some other place around the world that we do not know about, someone may wish to prosecute him or her for a war crime. So that it, I think, when looking at this Congress would do well to keep the wider framework in mind so that the rules and

procedures it lays down would be applicable to a person accused of a war crime wherever that person might have been picked up or detained.

Mr. SCHARF. As somebody whose career started out at the State Department, I do want to address some of the practical consequences of any decision that would be seen worldwide as abrogating the Geneva Conventions to echo some of what you and Judge Wald have just been saying.

First of all, not just the United States but other countries tend to follow our precedence and to use our precedence for good or bad in their own purposes. For example, Russia in its situation in Georgia and Chechnya are follow very carefully what we do in our war on terror and modeling their actions against what we are doing. So we have to be aware that there are these kind of consequences.

Second, it is harder to protect Americans, even civilians abroad, when we are seen as violating the essential Geneva Conventions.

I will remind the committee of the situation of MIT student Lori Berenson who went down to Peru a decade ago, and she was charged with being a member of the Shining Path Terrorist Organization. Hooded judges prosecuted her, secret witnesses were used against her, and the United States spent about six years trying to free her. We no longer try that, because Peru says what is the difference? You are doing it in Guantanamo. And it just does not give us a strong argument with them any more.

Third, Admiral Hudson, who had previously been the Judge Advocate General, testified a while back that the United States is more forward deployed than all of the other nations combined militarily, and therefore strict adherence to the Geneva Conventions is more important to us than to any other nations.

Finally, the kinds of due process violations that we have been charged with in both Abu Ghraib and also in Guantanamo Bay with the military commissions actually makes it much harder for us diplomatically to enlist international support for resolving the major issues of the day. So trying to get international support for peacekeeping in Lebanon or trying to get support for a U.S. departure and withdrawal from Iraq replaced by international bodies, these are areas that are affected by what we do in this context, and so there are practical consequences that always need to be kept in mind.

The CHAIRMAN. I thank the gentleman.

The gentleman from North Carolina, Mr. Butterfield.

Mr. BUTTERFIELD. Thank you very much, Mr. Chairman; and let me thank each one of you for your testimony today.

Before coming to Congress, I spent 30 years in a courtroom, 15 of those as a judge and 15 as a defense lawyer. So I want to thank you very much for your testimony, and I appreciate your testimony because I agree with most of what you have said this afternoon.

I have read the Hamdan decision. I have read it several times. I have taken it with me on leisure trips and reread it with a view of trying to get a full understanding of what the Supreme Court is requiring and what the Court is not requiring, and I think I have finally begun to get an appreciation for the decision.

Let me start with Judge Wald. Judge Wald, in the opinion, it talks about a regularly constituted court; and I did a LexisNexis

search on that term and not much came back, to my surprise. What do you perceive to be a regularly constituted court?

When I think of that term, I think of a tribunal, first of all, that is sanctioned by the legislative branch of government. I think about a court that has procedures, well-established procedures that govern its trials; and I also think about a body of law, a list of triable offenses that are attached to the court. Would you elaborate on that for me?

Judge WALD. I will do what I can.

My reading of the Hamdan decision, I do not have it in front of me, was that Justice Stevens was looking and saying, did Congress ever, in any way, sanction military commissions? And it said, well, yes, it did. It mentioned them along with courts-martials and some other modes. So that it had in certain circumstances authorized the President to set up military commissions that had to operate though in a very specific way. They had to implement—the ones the President could do himself had to implement the laws of war and had to implement them in a way that was consonant with, I read it as saying, international standards on the laws of war.

Now, a regular constitutes—so that, in that sense only, that would satisfy regularly constituted courts. However, the usual way courts are set up in our Constitution is by Congress. I mean, Congress generally sets up courts. So I would say that when you talk about regularly constituted courts, the presumption would be except for the kind of exception that Justice Stevens even recognized in the military commission situation but only if it stayed very much confined to that realm——

Mr. BUTTERFIELD. Let me ask you this. As we establish the procedures for these trials, do we also need to be listing the triable offenses that these individuals should be tried for?

Judge WALD. I believe so. I believe that if you are establishing regularly constituted courts to try these offenses that it certainly would be—I would think it would be necessary to lay out what offenses they are, and they would normally be the laws of war. But if by some chance you decided to add something then that certainly would have to be——

Mr. BUTTERFIELD. The opinion also has some language that states judicial guarantees which are recognized as indispensable by civilized peoples. Help me with that.

Judge WALD. All right. There I think you just go back into the body of international law which Professor Scharf talked about; and there are, in fact, many decisions, including one by the former President of the ICTY, Justice Cassese from Italy, as well as the International Court of Justice, the so-called world court, have laid down six or seven sources where you go for international law that is recognized as customary law.

I think when you look in those and you pull it all together you will find a series of rights that are recognized as indispensable. A quick fix on that would be to look at the rights that are set out in the charters of the ICTY, which I referred to briefly in my testimony, as well as in some of the other international tribunals.

Mr. BUTTERFIELD. Professor Scharf, let me conclude. Would you—let me ask you very simply, am I correct in assuming that the UCMJ has already built into it flexibility? It is not a rigid code.

There are provisions already in place that can take into account the unusual circumstances of a trial, right or wrong?

Mr. SCHARF. That is correct. However, there are some provisions of the UCMJ—and don't ask me right now to enumerate them—but I was just reading a list of them before I got here that just do not make sense when applied in this context. So you would not want to have everything from the UCMJ, which really was intended to be used against our own troops and not foreigners, to be imported whole scale.

But can I add one thing to what Judge Wald was saying to your initial question which was a very important one?

In the very first case that got up to the Court of Appeals to the Yugoslavia tribunal, the defense counsel argued that it was not one of these regularly constituted courts and did not pass muster. And the Yugoslavia tribunal appeals chamber looked at all the relevant precedents and in a very lengthy opinion walked through and said that, in fact, the requirements are those that you listed, that there has to be some kind of legislative creation, which in their case the Security Council was acting as a legislative body; second, there has to be adequate due process procedures under international law; and, third, there has to be a body of law, they call it *nullum crimen sine lege,* which is Latin for no crime without law.

The list of offenses, however, do not necessarily have to be incorporated in the statute. You could have something listed by reference.

For example, in the piracy law that Congress has on the books, piracy is not defined other than by reference to its definition in the law of nations, but as long as you are using those crimes that have been recognized under the law of nations, those very crimes have been recognized by these international tribunals, then you are in good shape.

Mr. BUTTERFIELD. Thank you. You have been very helpful.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

The gentlewoman from California, Mrs. Davis.

Ms. DAVIS OF CALIFORNIA. Thank you, Mr. Chairman.

Thank you all for being here and for contributing to our learning curve in this area.

Mr. Scharf, you brought up one of the issues that I think has been of concern to me, that in UCMJ at least we have judges with a reasonable amount of experience that can rule on hearsay and have some expertise and I guess depth and understanding there, whereas on the tribunal, the commission, that that is less likely to be the case. And yet you also are suggesting that we do better by building, complementing, I guess, the tribunal, as opposed to working with UCMJ. Could you talk a little bit more about the concerns that you would have around whether or not these are judges versus others that are sitting on a panel?

I do not know if anybody else has a comment on that as well, and what are the questions we should be asking around that, and then I will go to a few other questions.

Mr. SCHARF. Well, actually, my understanding of the UCMJ is that you do not have professional judges making those decisions either. You rather have the equivalent of a jury. It is a jury of offi-

cers. And, of course, you do not have anything that could be a jury for al Qaeda because these are foreigners, not U.S. military people. So what they have are essentially lay judges deciding their fate.

But in each case you do not have legally trained or professional judges making the decisions, and that is an important thing to keep in mind. Because when we talk about the hearsay rule as it is applied in the Yugoslavia tribunal, it is applied by seasoned judges like Patricia Wald, not by people who do not understand the frailties of hearsay evidence and its inherent unreliabilities.

I did suggest that there are two approaches, and I think I am not sure which is the appropriate approach, so Congress has to wrestle with that. You can either add on to the military commissions those things that the Supreme Court identified in Hamdan as required, or you could modify to the existing UCMJ those things that just do not make sense. And I am not a proponent of one over the other. I think that you all have to study which works best. Either of those ultimately would be successful, I believe.

Judge WALD. If I might add just one thing. My experience—I do not know that much about the military code. My experience would be that if it were possible to have at least one military judge on these commissions, as opposed to all military lay people, that might be exceedingly good. It would also mean that you would have a cadre of people who would, over a period of time, acquire the expertise.

Because since in the international tribunals people are elected for terms of several years, even if you do not know a great deal on day one after a while, you know, you pick it up and you acquire that kind of knowledge, as opposed to even in our civilian courts we do have juries of lay people, but we have a judge, a professional judge who sorts out things like is this evidence admissible or is this evidence not admissible.

So my own preference would be to, the extent you could have at least one military judge on the commissions, it would be, I am not saying absolutely indispensable, but it would be a help.

Ms. ELSEA. If I could clarify, the UCMJ, the military justice system that we have, does use a military judge and then a panel of lay officers who do not have as much judicial experience. But sort of like in civil courts they decide questions of fact, whereas questions of law are generally decided by the military judge.

Ms. DAVIS OF CALIFORNIA. And is the seriousness of the crime what they were being tried on? Does that matter in that case?

Ms. ELSEA. In military courts, yes. They can be tried by summary courts-martial or other even nonjudicial punishment, but not for the types of crimes that we would be looking at for war crimes.

Ms. DAVIS OF CALIFORNIA. Thank you.

Can I just go on quickly to the rate of acquittals? Because it seems to me that the bottom line for all of this is are the bad guys going to get off in any of this. Could you speak to what the rate of acquittals have been, perhaps even historically, for defendants charged with very serious crimes? What is the problem here that we are trying to solve?

Ms. ELSEA. At the Nuremberg trials, I, for example, believe there were three who were not convicted. Then, of course, there were some who were convicted of some charges but not others.

Perhaps Professor Scharf can speak to the more recent tribunals.

Ms. DAVIS OF CALIFORNIA. And is there a difference on those acquittal rates, whether or not there are more or less safeguards in the system itself?

Ms. ELSEA. I don't believe so. My understanding is that even in Federal courts there is a pretty high number of convictions, as opposed to acquittals based on the kinds of cases that actually make it to trial, for example. So I have not done any research. I can look into that and see if we can find any sort of correlation.

Judge WALD. I could give you a few statistics.

The CHAIRMAN. If the gentlewoman would yield, if she had a question on the rate of acquittals, our noble staff have let me know that there was eight acquittals in Yugoslavia and three in Rwanda.

Judge WALD. Could I elaborate a little bit?

Ms. DAVIS OF CALIFORNIA. Yes, anything about that.

Judge WALD. I just consulted the Web yesterday, and it said nine acquittals, but I would not guarantee that.

But I did want to add that is nine acquittals out of—let's see, I think the number of convictions—because 95 people have had all their proceedings done, but some of those pled guilty. There is a guilty plea procedure. And so my guess is—and this is more of a guess—it is nine acquittals out of maybe 60 convictions. That is a guess, but it is something under 95, because some people died, and some people had acquittals.

But I do want to add one other thing because I think it is relevant.

In the Detainee Treatment Act, the appeals which Professor Scharf talked about are appeals only for issues of law and whether or not the rules were complied with and whether or not the rules are constitutional. The ICTY allows appeals, I believe probably Rwanda does, on facts as well, subject to the same kind of thing we have in appellate courts. You always give the trial court a great presumption of regularity, but you can contest the facts.

I just want to bring this up because, while I was on the Yugoslav tribunal, although I was in the trial chamber I was designated to sit the way we do, our trial judges, on a couple of appeals. And one of appeals on which I presided at the appellate chamber were five Croats who were convicted down below of ambushing a village and firing on the Muslim homes with the intent of death.

Now, I had a panel of five judges from all over the world, and we agreed unanimously that three of those convictions had to be reversed because of the weakness of the factual elements down below. And those were the first three reversals of convictions in the Yugoslav tribunal, but that should be added to the nine acquittals from down below.

I think it emphasizes the fact that, though you normally do not have an appellate court overseeing much of the fact finding, you should have a safety valve. Because, in this case, it was all the convictions mostly were based on one eye-witness whose testimony we all looked at and said that it just does not support beyond a reasonable doubt level.

So I think that is something else you want to think about.

Mr. SCHARF. Just to add one critical point. So there are 500 detainees at Guantanamo Bay and we are talking about maybe 20 of

them actually being tried and you are concerned that maybe 2, 3, 4, 5 might be acquitted. The issue that has not yet been answered and this committee has an interest in is what happens to the other 480. Are they going to be kept in custody until the end of hostilities, which could be years and years, and what happens to the people who are acquitted? They could still be kept in custody for years; why not? And also those that are convicted but given short sentences might be kept in custody even longer after that.

And I guess the short answer is it is important in the short run to have the trials and to have due process even if there is a risk that some of them will be acquitted. It doesn't necessarily mean that if they are acquitted they go back to the battlefield, but that is another issue that has to be look at by this committee.

Ms. DAVIS OF CALIFORNIA. Thank you very much.

The CHAIRMAN. Thank the gentlelady.

The gentlelady from Guam, Ms. Bordallo.

Ms. BORDALLO. Thank you very much, Mr. Chairman. I, too, have had the opportunity to tour the facility at Guantanamo Bay with our distinguished chairman, Mr. Hunter, and my focus is on the prisoner. I am interested in the history of who has been tried in international war crime tribunals as compared to who our government currently holds in connection with their participation in the war on terror. To my knowledge, senior commanders, high political figures and others responsible for organizing and directing war crimes have primarily been prosecuted in international tribunals. Now low level soldiers and underlings have not necessarily been prosecuted in the same manner. By prosecuting senior commanders it seems that far more documents and evidence has been gatherable whereas prosecuting low level operatives means far less evidence can be found to facilitate a prosecution.

Can you discuss the types of individuals that have been prosecuted in international war crime tribunals and in past U.S. military tribunals and whether to your knowledge the types of individuals that the United States currently holds are equivalent in authority, rank or responsibility to those who have typically been prosecuted as war criminals as opposed to simply treated as soldiers in a war? How have lower level operatives in other instances been treated before the law?

I think maybe, Professor, you could answer that and possibly Judge Gahima might have a comment on that.

Mr. SCHARF. Generally for heads of state and other leaders it is perceived that an international trial is the most appropriate approach; if not international trial, something like the Iraqi high tribunal where there are international rules and international observers and international assistance.

But for lower level people most often either national courts or court martials have been used. In the United States we have had famous cases like Lieutenant Calley, a very low level person during Vietnam who was prosecuted for the My Lai massacre. More recently we have Lieutenant England who was prosecuted for her role at Abu Ghraib, a very low level person. And even in the most famous military commission case from World War II, *In Re Querin,* they were Nazi saboteurs of a very low level that happened to have botched the case and been found on our territory.

So the military commissions both in the United States and in other countries have been used for the lower level offenders whereas the higher ups you usually want to prosecute in something that is much more grand and world in scope like an international tribunal.

I would note, however, that the international tribunals have also prosecuted some low level people. Sometimes it is because at first they don't have anybody else in custody so that Tadic, who was just a visiting saddhist to a concentration camp and a part-time police officer, was the very first person prosecuted by the Yugoslavia tribunal.

Some people say that it is important not only to prosecute the top but exemplary people at all levels so that you show a deterrent. Not just that the top people are going to be held responsible but lower level people have known that they also could be prosecuted. But that has been the history of prosecutions.

Ms. BORDALLO. The judge, please. Judge Gahima.

Judge GAHIMA. The Rwanda tribunal started out badly, was very inefficient, it did not have prosecution strategy, so at the beginning they just took over any defendant who turned up and was arrested in foreign countries and they started out with some very junior people who should never have been in an international criminal tribunal.

I suppose it was more or less the same at the ICTY, the Yugoslav tribunal. I think someone was told, and indicated that unless you got an indictment, and got it soon, he would not get any money. However, the current international—the caseload of the current tribunals, they have completion strategies. They have been asked to wind up trials in about two years time and close their doors in 2010, and they are now focusing on the very high level people, people who are said to be the most responsible.

I think that it is appropriate that international tribunals should deal only with the most senior first because they are the people who pose threats to their communities, they are the people least likely to get fair trials in their own countries because if they are out of power, the people who have succeeded them in government will not accord them fair trials.

And I think the way the international criminal justice system is being structured, the new International Criminal Court, it gives the opportunity to states to try those they can try and the International Criminal Court will only step in if states are unable or unwilling to try these people, states who are unable and unwilling to try when people are responsible for abuses remain in office, and that is why I think it is likely that for the foreseeable future the international criminal tribunals will deal with the senior. I don't see any possibility of returning to the taking of small fish.

Ms. BORDALLO. Yes, Judge Wald.

Judge WALD. I just wanted to add something to your second question and that is the kind of evidence difference when you are dealing with big fish and small fish. Everything that my colleague said is true. In the beginning, the international courts, they needed bodies, and they tended to go for some of the smaller ones. Later on even the Sierra Leone tribunal was defined in its very charter

as saying it could only try the top dozen or so of the most serious criminals.

But, this is my point, I did preside—not preside, I did serve on the trial bench for one of the small fish cases in which they had five persons who were just the guards in one of the detention camps, the guards, the so-called shift commanders. I think the highest was a deputy camp commander, but it wasn't anybody up there.

And the kind of evidence we had there was almost entirely, as you can imagine, victim-witness evidence, people who had survived the camp and came to tell the tales.

But the other trial that I had was the person just below General Mladic, the second in command at the time of the Srebrenica massacre, a general, the brigade commander for the entire area, and would have been below General Mladic, who is being tried for genocide as well as crimes against humanity.

Now in that case, again, it was victim-witnesses, it was not paper. What happened in Nuremberg was the German defendants were, it has often been commented by Justice Jackson who was the prosecutor, that they left a paper trail, because it was part of their national character to keep memos.

Now subsequent high level persons who have been tried for war crimes learned their lesson from Nuremberg; you do not find those memorandum saying let's go out and get all the Muslims in the village. We had to depend in the genocide trial almost entirely on surviving witnesses, people in the town, fellow soldiers, some of whom we had got by videotape who had come to the United States and we were able to get their testimony through videotapes.

So that I am not sure that the type of evidence these days is so very much different between trying to show the chain of command. You can show the chain of command, but whether or not the order—the kind of orders that you get tried on the basis of for war crimes people don't put down on paper any more.

Ms. BORDALLO. One quick follow-up. In the model that we are currently developing would you then suggest that there be any changes made, or would it be the same?

Judge WALD. Well, I think the model that you are developing can probably be used for both big fish and little fish, and I believe, again, but I am not an expert on the Military Code but my notion is that you would expect that you are going to want to have the testimony, however it is recorded, in videotape or live witnesses, of many witnesses rather than being able to rely on documents.

Ms. BORDALLO. Thank you very much, Judge Wald.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentlelady and to our panel, thank you very much for being with us. I have got just a couple of questions here. It has been a very instructive session, really good, and our members had very, very important questions.

Under UCMJ the rights to counsel attach I presume kind of like in domestic law when the focus of suspicion is on the defendant, that he or she committed the crime in question. If you carry that to the battlefield that means that a sergeant who sees the terrorist shoot the rocket-propelled grenade (RPG) at him and then captures that terrorist would obviously at that point have focused suspicion

on that terrorist as being the actor or the person who committed the criminal act, and if you strictly applied the right to counsel, certainly the focus attaches at that point and upon capture he would have, I would think, under UCMJ, a right to counsel.

And if he had the right not to talk until counsel was appointed, even though you are operating in the exigencies of the battlefield, you couldn't then ask him, assuming that the sergeant doesn't have an attorney close by that he could bring in, he can't then ask him about the IEDs that are planted further up the road because that is an intrusion upon his right to counsel before speaking further.

Is that—so I would think that is probably not one of the UCMJ-based rights that we want to have. Does that make any sense to you guys?

Mr. SCHARF. Mr. Chairman, I am not sure that it does. I will tell you why I believe that. If you take the UCMJ, which is higher than the international tribunal standards but not quite as high as the Federal district court standards, but if you compare them to how the same thing would play out in a Federal district court case—in addition to teaching international law I teach criminal law and criminal procedure and I have spent a lot of time talking about the exclusionary rule with my students. There are constitutional exceptions in the United States which are under the higher standard and therefore would also apply under the lower standard of the UCMJ for a case, for example, where you need to get information that will be the whereabouts of a kidnapping victim.

And so you don't give someone the Miranda rights, you ask them questions, they tell you where the kidnapping victim is. You are doing this under the police exception to the exclusionary rule. The evidence can still come in.

In addition, even if the evidence were to be excluded, that doesn't mean that you can't go and find where the weapons of mass destruction are located, it just means that you can't also use that particular statement in the military commission and you would have to find some other circumstantial evidence that would support that the person was involved.

So I do think that it is a red herring to argue that these kinds of standards will actually hamstring our ability to fight on the battlefield or operationally against the terrorists.

The CHAIRMAN. So you are fairly certain of that, that the sergeant, this is a military sergeant as opposed to say a police sergeant, the police sergeant sees somebody shooting at him and he arrests him, the guy runs out of bullets and he gets arrested. The police sergeant at that time would have the obligation of advising him of his right to counsel, would he not? He is now handcuffed, he is handcuffed and he is spread eagle over the hood of the squad car.

He then is advised of his right to counsel at that time, is he not?

Mr. SCHARF. Right. But even in the United States if the police then take incriminating statements from that person, the consequence is they can't use it in court against them. And they could still use it though to save someone's life, for example, or to find a weapon of mass destruction.

The CHAIRMAN. I understand that. But you say take incriminating statements. Are they allowed to interrogate him after he tells

them I have a right the counsel and the guy says I want my lawyer and I don't want to talk? Let's walk through this.

Mr. SCHARF. All right.

The CHAIRMAN. Advise me because I am kind of fuzzy on the subject so I need you to advise me, but I was just thinking of what does attach in domestic law. You have arrested the person that was shooting at you, you have got him spread eagle over the squad car, you tell him he has a right to counsel, and he says I want my lawyer—he is a smart guy—and I don't want to talk until I get my lawyer. Under domestic law you can't ask him more questions, can you?

Mr. SCHARF. You can keep asking him questions but you can't use anything he says in response to those questions in court. That is correct.

The CHAIRMAN. Are any people trained to keep asking questions? I thought they said once a person says I don't want to answer questions, I want my lawyer.

Mr. SCHARF. Unfortunately, that is not the case. There have been studies done that show throughout the country police officers are actually taught how to circumvent Miranda and continue to ask questions, hoping to get other evidence but not testimony that can be used.

The CHAIRMAN. But the person is not under an obligation. He can keep asserting I don't want to answer the question until I get my lawyer. Right?

Mr. SCHARF. Right.

The CHAIRMAN. One thing that we saw in Guantanamo was, from things that we picked up, were that the bad guys had copies of our procedure manuals and let their fellows know what their rights were, just as criminals obviously, even though they haven't watched all the requisite television shows, know what their rights are and say you can't fool me, I don't have to talk. I do want my lawyer. People do so that every day, do they not?

So in the domestic law they have got a right to do that. Now it looked to me like under the UCMJ they have a similar right. An American soldier who is accused under UCMJ has the same right, is that right?

Let's take the police officer out of the squad car and let's put an MP who is arresting somebody in uniform who took a shot at him. Same guy is spread eagle—or uniformed guy spread eagle over the squad car. Does he now have an obligation to tell him he has got a right to counsel?

Ms. ELSEA. I believe that is the case, but I don't know that that would be the case in a typical battlefield situation. The UCMJ also recognizes that there are certain circumstances where questioning can be carried on for another purpose, and as long as another purpose is being served then the right to an attorney and a right to be informed of the right to remain silent do not attach immediately.

The CHAIRMAN. You say you think. Are you certain that there is a difference? If you are a corporal who is now spread eagle over the squad car and the MP has captured you, you are going to be prosecuted under the UCMJ. You are given an advisement that you have a right to an attorney, to counsel, right?

Ms. ELSEA. I believe that is the case. I will double check.

The CHAIRMAN. Do you have a right to say anything if you don't want to pending the arrival of that attorney? If you are a uniformed soldier.

Ms. ELSEA. That is correct.

The CHAIRMAN. So I mean I am just looking at the side-by-side you gave us. That is what I am operating off of. Now you say side-by-side, not withstanding that would necessarily hold true if we operated under the UCMJ and you used it in the battlefield situation where the sergeant has seen the terrorist shoot at o him, has now captured him, and instead of now being spread eagle over the squad car, he is spread eagle over a Humvee in Afghanistan.

Does the right to counsel attach at that point? If we are just looking at the right to counsel, when does that attach? When does it activate?

Ms. ELSEA. I would say that it activates once a person is accused of a crime.

The CHAIRMAN. So it doesn't activate upon—you are talking about a formal accusation by a prosecutorial authority.

Ms. ELSEA. That is correct. I believe that if on a battlefield situation, capturing a person does not necessarily have anything to do with the suspicion for a crime. So you could capture them, take them into custody, ask them questions regarding—ask them questions for intelligence purposes; for example, where are the other IEDs, et cetera, would not require an attorney.

The CHAIRMAN. But if we are characterizing these people as terrorists and the shooting of the RPG that the sergeant witnessed is a terrorist act, and that is a crime, then you have, just as the sergeant saw the person shoot at him with the handgun and threw him over the squad car and advised him of his rights, at that point in domestic law we say that the defendant has become the focus of suspicion that he committed a crime.

Would not the terrorist when he commits a terrorist act that you see and you now capture him and you throw him over a Humvee, is he not now suspected of a crime, the focus of suspicion at that point?

Ms. ELSEA. I would have to look into it and see if there is any case law on that.

The CHAIRMAN. Okay.

[The information referred to can be found in the Appendix on page 107.]

Mr. SCHARF. I would point out that as far as the international tribunal precedent goes, the precedent that is the minimum standard internationally, they do not attach those words until you are, quote, accused as defined as actually having been accused.

The CHAIRMAN. I wasn't talking about international right, I was looking at the UCMJ. I am just trying to differentiate because there are folks that say let's take the UCMJ totally and adopt it. And I just wanted to make sure that we wouldn't have problems under the UCMJ in terms of as right to counsel. Because it does have a fairly strong right to counsel for the accused, right?

I ask anybody else on the board to answer this, if you can do it. In your estimation, in the example I have just given where you see the person commit the terrorist act, the sergeant sees him do that

on the battlefield in Afghanistan, he captures him and he has thrown him over the hood of the Humvee and searched him, and he is going to be taken back later into a detainee enclosure and talked to, at what point, if we adopt the UCMJ, if we took the UCMJ today and Congress adopts it, the President adopts it, we sign the law, at what point did his right to counsel attach?

It is Ms. Elsea?

Ms. ELSEA. Yes.

The CHAIRMAN. Ms. Elsea, what do you think? Let's say six-months later he is in—or two months later he is in Guantanamo and he is charged under—by the tribunal.

Ms. ELSEA. It is hard to answer with a specific case like that without—I would have to look into it to see if there is any case law. From my understanding there are exceptions in the UCMJ, how it is operated, whether evidence can be used, whether the Miranda right has been explained.

The CHAIRMAN. Here is what I was suggesting, and Mr. Scharf, you might want to comment on this, I think it is unclear, I think it is a little fuzzy. It might not be bad if we had in that case, if we have the opportunity here to put together a new body of law, to make it clear that battlefield apprehensions do not generate or trigger a right to counsel. Do you think that is a reasonable thing to do? Maybe we should say exactly when they do trigger.

Mr. SCHARF. My own opinion is that the UCMJ was not meant to apply in that situation. So if Congress provides that kind of clarification, I would personally have no objection to that whatsoever.

The CHAIRMAN. With respect to that question, I have just given you the case history of a defendant, shoots at the convoy, captured by the sergeant who sees him shoot at the convoy, thrown over the Humvee in Afghanistan, becomes a detainee, taken back two hours later to the camp, interrogated, brought back ultimately to Guantanamo and two months later he is tried by the tribunal.

At what point in that process in your legal opinion did his right to counsel attach?

Mr. SCHARF. At the point where the system decided that they wanted to prosecute him rather than just detain him as an enemy and try to get information from him for the purposes of prosecuting the war.

The CHAIRMAN. So that would be at the point of charging him in Guantanamo; when they charge him with a crime, or make the decision to charge him with a crime.

Mr. SCHARF. That would be consistent with the international tribunal.

The CHAIRMAN. I am going under the UCMJ. I am saying if you adopted the UCMJ as the body of law, you would say that the right to counsel attached upon charge, upon formal charges, formal decision to make formal charges, right?

Mr. SCHARF. Correct.

The CHAIRMAN. Judge Gahima, what do you say? Do you have any thoughts on the UCMJ?

Judge GAHIMA. I don't, but I have something that is from previous experience, which may be of relevance. U.S. law enforcement agencies often go after terrorist suspects not on the battlefield but people out in the field in hiding or planning terrorist activities.

One thing that ought to be considered is whether if it is not somebody arrested in the course of combat but somebody who is apprehended as a result of intelligence that has been received from foreign states should be—should have access to these rights the moment the FBI or the Department of Justice turns up in the country and says we want to talk to you about activity X, Y and Z. That is common.

From my personal experience, it is a situation that I did find worrisome.

The CHAIRMAN. Thank you.

Judge Wald, what do you think?

Judge WALD. Well, I certainly think that when you are talking about the immediate atmosphere of the incident or the battlefield—I do not know the Military Code but I have talked to one or two people who do, and I am sure the committee will have their expert advice. I was under the impression, but that is all it is, that even under the Military Code there is a period of what you might call investigating the crime scene or that sort of thing where when he has got him slung over the Humvee, that the purpose of questioning might well be to make sure that he doesn't have somebody behind him that is going to come along a little bit later with another explosion or, in other words, in order to keep the scene in some kind of order, that nobody, including myself, expects that you are going to have a full Miranda-type warning there.

I think, and I am under the impression that one of my expert friends said that the Military Code provided for a certain period of investigating what had happened before you immediately brought that into being. Where I am not sure what would happen would be whether or not if they then took him back to the detention facility three miles away or five miles away, not Guantanamo, and then proceeded into an elaborate questioning period, I am not sure whether or not some of the rights wouldn't attach there, even though the military—even though the ICTY, which you are not that interested in, but would clearly not bring any of its rules into effect until past the field investigation period when a prosecutor says I want to question this guy. At that point it attaches then. My guess is it might attach earlier in a detention facility that was away from the battlefield.

The CHAIRMAN. Okay. So maybe if the detention were you take them ten miles back and put them in the detention.

Now, Mr. Scharf, I am looking at your answer, you thought it would attach when formal charges were filed. I am just looking at the side-by-side that was put together by Ms. Elsea and it said: Confessions made in custody without the statutory equivalent of Miranda warning are not admissible as evidence.

Now if that person shoots at the sergeant, sergeant captures him, throws him over the hood of the Humvee and he says I have got ten IEDs I buried last night going up the line, up the road here, and they are all discovered, right, those—that says in custody. Article 1 UCMJ, 10 USC Section 831, that doesn't say when they have been formally charged, if Ms. Elsea is quoting that section correctly. What do you think? You said you don't think that applies. But that is what the side-by-side says. The term custody is a lot different from charging, right?

Mr. SCHARF. The problem that the panel is having with this series of questions is that none of us are experts on the UCMJ and sitting ten feet behind me is one of my former students who is working—his colleague sitting next to him is Colonel Davis, who is one of the most expert people in the world on those issues.

The CHAIRMAN. Bring them on up.

Mr. SCHARF. I don't know if they are authorized. It seems like a basic question.

The CHAIRMAN. We don't have any suppression rules with respect to extraneous evidence or witnesses. Bring them on up.

Colonel, if you could give us that answer to that thing I just want over. You have been listening to it.

Colonel DAVIS. I am the chief prosecutor for the military commissions.

The CHAIRMAN. Come on up and grab that mike and tell us what you think. Colonel, give us your name and what you do.

Colonel DAVIS. I am Colonel Morris Davis. I am the chief prosecutor for the military commissions.

The CHAIRMAN. On that question what do you think?

Colonel DAVIS. Yes, sir. Article 31 is what you are referring to, 10 USC 831. It says if a person is suspected of an offense, and in your example certainly the person would be suspected of an offense, that you are required to provide the rights warning. I think Ms. Elsea says——

The CHAIRMAN. You mean right to counsel?

Colonel DAVIS. Yes, sir. There is an emergency exception. There is some case law on that, like one case I recall was on an airplane, a person had apparently taken LSD, there were safety concerns inflight about what he had done on the airplane and I believe there was an emergency exception applied there where rights warnings were not required.

But your example about the sergeant that sees the RPG, if the person had been a U.S. service member then certainly Article 31 would apply and a rights warning would be required and anything he said would not be admissible against him in court.

The CHAIRMAN. If you simply copied the UCMJ and said this shall now be applicable to the tribunals, certainly defense counsel would argue that if you take the uniform off the GI and you put a terrorist uniform on, he has got that same right once you see him fire the RPG and you have got him in your custody, not formally charged back at Guantanamo, but in your custody he has got the right to counsel, right?

Colonel DAVIS. Yes, sir. If you applied the UCMJ as written, that is exactly right.

The CHAIRMAN. So if—in your opinion if we put this new animal together, this new body of law then we probably should have, if we are following and we are going to—I think we are going to end up extracting a lot of parts of the UCMJ and utilizing it, that is probably one where we should make it clear that if in fact we intend to be able to interrogate immediately prisoners on the battlefield and even to use those statements against them later on, we should make that clear and make an exception, should we not?

Colonel DAVIS. Yes, sir. I think the problem you are running into, kind of what is being discussed here is in a perfect world how

would you do it. What I am stuck with as the prosecutor is what I currently have. We have got 450 people roughly that have never had any rights advisement given to them. So I have this box of information and the question is what can I do with it.

When these people were captured initially, the concern was intelligence. In the intelligence world you are interested in not what happened yesterday but what is going to happen tomorrow. Then you bring in the law enforcement piece. They are not concerned with what is going to happen tomorrow; they are concerned with what happened yesterday.

And often those two are combined where you had intelligence interrogators and law enforcement personnel at various times questioning these individuals without rights warnings.

The CHAIRMAN. The other thing I am kind of worried about is even if you have the right to remain silent, which apparently you don't—or you do under UCMJ, but even if you didn't have that right because of the battlefield exigency, the bad guys watch us pretty closely and if the guy simply says listen, I have read your laws, I have been briefed on it, I want my lawyer and I am not going to tell you anything, and absent that he might have told you about the ten IEDs up the road, then the perception, if you will, the street knowledge that somehow you didn't have to talk to American interrogators any more on the battlefield would accrue to our detriment, wouldn't it? Right now we only get the dummies in the domestic law who talk like canaries even after you have told them they have got the right. They think if they can out-talk the policemen they are going to get him to let him go.

Colonel DAVIS. Yes, sir.

The CHAIRMAN. Let me ask you a couple other. Stick around because I think you are an important part of this panel here, sir.

Just a couple others, folks, and we will free you here.

Hearsay evidence. You have got—we have got this churning population of people in these camps. We have got a churning population and you have got people who have incriminated their fellow terrorists and then been shot, been released, disappeared, whatever. The gates have opened, lots of people have left the prisons who initially were there.

What do you guys think about—and I noticed in Nuremberg no hearsay can be utilized and in the Yugoslavian forums hearsay can be utilized. Hearsay can't be utilized under UCMJ except under exceptions, is that right, Colonel?

Colonel DAVIS. Yes, sir, that is right.

The CHAIRMAN. Would you recommend that you have an allowance of hearsay, maybe subject to—if you have a military judge in these tribunals, subject to his finding that a reasonable person would find hearsay credible and probative, or do you think there should be a stricter limit on hearsay or maybe open—a no-exclusion Nuremberg-type rule on hearsay?

Colonel DAVIS. Sir, I guess my view would be, and I don't mean to disagree with Judge Wald entirely, we do have a military judge, a presiding officer who makes that preliminary determination that the evidence does have probative value to a reasonable person, and certainly there are factors that could cause the judge to find that it lacks that and suppress it.

If it gets past that threshold and the members of the jury, in essence the panel members in this case are all military officers who for the most part have master's degrees, if not doctorates, pretty well-educated, smart group of people, and I believe it would be up to them at that point to weigh the evidence, factor in all those—the totality of the circumstances and attach the weight that they believe is appropriate to that piece of evidence.

The CHAIRMAN. Okay. So once the judge let it in, let them assign a value to it.

What do you think, Mr. Scharf, about that?

Mr. SCHARF. Well, both the UCMJ with its many exceptions and even the Federal rules that apply to the district court have a residual hearsay exception that would apply in the circumstances you are describing. Federal rule of evidence 804B5 actually says that if the court determines that, A, the statement is offered as evidence of a material fact; B, the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and C, the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence, then it can be admitted.

So I think under both the Federal rules, the court-martial rules that there is a general residual exception for hearsay under the circumstances that you have described. I would be cautious about lowering that threshold further.

The CHAIRMAN. Okay.

Judge Wald.

Judge WALD. As I said before, I learned to live with hearsay during my two years, but with caution, but I do think the thing that might be remembered, and I don't know how it applies in military, is I would be very—I would feel very uncomfortable about a conviction that was based entirely on hearsay or even where hearsay was the key piece.

I think that is a balance which we used which might commend itself to some, and certainly has been the subject of some other international courts, that if a whole conviction depends upon hearsay then maybe it shouldn't stand.

The CHAIRMAN. Okay. Ms. Elsea. Did you have any position on that?

Ms. ELSEA. No.

The CHAIRMAN. Judge Gahima, any position on that?

Judge GAHIMA. Yes, sir. I think the particular circumstances of dealing with terrorism cases call for a lowering of the threshold against the admission of hearsay evidence. Terrorists groups are very closely knit groups. It is very unlikely that you find them willing to turn against their colleagues.

The threats against witnesses who may be willing to testify are enormous. I think that in the absence of other evidence it would be better if the criminal justice system were more flexible to consider hearsay evidence because of the particular threats that exist in these cases. That is my personal opinion.

The CHAIRMAN. Okay. Thank you.

Just one last question. The Geneva Convention. The President said that terrorists are not going to be accorded all the rights of

the Geneva Convention. As I understand, one of the rights under the Geneva Convention of POWs is you have only got to give name, rank and serial number and you are done. They don't have the right to ask you questions beyond that. That is the only obligation you have.

I could just tell you without going into classified stuff that we have saved a lot of lives in the war against terror by information that came—did not come immediately during interrogations, that came after a lot of work; not cruelty, not coercion, but just lots of questions and lots of time.

Do you folks think that—having set up that leading question, what do you think? Do you think we should have—because people say well, we should have followed Geneva and that would make the world love us. Do you think we should have a system where the terrorist is only required to give name, rank and serial number and we don't have the rights to ask, to engage in persistent interrogation?

Judge WALD. I would note first of all that the Common Article 3 is I think the only, in terms of terrorists, in terms of not international conflicts, is the provision which would apply to the terrorists, not the entire Geneva Convention. They would not be treated as prisoners of war. I don't think anybody suggested that it would necessarily be treated as prisoners of war.

The CHAIRMAN. No, but the President was taken to task for making that statement earlier in the war against terror, that we would not apply, and he said that in a general rule, he didn't say Common Article 3, he said these folks are not entitled to all the protections of the Geneva Convention. He said we are going to treat them humanely but we are going find out what they know. And the greatest thing to keep you from finding out what you know is a good old name, rank and serial number only.

Judge WALD. I understand.

The CHAIRMAN. So a little digressing but it goes to some of the questions of the panel.

Judge WALD. I don't think that applying the Geneva Conventions would have required that that provision that you talked about, name, rank and serial number, which in my memory applies to prisoners of war, would have applied to al Qaeda or Taliban, whatever, who would have been covered by Common Article 3, which applies to anybody you capture but isn't a prisoner of war.

The CHAIRMAN. I agree.

Judge WALD. So I don't think that the name, serial number, which my memory is, is not incorporated within the Article 3, Common Article 3 rights, or at least I don't know that it is. I don't know that there has been any decision which said it is inhumane as long as you aren't using torture, duress or coercion to be questioning somebody.

The CHAIRMAN. The context that I heard the President speak on this was he said we are not going to treat these folks like soldiers. And he didn't parse it as to whether Common Article 3 applied.

I guess what I am asking is if that in fact was our intent, not to treat them as uniformed soldiers, that a large part of that was to make sure we could engage in persistent interrogation to save lives.

Doesn't that—if the Geneva Convention requires that you treat people who are soldiers in that way, that you only require name, rank serial number, they don't have to talk beyond that, that if we treated them like soldiers, that would be the application and that would prevent us from having information which turned out to be pretty vital information to us?

Judge WALD. I guess my bottom line would be of course I don't know exactly what the President or the Administration had in mind when they made that, but even if they had applied the Geneva Convention, it would have allowed them to discriminate, to differentiate between prisoners of war and nonprisoners of war who would have come under Common Article 3. My belief is that the name, that the serial number questioning kind of thing only applies to prisoners of war and that——

Ms. ELSEA. Could I interject here? That is true, it does apply only to prisoners of war. The Geneva Conventions say that prisoners of war cannot be required to give any more than their identification. However, the ICRC interprets that as not prohibiting further questioning of prisoners of war. What is prohibited is methods of coercion. Asking questions itself is not prohibited.

Mr. SCHARF. Can I add——

The CHAIRMAN. It is not prohibited, but it also describes all you have to give, right?

Ms. ELSEA. That is true. Sometimes they look at that as a requirement; soldiers are required to give their identification for purposes of——

The CHAIRMAN. I guess what I am saying is I think the President would have been well advised to have expounded on his statement that we weren't going to treat these people like prisoners of war. But my understanding is it was to that point, whether or not we could do a persistent interrogation, that that position by the Administration was taken. I am glad they took it because I think it saved a lot of American lives and I think you are right, if he would have parsed it and conditioned it and made that statement with that expansion that you have just gone through, he could have explained they really aren't prisoners of war and therefore Geneva doesn't apply to them and therefore all you guys that are hounding me to follow the Geneva Conventions, you are in the wrong room, then that would have been great.

I think his statement was interpreted as meaning we were going to treat people inhumanely and I think the second part of that statement was they would be treated humanely.

Mr. SCHARF. Mr. Chairman, if I could add context. You are giving a very generous spin to what the President said. If you recall, at the time he said that he also——

The CHAIRMAN. He deserves it every now and then.

Mr. SCHARF. At the time he said that he also was against the idea of having our internal tribunals decide on a case-by-case basis whether there were people who were prisoners of war versus people who were unlawful combatants. That policy has changed. We now have Article 5 tribunals.

Also, the President now after Hamdan has done as an executive order the decision that the Geneva Conventions do apply.

I believe that he was being clear that he was going to treat these people humanely but without the definitions and the caveats of what Article 3 would require. And his intent, and especially if you look at the White House memos that have now been made public, seems to be to keep this body of people completely outside of the Geneva Conventions and within his full discretion to decide what humane treatment was without any kind of supervision. And the law according to the Supreme Court has evolved on that ground and the President has agreed with that.

The CHAIRMAN. That is true. But in the Geneva Convention the term humiliate and degrade, et cetera, even those words and terms have been conditioned by us in our self-interest and our interest for security by the so-called McCain language which says that they are conditioned by the reservations that the United States has made with respect to those words. Otherwise you could find, at least it could be argued, for example, that interrogating a Muslim defendant with a woman interrogator is a humiliating act or a degrading act, and so Senator McCain's language which basically restated the reservation was probably in order. Even that part of the Geneva Convention at least needed to be conditioned and modified, expanded upon in order to be acceptable and consistent with our security requirements.

But I think as we move forward we are tilling new ground, kind of creating a new system, and I think your commentary has been really, really, good, really instructive, and the back and forth with members has been great.

As you see, we have got a lot of smart folks here and they have all been thinking about how we are going to put this new animal together. And you have really, really contributed to that process. Thank you for letting me interchange with you a little bit here and thanks for your service to our country. I greatly appreciate it.

Is there anything anybody would like to make in final remarks here? Thanks for your endurance in this. And this hearing is adjourned.

[Whereupon, at 3:50 p.m., the committee was adjourned.]

A P P E N D I X

JULY 26, 2006

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

JULY 26, 2006

Hearing on Military Commissions:
Past and Present International War Crimes Tribunals

Introductory Remarks
Ranking Member Ike Skelton
July 26, 2006

I want to add my welcome to the Chairman's and compliment him as I think this is one of the most important hearings we will have this year. We have a lot to learn from our esteemed panel as we continue our effort to develop bi-partisan legislation on modern U.S. military commissions for war crimes.

As I and others have said over the course of the last month since our Supreme Court ruled in the *Hamdan* case, **THE WORLD IS WATCHING**. What is so important about today? We have outstanding experts on war crimes tribunals of the distant past and the present. In fact, we have

participants with actual practical experience from the Yugoslav, Rwandan and Iraqi Tribunals that are on going.

The laws of war, by their very nature, are some of the most important international laws we are a party to. Since the birth of our country we have incorporated customary international law and standards in many areas. In my mind, most important is that the United States has been a leader among the world's nations in helping to develop modern war crimes tribunals, starting with the Nuremberg and Tokyo tribunals and leading to those that still exist today.

Many of the government witnesses over the past weeks, in testimony to the House and Senate, have cited the World War II, Yugoslav and Rwandan Tribunals. I hope to learn more today about how accurate those analogies and examples are.

Our witnesses today can address what we've learned from the past, how tribunals have evolved, and how they are working today. But our Supreme Court also spoke to the nation about what international law means to our military. So, I also hope these witnesses will help us come to grips with what the rest of the world considers the fundamentals of due process. These basics are enshrined in the Geneva Conventions, other International treaties we have signed, and other customary law that binds us.

At the end of the day, our job will be to craft legislation that can both hold accused terrorists to account and that does not lower the high standards we have set for our nation and our servicemembers. I believe we are up to the challenge. Thank you, Mr. Chairman.

Testimony before House Armed Services Committee on Military Tribunals

Patricia M. Wald

July 25, 2006

Mr. Chairman and members of the Committee: Thank you for inviting me to testify today about the rules and procedures under which the ad hoc international criminal tribunals, particularly the Tribunal for the former Yugoslavia, operate. I served as a judge in one of the Trial Chambers of ICTY from 1999 until the end of 2001. Before that I had been a judge on the U.S. Court of Appeals for the D.C. Circuit for over 20 years and its Chief Judge for 5. Since leaving the ICTY I have participated in the training of both Prosecutors and defense counsel for the several international criminal courts. In the brief time allotted, I will try to describe the way in which the Yugoslav Tribunal, in which the U.S. has been an active participant since its establishment in 1993, deals with problem areas that military commissions will also encounter. ICTY is a U.N. court which adjudicates war crimes, crimes against humanity, grave breaches of the 1989 Geneva Convention and genocide, committed on the territory of the former Yugoslavia from 1991 forward. It has an Office of the Prosecutor, several Trial Chambers of three judges each, nominated by member countries and selected by the General Assembly, and an Appeal Chamber of seven. Judges are to have experience in international law; many American lawyers serve as both Prosecutors and defense counsel at the ICTY as well as an American judge. Two American judges have been past Presidents of the Court. The ICTY is authorized to sentence convicted defendants to prison terms up to life, but not to impose the death penalty. To date 161 indictments have been issued; in 95, proceedings have been completed; 48 are serving or have served sentences; 34 are awaiting trial; 11 are in trial; and 13 are pending appeal.

Rules of Procedure

The Rules of Procedure and Evidence for the ICTY must be agreed to by at least 10 of the 16 permanent judges in plenary session. There is a Rules Committee of judges on which I served during my tenure that screens rule change proposals and makes recommendations to the full court. Most of the practices in the courtroom are governed by these Rules which are frequently amended to reflect the experience of the court and to allow for flexible adjustments to new situations. Article 21 of the ICTY Statute passed by the Security Council contains a brief list of rights of the accused to which the Rules must conform but it is couched in quite general terms; it mandates a fair and public hearing, the presumption of innocence, notice to a defendant of the charges in his own language, time to prepare a defense, trial in his presence and without undue delay, a right to counsel, assigned if he cannot afford his own, a right "to examine or have examined the witnesses against him and to obtain the attendance of witnesses ... on his behalf," a right not to be compelled to testify against himself, and the right to an interpreter, if necessary. There are over 125 Rules elaborating on the provisions of the basic ICTY Charter. For instance, the requirement of guilt beyond a reasonable doubt is found in the Rules not in the Statute. I have a copy of the ICTY Rules here, but I will describe only and briefly the ones I think relevant to military commission power.

Rights of Suspects During Investigations: A suspect who is questioned by a Prosecutor must be informed of his right to assistance of counsel and to an interpreter, his right to remain silent and told any statement he makes will be recorded and may be used in evidence. The suspect must voluntarily waive counsel for the questioning to continue. He receives a copy of any statement recorded (R.42-3). Once he is charged, no questioning by the Prosecutor can take

place without counsel unless there is a recorded waiver of that right. (I note Article 55 of the Rome Statute governing the International Criminal Court forbids any coercion, duress or threat during an investigation, including torture or any form of cruel, inhumane or degrading treatment.) After arraignment before a judge who reads the indictment to the accused and assures he understands it, the defendant is brought personally before the court every 120 days thereafter, with counsel, for a status hearing and is asked by the court if he has any complaints about his physical or mental treatment (R. 65bis).

Rights to Pretrial Discovery: The Prosecutor at a time set by the pretrial judge must file with the court and defense a summary of the evidence the Prosecutor intends to introduce at trial, any admissions by the parties and a statement of matters not in dispute and those in dispute, a list of witnesses the Prosecutor intends to call (by name or pseudonym) and a summary of the facts about which each witness shall testify, and the parts of the indictment to which their testimony applies, as well as whether the witnesses will testify in person or pursuant to R.92bis (more on 92bis later) in audio or video form or by transcript from a prior proceeding, and, finally, a list of exhibits the Prosecution will offer. The defendant in turn files before trial a general statement on the nature of his defense and matters he takes issue with in the Prosecutor's pretrial statement and the reasons therefore. At the end of the Prosecutor's case the defendant files a list of his witnesses (name or pseudonym), a summary of facts about which his witnesses will testify and the part of the indictment to which they are relevant, whether they will testify in person or pursuant to 92bis, and finally his exhibits. The accused need not be present at these discussions of the Prosecution and defense work plans (R. 65ter).

Additionally, the Prosecutor must make available to the defense within 30 days of the initial appearance copies of all material supporting the indictment and all prior statements obtained by the Prosecutor from the accused, copies of all statements of all witnesses the Prosecutor intends to call and any statements taken pursuant to Rule 92bis, and he must let the defense inspect all objects or documents material to preparing his defense or intended to be introduced at trial, or materials previously taken from the defendant (R. 66). The defendant has a reciprocal obligation to let the Prosecutor view his evidence. Under Rule 68, the Prosecutor must disclose any material it has knowledge of that suggests the innocence of or that may mitigate the guilt of the accused or affect the credibility of a Prosecution witness. (This is the ICTY version of the Brady Rule.)

Limits on Disclosure: The ICTY Rules anticipate that there will be types of evidence that Prosecutors (or possibly defense) will not wish to disclose publicly. Thus, Rule 66 provides that if the Prosecutor believes information, otherwise disclosable, may prejudice ongoing investigations or be contrary to the security interests of a State, he may apply to the Chambers *in camera* to be relieved of his disclosure obligation but he must show the evidence to the Chambers judges. Similarly, Rule 69 says that in "exceptional circumstances" the Prosecutor may apply to Chambers to order nondisclosure of the identity of a victim or witness who may be in danger until such person can be brought under the protection of the Tribunal, i.e., a witness coming from afar who fears reprisal in her home village. Rule 70 also provides for confidentiality of the identity and origin of information provided to the Prosecutor on a confidential basis which is to be used only to generate other evidence. The initial information may not be disclosed without permission from its original source and cannot be itself introduced

into evidence without being shown to the accused who, if it is put into evidence, is allowed to challenge it. Rule 59bis makes special provision for a State to object when it is directed by the Court to produce documents. If it proclaims that production of certain documents will endanger national security it can ask for protective measures such as an *ex parte* or *in camera* hearing, disclosure in redacted form, disclosure without recording in the transcript and immediate return of the document to the State. Although measures to ease the concerns of States and witnesses are thus provided, nothing in the Rules permits evidence to be used to convict a defendant that is not shown to him and that he is not allowed to challenge. I know of no case in which evidence not disclosed to the defendant has been admitted. Rule 75 sets out a list of protective measures for witnesses at risk: they include orders of nondisclosure to the public or media of the witness' identity, expungement from the record of any identifying data, imagery or voice-altering mechanisms if, as at the ICTY, the proceedings are televised, one-way closed circuit TV, assignment of a pseudonym and closed hearings. Rule 79 permits hearings to be closed for security or witness protection. It must be the Court who orders it, however, and the reasons for closing must be made part of the public record. Otherwise the sessions are to be open (R. 78) and a full and accurate record is to be kept of all proceedings (R. 81). The Court may delay disclosing the identity of a victim or witness to several days before trial but that identity must be disclosed in time to allow the defendant to prepare for trial. An early declaration by the Trial Chamber in *Prosecutor v. Tadic* (IT-94-1-J, Op. & Judgment, 1 May 1999) that in some cases the witness' identity might be permanently kept from the defendant provoked such an uproar, especially from American lawyers, that the Court ultimately rejected it as a possibility. (Rule 81 of the ICC also allows the Court on petition of the Prosecutor and after an *ex parte* hearing to

permit nondisclosure of information prejudicial to national security or an ongoing investigation.) But again the Prosecutor cannot introduce that information into evidence without disclosing it to the accused.

What Kind of Evidence is Admissible?: The ICTY Rules allow for a range of ways in which evidence may be admitted. Rule 71 permits depositions to be taken for use at trial whether or not the deponent is able physically to appear. A Tribunal presiding officer is appointed (usually a senior legal officer) to supervise the deposition which can be held away from the site of the court; the defense must be allowed to be present and to examine the deponent; the deposition may also be conducted by videoconference; a record must be made and the request to proceed by deposition must be approved by the court after an explanation of the circumstances which justify it. Rule 71b provides for testimony by video link in real time in the courtroom. I have personally seen this done and was satisfied that it provided adequate opportunity for both sides and the court to examine and observe the witness. Rule 94 provides for judicial notice of facts of common knowledge and also of adjudicated facts or documentary evidence from other Tribunal proceedings. An example of the latter would be the judicial notice taken in a case I sat on involving a prison camp in which the deplorable camp conditions had already been proven in a prior case and valuable time would have been wasted if they had to be proven all over again. The defendants did not in fact disagree. (*Prosecutor v. Kvocka*, IT-98-30/1-T, Judgment, 2 Nov. 2001.) Parties, of course, can stipulate to evidence. (The ICC Rules also allow for video and audio testimony on order of the Court "provided the technology permits the witness to be examined by the Prosecutor, the defense and the Chamber," and the venue chosen is "conducive to the giving of truthful and open testimony" and to the safety and privacy

of the witness (ICC R. 67). ICC Rule 68 allows prior recorded testimony or transcripts to be admitted but only if both parties had an opportunity in the prior testimony to cross-examine the witness or if the witness is present currently and does not object to being cross-examined in the present proceeding.) I mention in passing, special limitations on evidence in sexual violence cases in both the ICTY and ICC that: do not require corroboration of a victim's testimony, do not accept a defense of consent where the witness was in a coercive atmosphere such as a prison camp or was threatened with violence if she did not succumb, and do not permit examination of her prior sexual conduct. The Trial Chamber *in camera* examines any proffered evidence of consent to determine before admission if it is reliable and relevant. Expert evidence must be submitted ahead of trial in writing and if the other party does not object, the expert need not appear; if there is an objection, the expert must appear for cross-examination.

When Can Written Testimony Take the Place of Live Witness Testimony?: Rule 89 is often cited, I believe, inaccurately for the proposition that the ICTY may consider any kind of evidence, including hearsay, it finds probative on any matter. Rule 89(c) does say a Chamber may admit any relevant evidence which it deems to have probative value. But Rule 89(f) says a Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form. From the beginning, however, the Court has put limits on the circumstances in which written evidence may substitute for oral testimony. The Rules originally expressed a preference for live testimony unless it was impracticable and decisions of the Appeal Chamber during my tenure refused to admit unsworn statements of a dead witness taken by investigators in the field as not having sufficient indicia of reliability. In 2000 the Court adopted a new comprehensive Rule 92bis setting out the kinds of non-live evidence admissible and the

circumstances in which they could be used. In sum, R. 92bis, which details when written testimony can be admitted, overrides Rule 89(c)'s general grant of authority to hear any relevant or probative evidence. Rule 92bis says that a court can only admit written evidence of a witness "which goes to proof of a matter other than the acts and conduct of an accused as charged in the indictment." It then lists factors militating in favor of allowing written testimony: evidence of a cumulative nature where other witnesses have given oral testimony to the same effect, relevant history, political or military background, statistical surveys on demographics, etc., the impact of crimes on victims, the character of the accused and sentencing evidence. Factors militating against the substitution of written for live witness testimony include an overriding public interest in an oral presentation, where the objecting party can demonstrate the nature and source of the written evidence renders it unreliable or where its prejudicial effect outweighs its probative value, and any other factor making it more appropriate for the witness to be subjected to cross-examination. To be admissible the written statement must have attached to it a declaration by its author that the contents are true to the best of his knowledge and it must be witnessed by an official of the State where the witness is located or by an officer of the Tribunal. The witnessing official must declare that the identity of the author has been verified, that the statement maker told the official that the facts represented therein were true to the best of his knowledge, that the author knew he could be prosecuted for falsehoods and it must contain the date and place where the statement was made. If a person has died or cannot be found or is unable to testify for health reasons, the trial court can waive the required form of the written statement if it finds the circumstances in which it was made satisfy sufficient indicia of reliability. Similarly, 92bis allows for admission of transcripts of prior testimony before the Tribunal—again only if the

transcripts do not go to the acts or conduct of the accused which have been charged in the current proceeding. (Compare ICC Rule 68, which requires for prior recorded testimony that the parties and court had opportunity to examine the witness at the time of the transcript.)

These are all general criteria to be sure and call for individual judgments by the finders of fact when substitution of written for oral evidence is permissible, but they do nonetheless represent a requirement that the judges justify substitutions for live testimony and indicate, in general, the outer perimeters of their discretion. In several cases, though admitting 92bis statements, the judges have nonetheless required the witness to be available for cross-examination if requested.

Rule 92bis, while providing for admission of written statements or transcripts of past testimony in lieu of live witnesses, still retains two essential elements of the time-honored right to face one's accusers. It requires that opportunity for cross-examination by the opposing party be retained in the case of past transcripts and forbids written statements that involve evidence of acts or conduct of the accused that go to proof of the wrongdoing charged. As far as the different types of oral testimony—video and audio recordings, and depositions—the right of cross-examination is retained (though with depositions judicial questioning is not possible). No secret testimony kept from the defendant is allowed into the record.

Exclusion of Illegally Obtained Testimony: Rule 89(d) provides for exclusion of evidence if the judges find its probative value is substantially outweighed by the need to assure a fair trial. Rule 90 also provides for a right against self-incrimination. Rule 95 underscores the ban: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to or would seriously damage the integrity of the

proceedings." The ICC Rule is virtually identical, though more specific that no evidence obtained in violation of the Statute or recognized human rights will be allowed.

Conclusion

The ICTY Rules in my experience provide flexibility in obtaining testimony through deposition, judicial notice, video recording for witnesses who are in distant countries and will or cannot appear live at the Hague. These modes allow for cross-examination and some for judicial questioning. I admit to being critical of the substitution of written witness statements for oral testimony in general, based on my preference for our own system of adversary hearings, but on balance I found the 92bis route allowing for such written submissions on peripheral and background matters not unduly prejudicial to a fair trial. The Rules also allow measures to protect the confidentiality of evidence that could involve national security but in the final analysis do not allow the material to be used to convict the accused unless he has an opportunity to challenge it. Similarly at least one-half of all witnesses who testify request some form of protection of identity by way of pseudonym or ban on disclosure of their identity to the public, but again their identity must eventually be disclosed to the defense. To my knowledge the Prosecution at the ICTY has not found these Rules impossible to operate under—nor has the defense. A record number of convictions have been secured.

Thank you. I hope these observations on the practice of international criminal tribunals will be of use in locating the right balance between the dictates of fair trials and deserved punishments for perpetrators of war crimes in the military commission context as well.

ADDENDUM

Heresay within Live Testimony: The ad hoc tribunals do not have any bar against heresay evidence per se. This is in line with the practice of many Continental countries. This does not mean however that there are no restraints on its use: not only must the trier find it relevant and probative under Rule 89© but several trial /chambers have refused to admit it if they find it unreliable. I will admit that depending on the background of judges at the ICTY some chambers were stricter than others in screening heresay in this regard.; the common law judges being not surprisingly more strict than those from civil law countries. I myself was uncomfortable with the use of heresay and like many of the judges asked searching questions about the circumstances in whichthe witness on the stand learned of the heresay material. There is a tradition among heresay country judges aswell that even though heresay may be admitted, the judges should be cautious in the weight they give it; there are many expressions in the judgements that it is not deemed of the same weight as directly observed testimony. That is certainly the way in which I approached it. It is also extremely important that the Tribunal abides by the standard laid down by the European Court of Human Rights that a conviction may not be based on heresay alone or principally. Thus I donot think a conviction based on a staff officers affadavit that he had beentold by line officers that they saw a defendant do something would pass muster. In general the ICTY has been sticky about the qualityof evidence, even eyewitness testimony; I presided over anAppeal panel which reversed the convictions of 3 Croats based on eyewitness testimony aunanimous panel found unreliable.

Prepared Statement of Gerald Gahima
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House Armed Services Committee
July 26, 2006

Testimony on the Practice of International Criminal Tribunals and their Relevance to Military Commissions in Light of *Hamdan v. Rumsfeld*

Thank you, Mr. Chairman and members of the Committee for inviting me to speak this afternoon. I am honored to be among such distinguished company.

I would at the outset wish to take the opportunity to clarify that I am testifying in my personal capacity and that the views I will express are my own and do not necessarily reflect the views of the United States Institute of Peace.

Mr. Chairman, I have been intimately involved with prosecutions of the crimes that were committed during the Bosnia and Rwanda conflicts of the early 1990's. I was for some years responsible for both Rwanda's own genocide investigations and prosecutions and support to the work of the United Nations International Criminal Tribunal for Rwanda (the ICTR). I worked with law enforcement of states such as Belgium, Switzerland, and Canada in their efforts to investigate crimes arising from the Rwanda genocide. I have also been involved in the establishment of the War Crimes Chamber of the Court of Bosnia and Herzegovina.

National courts and international criminal tribunals responsible for the trial of those who committed violations of international humanitarian and human rights law (during the Rwanda and Bosnia conflicts) have grappled with the complex problem of safeguarding the rights of defendants to fair trials. In war crimes trials, as in ordinary criminal cases, the defendant's right to a fair trial must be balanced against the rights of the victims. In the age of crimes of terrorism on a global scale, fair trial guarantees must be considered in the light of national security considerations as well.

Many of the evidentiary and security challenges that the U.S. legal system faces as it seeks to establish harmony between the requirements to ensure compliance with international fair trial norms and the exigencies of waging a war on terror have been the subject of war crimes litigation before other national courts as well as

international tribunals. I would like to discuss some issues that have confronted both the International Criminal Tribunal for Rwanda (the ICTR) and its sister tribunal, the International Criminal Tribunal for the Former Yugoslavia (the ICTY). Their experiences may be of particular relevance to efforts of the United States to craft appropriate mechanisms and procedures for ensuring both due process in trials of terror suspects and for dealing effectively with existing and future terrorists threats. The question which my testimony seeks to address is whether the experience of war crimes prosecutions over the last ten years or so has any lessons for America as to how it may seek to balance obligations to ensure compliance with fair trial guarantees, to protect witnesses, and to safeguard national security.

In the remainder of my testimony, I will address the following: the fair trial rights of defendants; the use of hearsay evidence and evidence obtained from foreign states; procedures developed to respect the national security concerns of cooperating states; and ways to protect victims and witnesses. The International Criminal Tribunals have addressed these issues in the quest to balance the rights and concerns of all parties to a trial.[3]

A. PROTECTING DEFENDANTS' RIGHTS TO FAIR TRIALS

The right to a fair trial is a fundamental norm of international human rights law. This right is enshrined in several human rights treaties which the United States has ratified, especially the International Covenant on Civil and Political Rights (ICCPR). The substance of the provisions of the ICCPR appears in the United Nations Universal Declaration of Human Rights, whose provisions are for the most part considered to be declarative of customary international law. The right to a fair trial is considered to begin not upon the formal lodging of the charge, but rather on the date on which state's activities substantially affect the situation of the person concerned. Fair trial guarantees must be observed from the moment the investigation against the suspect begins until the criminal proceedings, including the appeal, are concluded. Rights at trial include the right to equality before the

[3] This testimony will examine the experiences of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, as well as the Statute of the International Criminal Court and the views of various other courts, Conventions and relevant bodies. However, especially when referring to the two ad hoc tribunals, many of the articles and rules are exactly the same, the ICTR having adopted in whole measure the ICTY's Rules of Procedure and Evidence at the outset, and the two tribunals having made only minor amendments since. Additionally, appellate procedures for the two Tribunals, as well as any proceedings of the International Criminal Court, have as a source of precedent the decisions of both ad hoc courts, which leads to further similarity between the two. Where the rules of the two tribunals differ, the rule discussed applies only to the tribunal named.

law; the right to be tried by a competent, independent, and impartial tribunal established by law; the right to a fair hearing; the right to a public hearing; the presumption of innocence; the right not to be compelled to confess or testify; the exclusion of evidence elicited as a result of torture or other compulsion; the right to be tried without undue delay; the right to defend oneself in person or through counsel; the right to be present at trial and appeal; the right to call and examine witnesses; and the right to an interpreter and translation.

The challenges of dealing effectively with the threat of terror call for a need to re-assess the concept of the right to a fair trial. What evidence may be admitted in terror proceedings? Are there exceptions that might justify waiving the right to a public trial? Can the defendant be excluded from proceedings on grounds of national security or witness security concerns? These and many related issues need to be re-examined in the context of responding to threats of terror.

1. Right of an accused to be present

If the accused is not present at trial, such a trial may be referred to as a trial in absentia. There is no absolute prohibition on trials in absentia under international law. However, trials in absentia would compromise the ability of an accused person to exercise certain rights under the International Covenant on Civil and Political Rights, including the right to adequately prepare a defence, to communicate with counsel of choice and to examine witnesses.[4] As one legal commentator has noted, "One of the most important elements of due process in the realm of criminal procedure and procedural equality between the parties is the physical presence of the accused at trial."[5] Both the ICTY and ICTR statutes explicitly prohibit trials in absentia and declare, in identical terms, that the "accused shall be entitled... in full equality... to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing[.]"[6] Trials in absentia are likewise prohibited by the ICC statute, although the United Nations Human Rights Commission has opined that trials in absentia are

[4] Article 14.

[5] GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS: A COMPARATIVE STUDY (2003), at 175.

[6] Article 21(4)(d) ICTY Statute; Article 20(4)(d) ICTR Statute. *See also* ICCPR Article 14(3)(d) ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing[.]").

permissible in certain circumstances if the state makes "sufficient efforts with a view to informing the [accused] about the impending court proceedings, thus enabling him to prepare his defense."[7]

Subject to the possible exceptions relating to protection of national security, the right of an accused person to be present during his or her trial is a fundamental part of internationally recognized fair trial norms. The statutes of the both the ICTR and ICTY contain provisions, to be discussed at a later point, which address the issue of national security interests which might, if adopted in some modified form by the commissions, mitigate the need for excluding an accused, or at least his civilian counsel, from closed proceedings. However, we now turn to an examination of evidential rules which may or may not compromise the right of the defendant to know and understand the evidence presented against him.

2. Hearsay evidence

Common law legal systems have historically restricted or excluded hearsay evidence. Civil law systems have on the other hand been flexible in admitting hearsay evidence. The *ad hoc* United Nations criminal tribunals have similarly adopted a very open approach to what can be presented as evidence in court.

While neither the ICTY nor the ICTR statutes address the concept of hearsay evidence directly, it is well settled in ICTY case law that hearsay evidence is acceptable. A line of cases beginning with the *Prosecutor v. Tadic* have interpreted Rules 89(c) and 89(d) of the ICTY's Rules of Procedure and Evidence as indicative of how to evaluate hearsay evidence, noting that "any relevant evidence" may be admitted provided it has "probative value" and that such value not be "substantially outweighed by the need to ensure a fair trial."[8] The ICTY Appeals Chamber consequently identified three guiding criteria for the admission

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[7] *See Daniel Monguya Mbenge et al. v. Zaire* (16/1977) (March 25, 1983), Selected Decisions of the Human Rights Committee under the Optional Protocol, International Covenant on Civil and Political Rights, Volume 2, 17th to 32nd Sessions (October 1982-April 1988), at 78.

[8] *See Prosecutor v. Tadic*, Decision on the Defense Motion in Hearsay, 5 August 1996, para. 14 (considering that the tribunal is actually a fusion of civil and common law features and, as a result, hearsay evidence was not to be excluded beforehand) and para. 15 ("[I]n determining whether or not hearsay evidence… will be excluded, the Trial Chamber will determine whether the proffered evidence is relevant and has probative value... [It] may be guided, but not bound to, hearsay exceptions generally recognized by some national legal systems, as well as the truthfulness, voluntarism and trustworthiness of the evidence, as appropriate.").

of hearsay evidence, namely, that its reliability must be based on its voluntarism, its truthfulness, and its trustworthiness.[9] Moreover, the Tribunal has emphasized that ICTY judges are fit to assess the probative value and reliability of such evidence, and to decide how much weight to accord it.[10]

In an attempt to further clarify the Tribunal's hearsay jurisprudence, the ICTY later adopted Rule 92*bis*, which clearly states that written (though not oral) statements shall be admissible if they include a "declaration by the person making the written statement that the contents... are true and correct to the best of that person's knowledge and belief."[11] It also allows the admission of affidavits on matters that are cumulative in nature, consist of statistical analysis, concern the impact of a crime on its victims, and relate to the background of a conflict, the character of the accused, and sentencing issues.[12] As the ICTY and ICTR's Rules are institutionally linked, this amendment similarly applies to the ICTR as well. Even before the adoption of Rule 92*bis*, however, the ICTR had also upheld the admissibility of hearsay evidence. Like the ICTY, it held that while in principle hearsay evidence should not necessarily be excluded, it should nevertheless be handled cautiously and with due regard to the tests of relevance, probative value, and reliability.[13]

The Rules of Procedure and Evidence of the International Criminal Court, like those of the United Nations, are silent on the exclusion of hearsay or otherwise indirectly obtained evidence, although Article 69(4) adopts an admissibility test similar to that of the ICTY and ICTR, i.e., the ICC may rule on the relevance or

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[9] *See Prosecutor v. Aleksovski*, Appeals Chamber Decision on Admissibility of Evidence, 16 February 1999, paras. 15-19. The Chamber also provided these additional guidelines to determine the probative value of hearsay evidence: (4) the "content, context and character of the evidence as well as the circumstances under with the evidence arose;" (5) the absence of opportunity for cross-examination does not necessarily undermine the probative value of a hearsay statement, "albeit that it can affect its evidentiary weight;" and (6) "the adverse party bears the burden of proof that admission of hearsay is prejudicial to the right to a fair trial."

[10] *See Prosecutor v. Blaskic*, Decision on Standing Objection of the Defense to the Admission of Hearsay with No Inquiry as to its Reliability, 21 January 1998, paras. 13-14 (emphasizing that due to the professionalism and training of ICTY judges they are "perfectly fit" to assess the probative value of hearsay evidence).

[11] ICTY RPE, Art. 92*bis*.

[12] *See* ICTY RPE, 92*bis* (A)(i)(a)-(f).

[13] *See e.g., Prosecutor v. Akayesu*, Case No. ICTR-96-4-T-2, 2 September 1998. See also *Prosecutor v. Musema*, Judgment and Sentence, 27 January 2000, para. 51 (adopting the ICTY's position in *Blaskic*, wherein hearsay would not be excluded beforehand but heard and then assessed for its probative value).

admissibility of any evidence as long as takes into account its probative value and any prejudice that it may cause to a fair trial or fair assessment of the testimony.[14]

In light of this, the pre-*Hamdan* military commission's rules standards for hearsay evidence are not inconsistent with the standards of international criminal law. In any event, the issue as to whether or not hearsay evidence should be admitted in trials of terrorist suspects can not be determined in isolation from the context of the threat of terrorism. Whereas international criminal tribunals have dealt and are still dealing with vanquished war criminals, trials of terrorist suspects will involve defendants supported by active and powerful networks capable of endangering witnesses or threatening entire communities. There would few eye witnesses or insiders of terror networks willing to testify, first because conspiracy cells are compartmentalized and second, because witnesses fear revenge.[15]

3. Admissibility of Evidence obtained from foreign state entities.

Most terror suspects will be apprehended by agencies of foreign states. Therefore, the first contact of most terror suspects with law enforcement or public security agencies before their extradition or rendition to the US will be these foreign entities. The agencies in question will often have carried out interrogations of suspects before delivering the suspects along with the evidence. At least some of the evidence will have been gathered by military or intelligence rather than by police or prosecutorial agencies. Part of the evidence will often not have been voluntary. It will be necessary for judicial authorities to be on guard to ensure that the evidence, especially confessions or admissions of guilt, which will come into the possession of prosecutors and investigators will not be tainted by torture or coercion.

However, the determination of whether or not confessions or other information has been obtained by torture may be difficult to make without delving into a shadowy, often classified set of military and security operations, either by the United States or by another State. When examining evidence, submitting it for the record at trial, and seeking to defend against such evidence, the national security concerns of the states carrying out these activities may come into conflict of the accused's right to defend himself. Therefore, it is necessary to examine the rules which have been

[14] Rome Statute, Art. 69(3) ("the presented evidence must be relevant and necessary for the determination of the truth") and Art. 69(4) (stating that the ICC may rule on the relevance or admissibility of any evidence as long as it takes in account its "probative value" and "any prejudice that it may cause to a fair trial or fair assessment of the testimony.").
[15] Ruth Wegwood, The Case for Military Tribunals, Op-Ed, Wall Street Journal (December 3, 2001).

developed on the handling of information which is classified or which the public revelation of might compromise the national security of a state.

B. NATIONAL SECURITY CONCERNS

The rules of both the ICTR and the ICTY recognize the legitimacy of national security concerns of states assisting the two tribunals. It was understood and was provided for in the tribunals' rules of procedure and evidence that the sensitive nature of some of the assistance provided by states to the tribunals might preclude the conduct of public proceedings and or require restrictions on the submission of certain types of evidence. Rule 54(F) of the ICTY and ICTR's Rules of Evidence and Procedure ("RPE") were specifically constructed to address national security concerns of this nature. According to the rule, a state having concerns over the national security impact of a public hearing shall "file a notice of its objection not less than five days before the date of the hearing" and may request *in camera* or *ex parte* proceedings, or the use of documents submitted in redacted form accompanied by an affidavit signed by a senior official explaining the reasons for the document's restrictions.[16]

Additionally, the subpoena of witnesses whose appearance or testimony at court could endanger national security was addressed by the ICTY in the *Blaskic* case, in which a French military officer's appearance at the Tribunal was judged by France to raise national security concerns.[17] The Chamber concluded that, subject to certain conditions, the officer was able to testify without compromising "the necessary bounds of confidentiality." These conditions included a limitation of the scope of questions asked by the Prosecutor and the Defense, the witnesses' ability to state that requested information is wholly or in part confidential, the authorization of representatives of the French government to be present in the courtroom and to address the Trial Chambers, if necessary outside the presence of the Witness and/or parties, and "to present any reasoned request which they believe necessary for the protection of the higher interests they have been assigned to protect[.]"

Not every piece of information is subject to disclosure or exclusion based on national security. According to Rule 70(B) of both Tribunals on the production of evidence,

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[16] ICTY Rules of Procedure and Evidence [hereafter "RPE"], Rule 54(F).

[17] *Prosecutor v. Blaskic*, Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber, 12 May 1999.

> If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

Rule 70(D) continues:

> If the Prosecutor calls as a witness the person providing, or a representative of the entity providing, information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.

Thus, taking Rule 54(F), Rule 70 and the *Blaskic* precedent together, a government having national security concerns about the use of evidence or the testimony of witnesses may file an objection in advance of a hearing, explain their objections outside the presence of the witness and/or parties, and request that information either not be presented or be presented in redacted form. The Prosecution is not required to present the source of confidential information that is used solely to generate new evidence, and witnesses may not be compelled to respond to questions whose answers are confidential.

In order to determine whether the rules on non-disclosure and confidentiality are to be applied, the Prosecutor may make use of Rule 66(C) of the tribunals' statutes:

> Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-rule (A) and (B). When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential.

Thus, although confidential information may be kept from the parties, a presentation of the classified material as well as arguments why it should not be disclosed must be made to the trial judges. It is the judges who are responsible for determining if a Prosecutor's request for non-disclosure is valid, but that determination may be made on the basis of national security concerns, the public interest, or any further or ongoing investigations. Additionally, parties to proceedings at the ICTY and ICTR may request transcripts of closed proceedings in other trials, which, upon permission by the Trial Chamber, may be redacted to preserve their confidential nature. It is assumed that grounds for confidentiality protections have already been met through the use of closed chambers for the original testimony.

If rules of procedure of international criminal courts permit states which have assisted them to seek orders for the non-disclosure of information which might jeopardize their national interest, the availability of such remedies (the use of summaries and redactions of classified information, *in camera* proceedings and *ex parte* proceedings, etc.) in proceedings in U.S. courts trying suspected terror suspects would not by analogy violate international standards of fair trial.

C. WITNESS PROTECTION

International tribunals must respect the national security concerns of cooperating states, but they must also take note of the safety and security of those individuals who cooperate with and testify before them. The dangers which persons accused of very grave offences and their networks pose to witnesses should never be underestimated. In my experience with the Rwanda Tribunal, it has often been the case that the network of persons supporting defendants have used information obtained through the disclosure process to threaten witnesses even before the trial.[18] Serious threats to the security of witnesses call for considerations of questions such as the following: Can the identity of the witnesses be kept anonymous? Could their physical presence be dispensed with? Can the court impose restrictions on disclosure of some of the evidence to the accused? Could a witness dispense with a personal appearance and participate in the proceedings by swearing depositions or affidavits?

Both the ICTY and ICTR have had to grapple with the problem of protection of witnesses. The two tribunals have in practice been willing to place restrictions on

[18] Kajelijeli Case.

the right to disclosure. To limit the disclosure of information about protected witnesses to only what is necessary for the trial, a number of regulations exist on the disclosure of witness identity. Rule 69 regarding the protection of victims and witnesses allows the Trial Chamber, upon request by the Prosecutor, to order non-disclosure of the identity of a witness who may be in danger or at risk, although their identity must be disclosed to both the prosecution and the defense "in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence."[19] That time period has at the ICTR been around 21 days. At the ICTR, at least one case has been determined to be not less than 30 days before the trial date.[20] Additionally, the types of information which constitute a witness' "identity", such as name or age, do not include the witness' current address, making safety concerns a continuing priority.[21]

Civil law systems have a long history of using depositions and affidavit evidence in criminal proceedings. Whereas criminal courts in the United States, for example, grant both the defendant and the prosecution the right to compel witnesses to appear at trial,[22] "[i]n most instances, the evidence of witnesses [in civil law systems] will be accepted in written form, with no need for live testimony."[23]

The Rules of Procedure and Evidence for the ICTY and ICTR permit the taking of depositions by witnesses who do not physically appear before the tribunals.[24] Trial chambers may order the taking of such depositions at their own initiative or at the request of either party, when "the interests of justice" so dictate. Cross-examination by the opposing party is permitted, however, during the taking of the deposition. Depositions may be taken either at or away from the seat of the tribunals, and may also be given by means of video-conference technology.[25]

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[19] ICTR RPE, Rule 69(C).

[20] *Prosecutor v. Tadic*, Decision on the Prosecutor's motion Requesting Protective Measures for Witness L, 14 November 1995, para. 21.

[21] *Prosecutor v. Delalic*, Decision on the Defense Motion to compel the Discovery of Identity and Location of Witnesses, 18 March 1997.

[22] *See also* J.R. Spencer, *The English System, in* EUROPEAN CRIMINAL PROCEDURES 142, 162 (Mireille Delmas-Marty and J.R. Spencer eds., 2005) (noting that a "person's oral testimony may not be replaced by another person repeating to the court what the first person told him, or even by some other form of communication that comes directly from the original sources, such a written statement or an interview with him that has been tape-recorded.").

[23] JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE (2005), at 32.

[24] *See* ICTY RPE Rule 71; ICTR RPE Rule 90.

[25] ICTY RPE Rule 71*bis*. Rule 44 of the Iraqi High Criminal Court's Rules of Evidence and Procedure similarly states, in part, that "at the request of either party a Trial Chamber may, and in the interest of justice, order that a deposition be taken outside the court. The Trial Chamber

The use of depositions and affidavits at trial is both consistent with international fair trial standards and may be an effective substitute for the actual appearance of witnesses. This is of particular concern for military commanders and interrogators whose testimony may be required but whose duties require their presence in the field. Likewise, local witnesses may have legitimate fears of testifying in person and be disinclined to appear in person.

Witnesses may even qualify for anonymity. In order to qualify for such protection, witnesses must satisfy five conditions: There must be real fear for the safety of the witness or her or his family; the testimony of the particular witness must be important to the prosecutor's case; the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy; the ineffectiveness or non-existence of a witness protection programme is another point that has considerable bearing on any decision to grant anonymity; measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied.[26]

The protection of witness identity is for the safety of the witness himself, rather than for wider security or public order concerns, and the accused still has the right to know and confront his accuser during trial proceedings, albeit through use of video-conferencing or other distortive techniques.

The witness protection mechanisms of the international criminal tribunals have by and large been effective in ensuring the security of witnesses. The nature of threats to witnesses in war crimes prosecutions differs, however, from the threats posed to witnesses in cases of terror violence. International criminal tribunals conduct trials of vanquished war criminals whereas trials of persons suspected of terror violence involve organized networks able and eager to use violent means to pursue their goals. My opinion is that the approach which international criminal tribunals have taken in dealing with witness protection issues during war crimes trials would not be entirely appropriate to dealing with the dangers facing witnesses in terrorism trials in general.

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shall delegate one of its judges or an investigative judge to preside over the writing of the deposition, and organize a record for it."

[26] *Prosecutor v. Blaskic.* Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, 5 November 1996.

CONCLUSION

The right to a fair trial is a fundamental human right. It has been effectively safeguarded by international tribunals during their war crimes proceedings. However, war crimes prosecutions differ from trials of suspected perpetrators of terrorist violence in the sense that the war of terror remains ongoing and its architects retain the capacity both to take revenge against witnesses and to threaten the security of states. The obvious and potentially catastrophic risks which terrorism poses both to national security in general and to witnesses in cases of terrorism in particular call for consideration of new approaches to the question of how to ensure fair trial.

The experiences of international criminal tribunals and jurisprudence from civil law systems which have conducted war crimes trials have lessons to offer as to how the conflicting requirements to ensure compliance with international human rights norms relating to the right to fair trials while protecting witnesses and ensuring national security could be harmonized.

Given the state of affairs, my recommendations are:

1. The exclusion of defendants from proceedings violates the right to a fair trial and is highly undesireable;
2. Hearsay evidence of probative value should continue to be admissible, subject to appropriate safeguards to ensure that it has not been obtained through torture or coercion;
3. The possibility of utilizing depositions and affidavit evidence should be explored;
4. Consideration should be given to making greater use of appropriate mechanisms for protection of witnesses such as *in camera* proceedings[27]and anonymous witnesses;[28]
5. The scope of current rules relating to disclosure could be reviewed to minimize the risks posed to the witnesses or national security while providing defendants with enough information to answer the charges against them;
6. Procedural rules ought to be developed to discourage or minimize defendants' attempts to politicize proceedings or to abuse the criminal justice process in general.

[27] Article 22, ICTR statute.
[28] Tadic and Blasckic cases, Rule 75, ICTY statute.

Again Mr. Chairman, thank you for calling this hearing today and for giving me the opportunity to speak on this important issue.

The views reflect those of the author and not those of the U.S. Institute of Peace, which does not take policy positions.

House Armed Services Committee
Hearing on Standards of Military Commissions and Tribunals
July 26, 2006

PREPARED STATEMENT OF MICHAEL P. SCHARF

Professor of Law and Director
Frederick K. Cox International Law Center
Case Western Reserve University School of Law

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Prepared Statement of Michael P. Scharf
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I. Introduction

Mr. Chairman, members of the Committee. I am Michael Scharf, Professor of Law and Director of the International Law Center at Case Western Reserve University School of Law. I have been asked to testify today as an expert on the Nuremberg and Tokyo Tribunals and the modern international criminal tribunals. During the first Bush and Clinton Administrations, I served as the Attorney Adviser in the Office of the Legal Adviser of the U.S. Department of State with responsibility for issues relating to war crimes prosecutions, and I helped draft the Statute and Rules of Procedure of the International Criminal Tribunal for the Former Yugoslavia – the first international war crimes tribunal since Nuremberg. I am the author of seven books about international criminal tribunals, including two that have won national book awards. I have trained the judges of the Yugoslavia Tribunal, Rwanda Tribunal, and most recently the Iraqi High Tribunal, and the War Crimes Research Office at Case which I supervise currently provides research assistance to five international war crimes tribunals.[1] A full biography is attached.

Mr. Chairman, thank you for the opportunity to address the Committee on the international standards of due process that are required for the Military Commissions under international law.

II. Hamdan v. Rumsfeld

Last month, in *Hamdan v. Rumsfeld*, the Supreme Court ruled that Article 21 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. Section 821, had conditioned the President's use of military commissions on compliance with the "rules and precepts of the law of nations," including in particular Common Article 3 of the Geneva Conventions of 1949, and other provisions recognized by the United States as customary international law such as Article 75 of Protocol I to the Geneva Conventions.

[1] Case School of Law is also the only law school in the country advising the Prosecutor for the Office of Military Commissions. This program is run by my colleagues, Professors Amos N. Guiora and Gregory S. McNeal.

The Supreme Court held that the Military Commissions violated the required international rules of due process by:

- Authorizing the exclusion of the defendant from his own trial (whenever the government invokes "national security concerns" whether the particular evidence is actually classified or not).
- Permitting the admission of unreliable evidence (such as hearsay and evidence gained through coercion).
- Permitting witnesses to testify without disclosing their identities to the defendant (in order to protect intelligence sources and methods).
- Establishing review procedures that do not amount to an appeal to an independent higher court.

The Supreme Court found it significant that these violations were also departures from the procedures employed in U.S. courts-martial, and that the Executive Branch had made no effort to specify why adherence to the courts-martial procedures "was not practicable" for trial of suspected al Qaeda terrorists, as required by Article 36 of the UCMJ.

III. International War Crimes Tribunal Precedent

The Right to be Present and to Appeal to a Higher Independent Court

In his recent testimony before the Senate Judiciary Committee on July 11, the Deputy General Counsel of the Department of Defense, Paul Cobb, drew on the precedent of the Nuremberg and Tokyo Tribunals and the modern International Criminal Tribunals for the former Yugoslavia and Rwanda to argue that international law actually permits trials *in absentia*, use of hearsay evidence, use of anonymous witnesses, and other deviations from what is required in a United States Court-Martial proceeding.

It is true, for example, that the Nuremberg Tribunal tried Hitler's secretary, Martin Bormann *in absentia* (it was later discovered that he had actually been dead at the time of the trial). It is also true that the Nuremberg Tribunal admitted into evidence 300,000 unsworn affidavits. And it is true that the Nuremberg Tribunal granted no right of appeal, nor a right to challenge any of the judges.

But international law has not accepted those practices. Rather, the legacy of the Nuremberg Tribunal was tarnished by such procedural shortcomings. Thus, following Nuremberg, U.S. Supreme Court Justice William O. Douglass remarked "I thought at the time and still think that the Nuremberg Trials were unprincipled," and Chief Justice Harlan Fiske Stone characterized the Nuremberg trial as a "high-grade lynching party." Even Nuremberg's Deputy Prosecutor, Telford Taylor, acknowledged that "total reliance on untested depositions by unseen witnesses is certainly not the most reliable road to

factual accuracy." And Nuremberg's sister Tribunal, the Tokyo Tribunal, received even harsher criticism, with one of the Tokyo Tribunal's own judges, Judge Henri Bernard of France, opining that "so many principles of justice were violated during the trial that the Court's judgment certainly would be nullified on legal grounds in most civilized countries."

In the years following the Nuremberg and Tokyo trials, the international community took action to address the procedural deficiencies of the world's first international war crimes tribunals. The 1949 Geneva Conventions provided for the first time a list of minimum required due process guarantees for any international or domestic war crimes proceedings. This list of due process safeguards was expanded in Article 75 of Additional Protocol I to the Geneva Conventions, which the Supreme Court in *Hamdan v. Rumsfeld* noted constituted customary international law. These due process guarantees were further elaborated upon in the Statutes and Rules of the International Criminal Tribunal for the Former Yugoslavia (1993), the International Criminal Tribunal for Rwanda (1994), and the International Criminal Court (1998), and the International Tribunals have repeatedly held that these due process rights are required of all war crimes prosecutions under international law.

Each of the modern war crimes tribunals provide the following due process protections: the presumption of innocence; the right to be informed promptly and in detail of the charges and to have adequate time and facilities to prepare a defense and to communicate freely with counsel of choice; the right to be tried without undue delay; the right to be present during trial and to appointment of counsel; the right to have counsel present during questioning; the right to examine and confront witnesses; the right against self-incrimination and not to have silence taken into account in determining guilt; and the right to disclosure by the Prosecution of exculpatory evidence, and witness statements; and the right to appeal. It is noteworthy that even the Statute of the Iraqi High Tribunal, which was promulgated by U.S. Administrator Paul Bremer in 2003, includes these minimum due process rights.

Thus, recourse to the Nuremberg and Tokyo experience cannot today be used to justify departure from these rights. Rather, any legislation on military commissions needs to reflect the practice of international humanitarian law as it has evolved over the last sixty years, not as it existed at the time of Nuremberg and Tokyo. The law has evolved and there is no doubt that we are bound by it.

Consistent with these internationally recognized fundamental due process guarantees, there should be a right of appeal from the Military Commissions to the Court of Appeals for the Armed Forces, as in the case of courts-martial judgments under the UCMJ. Moreover, the defendant and his civilian counsel should be permitted to be present for all proceedings before the Commission, consistent with the internationally recognized right to be present at one's trial. In the event that classified information must be considered, as Senator Specter has proposed, the Military Commission should employ a process similar to the Classified Information Procedures Act, which authorizes a presiding judge to sift through the information and make available to the defense only

whatever is directly relevant and exculpatory, with the option of providing redacted summaries or making stipulations of fact to protect sensitive intelligence sources and methods. See Cong. Rec., June 29, 2006, S6796-S6801 (Statement of Senator Specter).

Use of Anonymous Witnesses

Previous expert witnesses have brought to this Committee's attention the fact that the Yugoslavia Tribunal has permitted use of "anonymous witnesses," whose identity was withheld from the defendant. This precedent, they assert, supports a similar practice within the Military Commissions. It is true that in its very first case, the Yugoslavia Tribunal permitted the testimony of an "anonymous witness" (known only as witness "K") whose identity was withheld from the defendant in order to protect the witness and his family from retaliation. See *Prosecutor v. Tadic*, No. IT-94-I-T (Aug. 10, 1995) (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses). But this case is no longer good law.

At the time of the *Tadic* decision, one of the three judges (Judge Stephens from Australia) filed a strong dissent, stating that the Yugoslavia Tribunal Statute "does not authorize anonymity of witnesses where this would in a real sense affect the rights of the accused." Shortly thereafter in the *American Journal of International Law*, former Department of State Legal Adviser Monroe Leigh argued that the majority of the Trial Chamber struck the wrong balance between the protection of the witnesses and the rights of the accused. The right to examine or cross-examine witnesses guaranteed by the Yugoslavia Tribunal Statute, Leigh argued, cannot be effective without the right to know the identity of adverse witnesses. Leigh concluded that "it is a radical proposition to suggest that the minimum rights of the accused to a fair trial can be diminished in order to protect witnesses and victims," a point also made in Judge Stephen's dissent in *Tadic*. See Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 Am. J. Int'l L. 235 (1996). See also Monroe Leigh, *Witness Anonymity is Inconsistent with Due Process*, 91 Am. J. Int'l L. 80 (1997).

Subsequently, the Yugoslavia Tribunal rescinded the grant of anonymity for witness "K," and the Tribunal has never since granted such a measure. In a later case, the Tribunal made clear that witness anonymity was only appropriate during the pre-trial phase, and that in any event a witness's identity must be disclosed to the Defendant a reasonable time before testifying, although the witness's identity may continue to be protected from the media and public. *Prosecutor v. Blaskic*, Decision on the Application of the Prosecutor requesting protective measures for victims and witnesses, 5 November 1996, at paras. 22-23. Thus, the Yugoslavia Tribunal precedent does not in fact support the use of anonymous witnesses in the Military Commission. Rather, the Yugoslavia Tribunal's experience reaffirms that the international right of confrontation requires that the defendant know the identity of his accuser.

Hearsay Evidence

Like the Military Commissions, the Rules of Procedure of the Yugoslavia Tribunal and Rwanda Tribunal allow the Trial Chamber to hear any evidence deemed to have probative value, including hearsay evidence. However, before admitting hearsay evidence, the International Tribunals require that a Trial Chamber must assess its "indicia of reliability." *Kordic and Cerkez*, Appeals Chamber Decision on Appeal Regarding Statements of a Deceased Witness, 21 July 2000, at para 24.

The American hearsay rule generally prohibits a court from using a person's assertion as equivalent to testimony of the fact asserted, unless the asserter is brought to testify in court where he may be probed and cross-examined as to the grounds of his assertion, his sincerity, and his credibility. The American rule against hearsay is not, however, absolute. The Federal Rules of Evidence contain various exceptions to the rule against hearsay, including a residual exception recognized for situations in which there are circumstantial guarantees of trustworthiness, if the court determines that: (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. Fed. R. Evid. 804(b)(5).

The American hearsay rule reflects the view that hearsay is inherently less reliable than direct testimony in several respects. First, a hearsay declarant has not made a solemn oath or declaration before a judicial authority. In contrast, if he were to testify to matters under oath before the Tribunal, he would be more aware of the solemn nature of the proceedings, the importance of testifying truthfully and accurately, and the possible legal consequences of the failure to testify or to do so truthfully. Second, a hearsay declarant is not subject to face-to-face confrontation through cross-examination, which is fundamental to establish the reliability of the statement. As the U.S. Supreme Court has stated, "face-to-face confrontation generally serves to enhance the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person." *Maryland v. Craig*, 497 U.S. 836, 846 (1990). Third, if the person in the courtroom has either misheard or misremembered the hearsay statements he quotes, this would be almost impossible to establish through cross examination. Finally, the judges can only fully assess the credibility and veracity of these statements by observing the demeanor of the actual declarant while testifying.

While recognizing the inherent unreliability of hearsay testimony, the Yugoslavia and Rwanda Tribunal judges have pointed out that as professional judges, as opposed to lay jurors, they are capable of assessing the appropriate weight and credibility of such statements. Fundamentally, the reason behind the common law's relatively inflexible approach to hearsay evidence has been to ensure that lay jurors would not be unduly influenced by evidence that judges themselves knew, from experience, to be frail and

unreliable. It is significant that the International Tribunal judges have been careful to segregate hearsay from direct testimony in preparing their judgments. According to the caselaw of the Tribunals, hearsay evidence is to be considered "with caution." In the recent *Samanza case*, the Rwanda Tribunal specified in its judgment which evidence had been hearsay and explained that such evidence had to be substantially discounted. *Prosecutor v. Laurent Semanza*, ICTR-97-20-T (May 15, 2003).

In contrast to the International Tribunals, the Military Commissions are made up of military officers who are not usually legally trained, let alone judges with a lifetime of judicial experience under their belts. Thus, the international tribunal practice of accepting hearsay evidence without restriction may not in fact be appropriate for the Military Commissions. At a minimum, the Military Commissions should be required to assess the "indicia of reliability" before admitting hearsay, and should consider hearsay evidence "with caution," consistent with the caselaw of the International Tribunals.

Torture Evidence

Reports by government officials and in the press include reports of Guantanamo detainees being subject to "water boarding" (simulated drowning), tied to a leash and led around like dogs, stripped naked, held in isolation for months on end and subjected to consecutive days of 20-hour interrogations, subjected to sleep deprivation, being chained hand and foot to the floor for eighteen hours or more without food or water, and being subjected to temperatures below freezing or well over one hundred degrees, having their genitals squeezed and thumbs bent back by interrogators, and being kept for months on end in isolation in a cell that was always flooded with light. See Neil A. Lewis, *FBI Memos Criticized Practices at Guantanamo*, December 7, 2004, at A19.

Until the issuance of Military Commission Instruction No. 10 on March 27, 2006, on the eve of oral arguments in the Supreme Court in *Hamdan v. Rumsfeld*, the rules of the Military Commissions authorized admission of evidence even if it had been obtained through the most severe abuses constituting torture. While Military Commission Instruction No. 10 explicitly prohibited the Commission from admitting "statements established to have been made as a result of torture," the rule did not bar use of evidence obtained through other forms of unlawful coercion, including cruel, inhuman or degrading treatment. In his recent testimony before the Senate Judiciary Committee, Steven Bradburry, acting Assistant Attorney General and head of the DOJ Office of Legal Counsel, argued that it was necessary to use evidence extracted using a variety of coercive techniques, including water boarding, which have been condemned by the European Court of Human Rights, the International Committee on Human Rights, and UN Human Rights Commission. See *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260; *Aydin v. Turkey; 1997-V Eur. Ct. H.R. 1866; Selmouni v. France 1999-V Eur. Ct. H.R. 155; Selmouni v. France 1999-V Eur. Ct. H.R. 155, 183;* Robert Goldman, *Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law* Against Torture," 12 HUM. RTS. BR. 1 (2004) (and cases cited therein).

The prohibition against the use of evidence obtained by torture or other forms of unlawful coercion is one of the "judicial guarantees which are recognized as indispensable by civilized people" for purposes of Common Article 3(1)(d) of the Geneva Conventions. Thus, the Rules of Procedure of the Yugoslavia and Rwanda Tribunal each provide that "no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." ICTY Rule 95; ICTR Rule 95. The Rule, which was proposed by the United States, makes clear that the Tribunal must refuse to admit evidence – no matter how probative – if it was obtained by improper methods. Since the Tribunals do not utilize a pre-trial proceeding to determine admissibility of evidence, this rule is enforced not by keeping the fact finders from viewing such evidence, but rather by prohibiting reference to the inadmissible evidence in the written opinion of the Tribunal.

Even the Iraqi High Tribunal has a provision excluding use of evidence obtained through torture or other forms of unlawful coercion. Rule 59, IHT Revised Rules of Procedure (adopted October 19, 2005), available at www.law.case.edu/saddamtrial.

A clear statement by Congress rejecting the use of such evidence by Military Commissions (similar to Article 31(d) of the UCMJ) would have two important benefits. First, it would protect against the dangers of unfair trials, and would remove a stain clouding the legitimacy of these important trials in the eyes of the world. Second, it would serve an important prophylactic function in deterring practices that are abhorrent to international law.

IV. The Later in Time Rule

I understand that some in this room may favor the idea of responding to *Hamdan* by enacting legislation that would simply give Congressional authorization to the President's existing Military Commission system without changing a thing. It is true that for purposes of domestic law, Congress can override the requirements of the 1949 Geneva Conventions if it enacts a later-in-time statute that manifests a clear intent to violate the provisions of these venerable international humanitarian law treaties, to which the United States is a ratifying party. See *Breard v. Greene*, 523 U.S. 371 (1998). However, Congress has always been extremely reluctant to use this power, as it renders the United States in breach of its international obligations with often serious international legal and diplomatic consequences.

Do we really want to be the only country in the world to go on record as abrogating the Geneva Conventions?

Since the United States military is more forward-deployed than all other nations combined, strict adherence to the Geneva Conventions is more important to us than any other nation. Since the United States is a world leader, our practice is followed by other nations. If we try detainees in violation of internationally-required fair trial procedures, we increase the risk that our own troops and those of our allies (such as Israel) will be

subject to similar mistreatment at the hands of others. And if by approving departure from the requirements of the Geneva Conventions, Congress is perceived as expressing disdain for some of the most important treaties of the international system, it will seriously complicate our diplomatic efforts to solve the Lebanon crisis, to eventually withdraw from Iraq, and to maintain support for our efforts to suppress terrorism worldwide.

Some believe that increasing the standards of due process and admissibility of evidence for the Military Commissions would prevent the government from getting convictions. Thus, the Deputy General Counsel of DOD, Paul Cobb, told the Senate on July 11, 2006: "The evidence that the government has available to it in the war with al Qaeda is not always going to have the indicia of reliability that we would expect in our domestic criminal court proceedings." The international tribunal due process rules that I have discussed today do not rise to the level of the protections afforded in a domestic criminal court proceeding. They do, however, provide enough protections to remedy the deficiencies in the existing Military Commissions. The internationally required standards may make it somewhat harder to obtain convictions in some of these cases. But in the broader scheme of things, we lose far more than a few trials when we insist on departing from the due process rights required by the Geneva Conventions and international law.

V. Conclusion

Perhaps no single issue better defines who we are as a nation then our treatment of detainees. I fully understand, based on my professional background, the enormous complexity of counter-terrorism policy, and deeply respect those bravely fighting terrorism world-wide. But denial of internationally recognized fundamental due process rights to detainees violates the core principles on which our great nation was founded, and in the long run will endanger American troops who have so bravely chosen to defend those sacred principles.

DOCUMENTS SUBMITTED FOR THE RECORD

JULY 26, 2006

Memorandum July 25, 2006

TO: House Armed Services Committee
Attention: Lorry Fenner

FROM: Jennifer K. Elsea
Legislative Attorney
American Law Division

SUBJECT: Comparison of Procedural Rules in Criminal Proceedings

The attached document, a chart entitled "Comparison of Selected Procedural Rights in Criminal Tribunals," is provided in response to your request for a new version of the chart from CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*. In addition to columns comparing the rules for courts-martial and for military commissions as presently established by the Department of Defense Military Commission Order No. 1, the chart provides information regarding the procedural rules in selected international tribunals. These include the International Military Tribunal (IMT) established by the Allies to try European Axis war crimes after World War II, as well as the more recent "ad hoc" tribunals established by the United Nations Security Council to try war crimes that occurred during the conflicts in the former Yugoslavia and Rwanda.

The following sources and abbreviations are used:

M.C.M.: Manual for Courts-Martial, 2002 ed.
R.C.M.: Rules for Courts-for Courts-Martial, M.C.M. Part II.
Mil. R. Evid.: Military Rules of Evidence, M.C.M. Part III.
M.C.O. No. 1: Department of Defense Military Commission Order Number 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (August 31, 2005), available online at [http://www.defenselink.mil/news/Sep2005/d20050902order.pdf].
M.C.I.: Military Commission Instruction, issued by the Department of Defense General Counsel, available online at [http://www.defenselink.mil/news/Aug2004/commissions_instructions.html].
IMT: International Military Tribunal (Nuremberg), created pursuant to the London Agreement of August 8, 1945. The agreement, as well as the tribunal's constitution ("IMT Charter") and rules of procedure are available online at the Avalon Project at Yale University, [http://www.yale.edu/lawweb/avalon/imt/proc/v1menu.htm]. The Opinion and

Judgment of the IMT is available at [http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm].
ICTY: International Criminal Tribunal for the former Yugoslavia, created by UN Security Council Resolution 827 (May 25,1993). Its statute (ICTY Stat.) and procedural rules (ICTY Rule) are available at [http://www.un.org/icty/legaldoc-e/index.htm].
ICTR: International Criminal Tribunal for Rwanda, created by UN Security Council Resolution 955 (Nov. 8,1994). Its statute (ICTR Stat.) and procedural rules (ICTR Rule) are available at [http://69.94.11.53/default.htm].

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Comparison of Selected Procedural Rights in Criminal Tribunals

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Presumption of Innocence	If the defendant fails to enter a proper plea, a plea of not guilty will be entered. R.C.M. 910(b). Members of court martial must be instructed that the "accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond a reasonable doubt." R.C.M. 920(e). The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restraint shall not be imposed unless prescribed by the military judge. R.C.M. 804.	The accused shall be presumed innocent until proven guilty. § 5(B). Commission members must base their vote for a finding of guilty on evidence admitted at trial. §§ 5(C); 6(F). The Commission must determine the voluntary and informed nature of any plea agreement submitted by the accused and approved by the Appointing Authority before admitting it as stipulation into evidence. § 6(B).	No written rule addressing presumption of innocence, although U.S. negotiators were able to win a concession from Soviet negotiators to the effect that the rule would apply. *See* Henry T. King, Jr., Robert *Jackson's Transcendent Influence Over Today's World*, 68 ALB. L. REV. 23, 25 (2006).	"The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute." ICTY Stat. art. 21(3); ICTR Stat. art. 20. If the accused fails to enter a plea, the court must enter a plea of not guilty on the accused's behalf. ICTY Rule 62(a)(iv); ICTR Rule 62(a)(iii). Instruments of restraint may not be used during court proceedings. ICTY Rule 83; ICTR Rule 83. Guilty pleas may be accepted only if the trial chamber determines it is voluntary, informed, unequivocal, and supported by evidence. ICTY Rule 63 *bis*; ICTR Rule 62(B).
Right to Remain Silent	Coerced confessions or confessions made in custody without statutory equivalent of *Miranda* warning are not admissible as evidence. Art. 31, UCMJ, 10 U.S.C. § 831. The prosecutor must notify the defense of any incriminating statements made by the accused	Not provided. Neither the M.O. nor M.C.O. requires a warning or bars the use of statements made during military interrogation, or any coerced statement, from military commission proceedings. Art. 31(a), UCMJ (10 U.S.C. § 831) bars persons subject to it from compelling any individual	No right to remain silent.	A suspect to be questioned by the prosecutor during an investigation must be informed of his right to remain silent. ICTY Rule 42; ICTR Rule 42. Persons are to be informed of the right to remain silent upon their arrest. ICTY Rule 55; ICTR Rule 55. "No evidence shall be admissible

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	that are relevant to the case prior to the arraignment. Motions to suppress such statements must be made prior to pleading. Mil. R. Evid. 304. Interrogations conducted by foreign officials do not require warnings or presence of counsel unless the interrogation is instigated or conducted by U.S. military personnel. Mil. R. Evid. 305.	to make a confession, but there does not appear to be a remedy in case of violation. No person subject to the UCMJ may compel any person to give evidence before any military tribunal if the evidence is not material to the issue and may tend to degrade him. 10 U.S.C. § 831.		if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." ICTY Rule 95; ICTR Rule 95.
Freedom from Unreasonable Searches & Seizures	"Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused ..." unless certain exceptions apply. Mil. R. Evid. 311. "Authorization to search" may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the law of war. It must be based on probable cause. Mil. R. Evid. 315. Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 *et seq.* Mil. R. Evid. 317.	Not provided; no exclusionary rule appears to be available. However, monitored conversations between the detainee and defense counsel may not be communicated to persons involved in prosecuting the accused or used at trial. M.C.O. No. 3. No provisions for determining probable cause or issuance of search warrants are included. Insofar as searches and seizures take place outside of the United States against non-U.S. persons, the Fourth Amendment may not apply. United States v. Verdugo Urquidez, 494 U.S. 259 (1990).	Not provided.	"No evidence shall be admissible if ... its admission is antithetical to, and would seriously damage, the integrity of the proceedings." ICTY Rule 95; ICTR Rule 95.

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	A search conducted by foreign officials is unlawful only if the accused is subject to "gross and brutal treatment." Mil. R. Evid. 311(c).			
Assistance of Effective Counsel	The defendant has a right to military counsel at government expense. The defendant may choose counsel, if that attorney is reasonably available, and may hire a civilian attorney in addition to military counsel. Art 38, UCMJ, 10 U.S.C. § 838. Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the defendant. Art. 27, UCMJ, 10 U.S.C. § 827. The attorney-client privilege is honored. Mil. R. Evid. 502.	M.C.O. 1 provides that the accused must be represented "at all relevant times" (presumably, once charges are approved until findings are final — but not for individuals who are detained but not charged) by detailed defense counsel. § 4(C)(4). The accused is assigned a military judge advocate to serve as counsel, but may request to replace or augment the detailed counsel with a specific officer, if that person is available. § 4(C)(3)(a). The accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has a SECRET clearance (or higher, if necessary for a particular case), and agrees to comply with all applicable rules. The civilian attorney does not replace the detailed counsel, and is not guaranteed access to classified evidence or closed hearings.	"Each defendant has the right to conduct his own defense or to have the assistance of counsel," and was required to be told of that right. Only one counsel was permitted to appear at the trial for any defendant, unless the IMT granted special permission. The IMT was to designate counsel for any defendant who failed to apply for particular counsel or if the counsel requested was not available, unless the defendant elected in writing to conduct his own defense. IMT Rule 2.	Prior to being charged, "[i]f questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands." ICTY Stat. art. 18; ICTR Stat. art. 17. The accused has the right "to communicate with counsel of his own choosing ... 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." ICTY Stat. art. 21; ICTR Stat.

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		§ 4(C)(3)(b). Defense Counsel may present evidence at trial and cross-examine witnesses for the prosecution. § 5(I). The Appointing Authority must order such resources be provided to the defense as he deems necessary for a "full and fair trial." § 5(H). Communications between defense counsel and the accused are subject to monitoring by the government. (Although information obtained through such monitoring may not be used as evidence against the accused, M.C.I. No. 3, the monitoring could arguably have a chilling effect on attorney-client conversations, possibly hampering the ability of defense counsel to provide effective representation.)		art. 20. All communications between lawyer and client are privileged, and disclosure cannot be ordered unless the client or has waived the privilege by voluntarily disclosing the content of the communication to a third party. ICTY Rule 97; ICTR Rule 97. Qualifications for counsel and assignment of counsel to indigent defendants are set forth in ICTY Rules 44-45 and ICTR Rules 44-45.

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Right to Indictment and Presentment	The right to indictment by grand jury is explicitly excluded in "cases arising in the land or naval forces." Amendment V. Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry and deciding how to dispose of the offense. R.C.M. 303-06.	Probably not applicable to military commissions, provided the accused is an enemy belligerent. *See Ex parte* Quirin, 317 U.S. 1 (1942). The Office of the Chief Prosecutor prepares charges for referral by the Appointing Authority. § 4(B). There is no requirement for an impartial investigation prior to a referral of charges. The Commission may adjust a charged offense in a manner that does not change the nature or increase the seriousness of the charge. § 6(F).		The prosecutor, if satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the ICTY (or ICTR), prepares an indictment for confirmation by a Judge, setting forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged. ICTY Stat. arts. 18-19 and ICTY Rule 47; ICTR Stat. arts. 17-18; ICTR Rule 47. A person against whom an indictment has been confirmed is to be taken into custody and immediately informed of the charges in a language he understands. ICTY Stat. arts. 20-21 and Rule 47; ICTR Stat. arts. 19-20 and ICTR Rule 47. The prosecutor may amend the indictment as prescribed in ICTY Rule 50 or ICTR Rule 50.
Right to Written Statement of Charges	Charges and specifications must be signed under oath and made known to the accused as soon as practicable. Art. 30, UCMJ, 10 U.S.C. § 830.	Copies of approved charges are provided to the accused and Defense Counsel in English and another language the accused understands, if appropriate. § 5(A).	"Each individual defendant in custody shall receive not less than 30 days before trial a copy, translated into a language which he understands, (1) of the Indictment, (2) of the Charter, (3) of any other documents	An arrested person must be completely informed of charges, which may be satisfied by presentation to the accused of a copy of the written charges, translated, if necessary. ICTY Rule 59 *bis*.

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			lodged with the Indictment…." IMT Rule 2.	At the ICTR, the registrar is required to prepare certified copies of the indictment in a language the accused understands, but there does not appear to be a requirement that the accused be furnished with a written copy. ICTR Rule 47.
Right to be Present at Trial	The presence of the accused is required during arraignment, at the plea, and at every stage of the court-martial unless the accused waives the right by voluntarily absenting him or herself from the proceedings after the arraignment or by persisting in conduct that justifies the trial judge in ordering the removal of the accused from the proceedings. R.C.M. 801.	The accused may be present at every stage of trial before the Commission unless the Presiding Officer excludes the accused because of disruptive conduct or for security reasons, or "any other reason necessary for the conduct of a full and fair trial." §§ 4(A)(5)(a); 5(K); 6B(3).	Not provided. "The Tribunal shall have the right to take proceedings against a person charged … in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence." IMT Charter art. 12. (Martin Bormann, who was never located and was rumored to be dead, was convicted in absentia and sentenced to death.)	The accused has the right "to be tried in his presence." ICTY Stat. art. 21; ICTR Stat. art. 20.
Prohibition against Ex Post Facto Crimes	Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes. U.S. v. Gorki, 47 M.J. 370 (1997).	Not provided, but may be implicit in restrictions on jurisdiction over offenses. *See* § 3(B). M.C.I. No. 2 § 3(A) provides that "no offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."	Not provided. Article 6 of the IMT Charter provided for jurisdiction to try not only war crimes, but also "crimes against peace" and "crimes against humanity," which had never before been defined as international crimes. The IMT rejected defenses based on the *ex post facto* nature of the charges, remarking that the rule against	Jurisdiction is limited to specified crimes. ICTY Stat. arts. 2-5 (grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity). ICTR jurisdiction is limited to genocide, crimes against humanity, and violations of

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			such charges "is not a limitation of sovereignty, but is in general a principle of justice." The IMT went on to conclude that justice does not prohibit, but rather requires the punishment of "those who in defiance of treaties and assurances have attacked neighbouring states without warning." IMT Opinion and Judgment: The Law of the Charter.	Article 3 Common to the Geneva Conventions and of Additional Protocol II. ICTR Stat. arts. 1-4.
Protection against Double Jeopardy	Double jeopardy clause applies. *See* Wade v. Hunter, 336 US 684, 688-89 (1949). Art. 44, UCMJ prohibits double jeopardy, provides for jeopardy to attach after introduction of evidence. 10 U.S.C. § 844. General court-martial proceeding is considered to be a federal trial for double jeopardy purposes. Double jeopardy does not result from charges brought in state or foreign courts, although court-martial in such cases is disfavored. U. S. v. Stokes, 12 M.J. 229 (C.M.A. 1982). Once military authorities have turned service member over to civil authorities for trial, military may have waived jurisdiction for that crime, although it may be	The accused may not be tried again by any Commission for a charge once a Commission's finding becomes final. (Jeopardy appears to attach when the finding becomes final, at least with respect to subsequent U.S. military commissions.) § 5(P). However, although a finding of Not Guilty by the Commission may not be changed to Guilty, either the reviewing panel, the Appointing Authority, the Secretary of Defense, or the President may return the case for "further proceedings" prior to the findings' becoming final. If a finding of Not Guilty is vacated and retried, double jeopardy may be implicated. The order does not specify whether a person already tried	Not provided. Jurisdiction was concurrent with national courts, but the IMT could only try serious crimes not limited to a specific geographical location.	"No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal…" A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the ad hoc tribunal, but only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was

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	possible to charge the individual for another crime arising from the same conduct. *See* 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.	by any other court or tribunal may be tried by a military commission under the M.O. The M.O. reserves for the President the authority to direct the Secretary of Defense to transfer an individual subject to the M.O. to another governmental authority, which is not precluded by the order from prosecuting the individual. This subsection could be read to authorize prosecution by federal authorities after the individual was subject to trial by military commission, although a federal court would likely dismiss such a case on double jeopardy grounds. M.O. § 7(e).		not diligently prosecuted. ICTY Stat. art. 10; ICTR Stat. art. 9. "When...criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal, a Trial Chamber shall…issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council." ICTY Rule 13; ICTR Rule 13. However, the prosecution can seek to appeal an acquittal, including based on the discovery a new fact that was unknown at the time of the proceedings but that could have been decisive. ICTY Stat. art. 26.; ICTR Stat. art. 25.
Speedy & Public Trial	In general, accused must be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever date is earliest. R.C.M. 707(a). The right to a public trial applies in courts-martial but is not absolute. R.C.M. 806.	The Commission is required to proceed expeditiously, "preventing any unnecessary interference or delay." § 6(B)(2). Failure to meet a specified deadline does not create a right to relief. § 10. The rules do not prohibit	The IMT was to ensure expeditious proceedings, although this principle was not framed in terms of the rights of the accused. The IMT was to "take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever," and to	The accused has the right "to be tried without undue delay." ICTY Stat. art. 21; ICTR Stat. art. 20. Proceedings are to be public unless otherwise provided. ICTY Rule 78; ICTR Rule 78. "The press and the public [may] be excluded from all or part of the proceedings for reasons of:

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	The military trial judge may exclude the public from portions of a proceeding for the purpose of protecting classified information if the prosecution demonstrates an overriding need to do so and the closure is no broader than necessary. United States v. Grunden, 2 M.J. 116 (CMA 1977).	detention without charge, or require charges to be brought within a specific time period. Proceedings "should be open to the maximum extent possible," but the Appointing Authority has broad discretion to close hearings, and may exclude the public or accredited press from open proceedings. § 6(B)(3).	"deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges." IMT Charter art. 18. The IMT was to rule in open court upon all questions arising during the trial, although it could deliberate certain matters in closed proceedings. IMT Rule 8. Provision was made for the publication of all proceedings in multiple languages. IMT Charter art. 25.	(i) public order or morality; (ii) safety, security or non-disclosure of the identity of a victim or witness...; or (iii) the protection of the interests of justice." ICTY Rule 79; ICTY Rule 79.
Burden & Standard of Proof	Members of court martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt must be resolved in favor of the defendant. R.C.M. 920(e).	Commission members may vote for a finding of guilty only if convinced beyond a reasonable doubt, based on evidence admitted at trial, that the accused is guilty. §§ 5(C); 6(F). The burden of proof of guilt is on the prosecution, § 5(C); however, M.C.I. No. 2 states that element of wrongfulness of an offense is to be inferred absent evidence to the contrary. M.C.I. No. 2 § 4(B).	The IMT could "admit any evidence which it deem[ed] to be of probative value." IMT Charter art. 19. Guilty verdicts and sentences required a majority vote, that is, three out of four votes. IMT Charter art. 4.	"A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt." ICTY Rule 87; ICTR Rule 87. "A Chamber may admit any relevant evidence which it deems to have probative value," and "… shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." ICTY Rule 89; ICTR Rule 89.

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				At the ICTY, "A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form." ICTY Rule 90. At the ICTR, "Witnesses shall … be heard directly by the Chambers unless [it] has ordered that the witness be heard by means of a deposition as provided for in Rule 71." ICTR Rule 90.
Privilege Against Self-Incrimination	No person subject to the UCMJ may compel any person to answer incriminating questions. Art. 31(a) UCMJ, 10 U.S.C. § 831(a). Defendant may not be compelled to give testimony that is immaterial or potentially degrading. Art. 31(c), UCMJ, 10 U.S.C. § 831(c). No adverse inference is to be drawn from a defendant's refusal to answer any questions or testify at court-martial. Mil. R. Evid. 301(f). Witnesses may not be compelled to give testimony that may be incriminating unless granted immunity for that testimony by a general court-martial convening	The accused is not required to testify, and the commission may draw no adverse inference from, a refusal to testify. § 5(F). However, there is no rule against the use of coerced statements as evidence, except for statements resulting from torture. There is no specific provision for immunity of witnesses to prevent their testimony from being used against them in any subsequent legal proceeding; however, under 18 U.S.C. §§ 6001 *et seq.*, a witness required by a military tribunal to give incriminating testimony is immune from prosecution in any criminal case, other than for perjury, giving false statements,	Not provided.	The accused may not to be compelled to testify against himself or to confess guilt. ICTY Stat. art. 21; ICTR Stat. art. 20. "A witness may object to making any statement which might tend to incriminate the witness. The Chamber may ...compel the witness to answer the question [but such testimony] shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony." ICTY Rule 90; ICTR Rule 90.

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	authority, as authorized by the Attorney General, if required. 18 U.S.C. § 6002; R.C.M. 704.	or otherwise failing to comply with the order. 18 U.S.C. §§6002; 6004.		
Right to Examine or Have Examined Adverse Witnesses	Hearsay rules apply as in federal court. Mil. R. Evid. 801 *et seq.* In capital cases, sworn depositions may not be used in lieu of witness, unless court-martial is treated as non-capital or it is introduced by the defense. Art. 49, UCMJ, 10 U.S.C. § 849.	Defense Counsel may cross-examine the prosecution's witnesses who appear before the Commission. § 5(I). However, the Commission may also permit witnesses to testify by telephone or other means not requiring the presence of the witness at trial, in which case cross-examination may be impossible. § 6(D)(2). In the case of closed proceedings or classified evidence, only the detailed defense counsel may be permitted to participate. Hearsay evidence is admissible as long as the Commission determines it would have probative value to a reasonable person. § 6(D)(1). The Commission may consider testimony from prior trials as well as sworn and unsworn written statements, apparently without regard to the availability of the declarant, in apparent contradiction with 10 U.S.C.	Defendants had the right "to present evidence at the Trial in support of [their] defense, and to cross-examine any witness called by the Prosecution." IMT Charter art. 16(d). Hearsay was not strictly prohibited. The judges were empowered to inquire into the nature of evidence and determine its reliability. IMT Charter art. 20.	The accused has the right "to examine, or have examined, the witnesses against him…." ICTY Stat. art. 21; ICTR Stat. art. 20. Hearsay evidence may be admissible. "A Chamber may admit any relevant evidence which it deems to have probative value. ... A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial." ICTY Rule 89. "A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." ICTY Rule 92 *bis*. Unsworn written testimony and transcripts are admissible only under certain circumstances, including where the declarant is unavailable but there are

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		§ 849. § 6(D)(3).		sufficient indicia of reliability to satisfy the court. *Id.* The ICTY has held that "out-of court statements that are relevant and found to have probative value are admissible" but that judges may be guided by "hearsay exceptions generally recognised by some national legal systems, as well as the truthfulness, voluntariness and trustworthiness of the evidence, as appropriate." Prosecutor v. Tadic, Case No.IT-94-1-T, Decision on Defense Motion on Hearsay, 5 August 1996, paras. 7-19.
Right to Compulsory Process to Obtain Witnesses	Defendants before court-martial have the right to compel appearance of witnesses necessary to their defense. R.C.M. 703. Process to compel witnesses in court-martial cases is to be similar to the process used in federal courts. Art. 46, UCMJ, 10 U.S.C. § 846.	The accused may obtain witnesses and documents "to the extent necessary and reasonably available as determined by the Presiding Officer." § 5(H). The Commission has the power to summon witnesses as requested by the defense. § 6(A)(5). The power to issue subpoenas is exercised by the Chief Prosecutor; the Chief Defense Counsel has no such authority. M.C.I. Nos. 3-4.	The defense had an opportunity to apply to the Tribunal for the production of witnesses or of documents by written application stating where the witness or document was thought to be located and the facts proposed to be proved. The Tribunal had the discretion to grant applications and seek to have evidence made available by cooperating states. IMT Rule 4.	The accused has 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." ICTY Stat. art. 21; ICTR Stat. art. 20.

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Right to Trial by Impartial Judge	A qualified military judge is detailed to preside over the court-martial. The convening authority may not prepare or review any report concerning the performance or effectiveness of the military judge. Art. 26, UCMJ, 10 U.S.C. § 826. Article 37, UCMJ, prohibits unlawful influence of courts-martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority. Art. 37, UCMJ, 10 U.S.C. § 837.	The Presiding Officer is appointed directly by the Appointing Authority, which decides all interlocutory issues. There do not appear to be any special procedural safeguards to ensure impartiality, but challenges for cause have been permitted. § 4(A)(4). The presiding judge, who decides issues of admissibility of evidence, also votes as part of the commission on the finding of guilt or innocence. Article 37, UCMJ, provides that no person subject to the UCMJ "may attempt to coerce or, by any unauthorized means, influence the action of a court-martial *or any other military tribunal* or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts." 10 U.S.C. § 837. M.C.I. No. 9 clarifies that Art. 37 applies with respect to members of the review panel. MCI No. 9 § 4(F).	Each state party to the London Agreement establishing the IMT nominated one judge, whom they could replace "for reasons of health or for other good reasons," except that no replacement was permitted to take place during a trial, other than by an alternate. IMT Charter art. 3.	The judges are to be "persons of high moral character, impartiality and integrity...." ICTY Stat. art. 13; ICTR Stat. art. 12. "A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality." ICTY Rule 15; ICTR Rule 15.
Right to Trial	A military accused has no Sixth Amendment right to a trial by	Military tribunals probably do not require a jury trial.	There was no provision for a jury trial.	The ICTY follows the civil law tradition of employing a panel of

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By Impartial Jury	petit jury. *Ex Parte* Quirin, 317 U.S. 1, 39-40 (1942) (*dicta*). However, "Congress has provided for trial by members at a court-martial." United States v. Witham, 47 MJ 297, 301 (1997); Art. 25, UCMJ, 10 U.S.C. § 825. The Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations. United States v. Lambert, 55 M.J. 293 (2001). The absence of a right to trial by jury precludes criminal trial of civilians by court-martial. Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).	*See Ex Parte* Quirin, 317 U.S. 1, 39-40 (1942) (*dicta*). The commission members are appointed directly by the Appointing Authority. While the Commission is bound to proceed impartially, there do not appear to be any special procedural safeguards designed to ensure their impartiality. However, defendants have successfully challenged members for cause. § 6(B).		judges to decide questions of both fact and law. There is no provision for trial by jury.

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
Right to Appeal to Independent Reviewing Authority	The writ of *habeas corpus* provides the primary means by which those sentenced by military court, having exhausted military appeals, can challenge a conviction or sentence in a civilian court. The scope of matters that a court will address is narrower than in challenges of federal or state convictions. Burns v. Wilson, 346 U.S. 137 (1953).	A review panel appointed by the Secretary of Defense reviews the record of the trial in a closed conference, disregarding any procedural variances that would not materially affect the outcome of the trial, and recommends its disposition to the Secretary of Defense. Although the Defense Counsel has the duty of representing the interests of the accused during any review process, the review panel need not consider written submissions from the defense, nor does there appear to be an opportunity to rebut the submissions of the prosecution. If the majority of the review panel forms a "definite and firm conviction that a material error of law occurred," it may return the case to the Appointing Authority for further proceedings. § 6(H)(4). The review panel recommendation does not appear to be binding. The Secretary of Defense may serve as Appointing Authority and as the final reviewing authority, as designated by the President. Although the M.O specifies that the individual is not privileged to seek any remedy in any U.S. court or state court, the court of	None. "The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review." IMT Charter art. 26. The Control Council for Germany was empowered to reduce or otherwise alter the sentences, but could not increase its severity. IMT Charter art. 29.	The ICTY Statute creates an Appeals Chamber, which may hear appeals from convicted persons or from the prosecutor on the grounds of "an error on a question of law invalidating the decision," or "an error of fact which has occasioned a miscarriage of justice." ICTY Stat. art. 25; ICTY Stat. art. 24.

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
		any foreign nation, or any international tribunal, M.O. § 7(b), Congress established jurisdiction in the Court of Appeals for the D.C. Circuit to hear challenges to final decisions of military commissions. Detainee Treatment Act of 2005.		
Protection against Excessive Penalties	Death may only be adjudged for certain crimes where the defendant is found guilty by unanimous vote of court-martial members present at the time of the vote. Prior to arraignment, the trial counsel must give the defense written notice of aggravating factors the prosecution intends to prove. R.C.M. 1004. A conviction of spying during time of war under article 106, UCMJ, carries a mandatory death penalty. 10 U.S.C. § 906.	The accused is permitted to make a statement during sentencing procedures. § 5(M). The death sentence may be imposed only on the unanimous vote of a seven-member panel. § 6(F). The commission may only impose a sentence that is appropriate to the offense for which there was a finding of guilty, including death, imprisonment, fine or restitution, or "other such lawful punishment or condition of punishment as the commission shall determine to be proper." § 6(G). If the Secretary of Defense has the authority to conduct the final review of a conviction and sentence, he may mitigate, commute, defer, or suspend, but not increase, the sentence. However, he may disapprove the findings and return them for	Penalties included "death or such other punishment as shall be determined by [the IMT] to be just." IMT Charter art. 27. The IMT could also order the convicted person to deliver any stolen property to the Control Council for Germany. IMT Charter art. 28.	Penalties are limited to imprisonment; there is no death penalty. The ICTY may also order the return of any property and proceeds acquired by criminal conduct to their rightful owners. ICTY Stat. art. 24; ICTR Stat. art. 23. Sentences are to be imposed consistently with the general practice regarding prison sentences in the courts of the former Yugoslavia or Rwanda, taking into account such factors as the gravity of the offence and the individual circumstances of the convicted person. ICTY Stat. art. 24; ICTR Stat. art. 23.

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
		further action by the military commission. § 6(H).		

Source: Congressional Research Service

Memorandum September 7, 2006

TO: House Armed Services Committee
Attention: Regina Burgess

FROM: Jennifer K. Elsea
Legislative Attorney
American Law Division

SUBJECT: The Application of Article 31, UCMJ, to Battlefield Captures

This memorandum provides follow-up analysis regarding a hypothetical question posed by Chairman Hunter at the hearing held by the Committee on July 26, 2006, on procedural safeguards employed in trials of war criminals at various tribunals. In discussing the feasibility of applying the Uniform Code of Military Justice (UCMJ) procedures that apply in general courts-martial, Chairman Hunter posed a hypothetical situation involving a U.S. soldier who captures an insurgent in the act of firing a rocket propelled grenade (RPG) at U.S. personnel. Chairman Hunter asked whether, if the shooting of the RPG is a terrorist act and a crime, the captured terrorist would become "the focus of suspicion" and would therefore be entitled to a rights warning, just as a U.S. soldier arrested after having committed a similar act would be entitled to be informed of his right under article 31 to remain silent, and whether either of these hypothetical suspects would have the right to request the presence of an attorney before undergoing interrogation. The question does not appear to have been addressed by the courts, but the relevant question appears to be whether the individual captured is apprehended in a law-enforcement context or as a captive under the law of war.

Article 31, UCMJ provides:

> No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.[1]

[1] 10 U.S.C. § 831(b).

It provides further that no statement obtained in violation of this requirement may be entered into evidence at court-martial.[2] Article 38, UCMJ, prescribes the right of an accused to be represented by an attorney before a general or special court-martial or at an investigation under article 32, UCMJ.[3]

The Manual for Courts-Martial (MCM) defines "person subject to the code" within the meaning of article 31 to include military personnel or persons acting as agents of military personnel or units.[4] "Interrogation" includes "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning."[5] The right to counsel attaches when "evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the Constitution" is sought or is likely to result, under two conditions. First, the right attaches if the person to be interrogated is in custody or could reasonably believe him or herself to be in custody, or is "otherwise deprived of his or her freedom of action in any significant way." Alternatively, the right attaches if the interrogator is acting in a law enforcement capacity, charges have been preferred, and the interrogation concerns the offenses or matters that were the subject of the preferral of the charges.[6]

Military courts have recognized a public safety exception similar to the rule applied in federal courts.[7] Persons in custody may be interrogated for reasons reasonably related to public safety without a warning, and statements thus elicited may be entered into evidence at trial unless they were made involuntarily.[8] In the hypothetical case of the soldier arrested by a Military Police officer who witnessed the soldier firing an RPG, the officer could, depending on the circumstances, question the soldier to determine the location of any other perpetrators participating in the attack, the location of other weapons or ammunition, whether targets had been hit or victims left wounded, or similar questions relevant to preventing or mitigating bloodshed, all without advising the captive of his right to remain silent or to request counsel,[9] so long as the questioning is conducted without unlawful coercion. It is reasonable to suppose that, if article 31 applies to suspected terrorists captured on the battlefield, a similar exception would apply to information needed for operational or intelligence purposes rather than for purposes of prosecuting crimes.

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[2] 10 U.S.C. § 831(d).

[3] 10 U.S.C. § 838. A "suspect" becomes an "accused" only after charges are referred for investigation under article 32, UCMJ (10 U.S.C. § 832).

[4] Mil. R. Evid. 305.

[5] *Id.*

[6] Mil. R. Evid. 305(d)(1).

[7] *See* DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE § 5-4(B) (5th ed. 1999).

[8] *See, e.g.,* United States v. Catrett, 55 M.J. 400. 404-05 (2001); United States v. Jones, 26 M.J. 353, 356-57 (opining, however, that "Congress undoubtedly would have desired that this exception be narrowly construed, so that it would apply only when life is endangered and not in the usual criminal investigation").

[9] Article 31 does not provide for access to counsel; however, the Manual for Courts-Martial (MCM) provides for access to counsel for persons undergoing custodial interrogation in order to comply with the Fifth Amendment. *See* MCM Appendix 22 at 14-15 (citing Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Tempia, 37 C.M.R. 797 (1967)).

It is not clear whether a battlefield captive would be entitled to article 31 protection to begin with, although a textual reading of it does not supply any exception. There is no indication in the legislative history whether Congress contemplated that article 31 would apply in situations involving battlefield captures.[10] Neither the UCMJ nor the MCM indicates that the "accused" or "person suspected of an offense" must also be a "person subject to the code" in order to be entitled to a warning under article 31(b). Nor do they define the type of "offense" of which a person must be suspected in order to qualify for the protection. The reference to court-martial in the article 31(b) warning, together with the provision for the exclusionary remedy for violations in article 31(d), may be read to imply that it covers only persons who are subject to court-martial. Prisoners of war are subject to the UCMJ in accordance with article 2, UCMJ; other persons are subject to court-martial for violations of the law of war pursuant to article 18, UCMJ.[11] It therefore seems that captured combatants suspected of violating the law of war would be covered. In any event, other parts of article 31 appear to apply more broadly, suggesting that its protection is not limited to service members. Article 31(a) provides that "[n]o person subject to this chapter may compel *any person* to incriminate himself or to answer any question the answer to which may tend to incriminate him." Article 31(c) provides that "[n]o person subject to this chapter may compel *any person* to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him." (Emphasis added in both cases.)

Because a captured combatant is by definition restrained of his freedom of action, a strict reading of the UCMJ and MCM supports the proposition that a captured insurgent suspected of engaging in unlawful hostilities could not be questioned by military personnel about such activities without first receiving a warning and possibly the opportunity to consult an attorney. However, developments in military case law cast that conclusion in doubt. Not long after the passage of the UCMJ, the Court of Military Appeals (CMA) began to interpret article 31(b) in light of congressional intent, wherein it discerned the aim on Congress's part to counteract the presumptively coercive effect created whenever a service member is questioned by a superior.[12] Subsequently, the CMA determined that "person subject to the

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[10] The Federal Research Division of the Library of Congress and the U.S. Army Judge Advocate General's Legal Center & School Library have created a website devoted to the legislative history of the UCMJ, available at [http://www.loc.gov/rr/frd/Military_Law/UCMJ_LHP.html]. For more analysis of the legislative history of the UCMJ, see Fredric I. Lederer, *Rights Warning in the Armed Services*, 72 MIL. L. REV. 1 (1976).

[11] 10 U.S.C. § 818 ("General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal...."); *see also* MCM § 201(f)(1)(B)(defining court-martial cases under law-of-war jurisdiction to include offenses against the law of war or the law of occupied territory whenever the local civil authority is superseded in whole or part by the military authority of the occupying power).

[12] United States v. Franklin, 8 C.M.R. 513 (C.M.A. 1952). Finding that the failure to provide an adequate warning under art. 31(b) rendered any statements made during an interrogation inadmissible per se in court-martial proceedings, the CMA opined that

> It is recognized that, where the proceedings are military, the accused, who has been subjected to military discipline with all its concepts of obedience to superior authority, will be more inclined to speak out when interrogated than a civilian without such training and background. It is this influence of implied command or presumptive coercion which Congress has attempted to eliminate in its enactment of Article 31(b).

(continued...)

code" was not meant to be read as broadly in article 31 as that phrase is used elsewhere in the UCMJ. The court explained:

> Taken literally, this Article is applicable to interrogation by all persons included within the term "persons subject to the code" as defined by Article 2 of the Code, supra, [10 U.S.C. § 802], or any other who is suspected or accused of an offense. However, this phrase was used in a limited sense. In our opinion, in addition to the limitation referred to in the legislative history of the requirement, there is a definitely restrictive element of officiality in the choice of the language "interrogate, or request any statement," wholly absent from the relatively loose phrase "person subject to this code," for military persons not assigned to investigate offenses, do not ordinarily interrogate nor do they request statements from others accused or suspected of crime. This is not the sole limitation upon the Article's applicability, however. Judicial discretion indicates a necessity for denying its application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation.[13]

After a brief period in the latter half of the 1970s, during with the Court of Military Appeals applied the "position of authority test,"[14] the court developed a two-prong test for determining when the duty to warn arises. The court examined article 31(b) in light of its purpose and legislative history to determine that it

> applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry.... Accordingly, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation.... Unless both prerequisites are met, Article 31(b) does not apply.[15]

The phrase "subject to the code" may also be read more broadly for the purposes of article 31. In certain cases the article 31 duty to warn applies to civilians, sometimes even to foreign officers, who participate in the official questioning of a service member,[16] even though such persons are not ordinarily "subject to" the UCMJ. As described above, not all questioning amounts to interrogation under article 31. Questions that are not posed for law-enforcement or disciplinary purposes, even if they are asked in an official capacity, are not considered interrogation, and any incriminating information that results need not be

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[12] (...continued)
Id. at 517.

[13] United States v. Gibson, 14 C.M.R. 164, 170 (C.M.A. 1954) (questioning of prisoner by fellow inmate who was cooperating with investigators did not require art. 31 warning).

[14] The position of authority test, developed in *United States v. Dohle*, 1 M.J. 223 (C.M.A.1975), focused on whether, because of the questioner's position relative to the suspect, the suspect could have been pressured into responding to the inquiry.

[15] United States v. Duga, 10 M.J. 206, 210 (C.M.A.1981).

[16] Civilian investigators are required to give art. 31 warnings "(1) When the scope and character of the cooperative efforts demonstrate 'that the two investigations merged into an indivisible entity,' and, (2) when the civilian investigator acts 'in furtherance of any military investigation, or in any sense as an instrument of the military.'" United States v. Penn, 39 C.M.R. 194, 199 (1969) (citations omitted). *See* DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE § 5-4(B) (5th ed. 1999).

suppressed at court-martial.[17] Further, it has been held that interrogation for counter-espionage purposes conducted by civilian agents of the U.S. Navy does not require a rights warning.[18] These holdings were reached in cases in which the suspects were found not to be in custody during the questioning. However, as noted above, the custodial element expressed in rule 305 and the right-to-counsel warning requirement derive not from article 31, but from Supreme Court interpretation of the Constitution regarding custodial interrogations.

A review of Army regulations pertaining to the treatment of war-time captives suggests that military authorities do not regard article 31 as applicable to captured belligerents suspected of violating the law of war, regardless of their prisoner-of-war status. In the case of a captured person who has committed a belligerent act but does not appear to be entitled to prisoner-of-war status, Army Regulation 190-8 instructs soldiers that all captives are to be treated as prisoners of war until a status hearing is convened to determine their status, generally as either enemy prisoner of war (EPW) or civilian internee (CI).[19] Civilian internees are categorized as innocent, to be released, or as civilians "who for reasons of operational security, or probable cause incident to criminal investigation, should be detained." The regulation also states that

> The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.[20]

The regulations do not prohibit military policemen from interrogating detainees who are suspected of being unlawful belligerents or having violated the law of war, nor do they instruct them to read detainees their rights. Instead, it provides that

> Prisoners may be interrogated in the combat zone. The use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited. Prisoners may voluntarily cooperate with PSYOP personnel in the development, evaluation, or dissemination of PSYOP messages or products. Prisoners may not be threatened, insulted, or exposed to unpleasant or disparate treatment of any kind because of their refusal to answer questions. Interrogations will normally be performed by intelligence or counterintelligence personnel.[21]

Prisoners before a status tribunal are to be informed of their applicable rights at the beginning of the hearing. These rules appear to be designed to comply with the Geneva Conventions, but not with article 31, UCMJ.

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[17] *See, e.g.*, United States v. Loukas, 29 M.J. 385 (C.M.A. 1990) (crew chief of an operational military aircraft who was responsible for the plane's safety was not required to give article 31(b) warning before questioning a subordinate about strange behavior suspected to be related to drug use, where questions were limited to those necessary to fulfill operational responsibilities).

[18] *See* United States v. Lonetree, 35 M.J. 396 (C.M.A. 1992).

[19] Department of the Army, AR 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997).

[20] *Id.* para 1-5(a)(3).

[21] *Id.* para. 2-1(d).

By contrast, the Army Military Police regulation pertaining to ordinary criminal investigations advises MPs to use DA Form 3881 (Rights Warning Procedure/Waiver Certificate) to warn accused or suspected persons of their rights.[22] AR 190-9, regarding the apprehension of deserters, provides that

> When a person claims to be a deserter from the U.S. Army, the first receiving military authority must advise the person of his or her rights per article 31 UCMJ, and provide as much [specified identification] data as possible to the provost marshal....[23]

While there is no precedent directly addressing the hypothetical scenario the Chairman posed, it seems reasonable to expect that a military court confronting such a case would not apply a plain-text reading of article 31, but would look instead to Congress's intent, most likely to conclude that the article was not meant to apply to such situations. Because the right to counsel is derived from the Constitution rather than article 31, a military court could reasonably construe the requirement to be inapplicable to a situation in which a person is in custody for reasons not primarily related to law enforcement and the questioning is for purposes of intelligence. Furthermore, it does not appear that the armed services have considered article 31 to apply to battlefield captures, although a plain reading of the text seems to suggest otherwise. There may be grounds to consider a legislative clarification of the intended scope of article 31 above and beyond those presented by the use of military commissions for terrorist suspects.

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[22] Department of the Army, AR 190-30, Military Police Investigations, para. 4-13(b).

[23] Department of the Army, AR 190-9, Absentee Deserter Apprehension Program and Surrender of Military Personnel to Civilian Law Enforcement Agencies, para. 4-3 (2004).

accused are tried together under Rule 48, separate findings shall be made as to each accused.

(C) If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused. (Amended 10 July 1998, amended 1 Dec 2000 and 13 Dec 2000)

Rule 88
[Deleted]
(Adopted 11 Feb 1994, revised 30 Jan 1995, revised 12 Nov 1997, deleted 10 July 1998)

Rule 88 *bis*
[Deleted]
(Adopted 12 Nov 1997, deleted 10 July 1998)

Section 3 : Rules of Evidence

Rule 89
General Provisions
(Adopted 11 Feb 1994)

(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence. (Amended 1 Dec 2000 and 13 Dec 2000)

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form. (Amended 1 Dec 2000 and 13 Dec 2000)

Rule 90
Testimony of Witnesses
(Adopted 11 Feb 1994, revised 30 Jan 1995, amended 25 July 1997, amended 17 Nov 1999, amended 1 Dec 2000 and 13 Dec 2000)

(A) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth".

(B) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. A judgement, however, cannot be based on such testimony alone. (Revised 30 Jan 1995)

(C) A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

(D) Notwithstanding paragraph (C), upon order of the Chamber, an investigator in charge of a party's investigation shall not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings. (Amended 25 July 1997, amended 1 Dec 2000 and 13 Dec 2000)

Rule 94
Judicial Notice
(Adopted 11 Feb 1994)

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings. (Amended 10 July 1998)

Rule 94 *bis*
Testimony of Expert Witnesses
(Adopted 10 July 1998)

(A) The full statement of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge. (Amended 14 July 2000, amended 1 Dec 2000 and 13 Dec 2000, amended 13 Dec 2001)

(B) Within thirty days of disclosure of the statement of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:

(i) it accepts the expert witness statement; or

(ii) it wishes to cross-examine the expert witness; and

(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the report and, if so, which parts

(Amended 12 Dec 2002)

(Amended 13 Dec 2001)

(C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

Rule 94 *ter*
[Deleted]
(Adopted 4 Dec 1998, amended 17 Nov 1999, deleted 1 Dec 2000 and 13 Dec 2000)

Rule 95
Exclusion of Certain Evidence
(Adopted 11 Feb 1994, revised 30 Jan 1995, revised 12 Nov 1997)

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Rule 96
Evidence in Cases of Sexual Assault
(Adopted 11 Feb 1994)

In cases of sexual assault:

(i) no corroboration of the victim's testimony shall be required;

(ii) consent shall not be allowed as a defence if the victim

(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or

QUESTIONS AND ANSWERS SUBMITTED FOR THE RECORD

JULY 26, 2006

QUESTIONS SUBMITTED BY MR. HUNTER

The CHAIRMAN. If we are characterizing these people as terrorists and the shooting of the RPG that the sergeant witnessed is a terrorist act, and that is a crime, then you have, just as the sergeant saw the person shoot at him with the handgun and threw him over the squad car and advised him of his rights, at that point in domestic law we say that the defendant has become the focus of suspicion that he committed a crime.

Would not the terrorist when he commits a terrorist act that you see and you now capture him and you throw him over a Humvee, is he not now suspected of a crime, the focus of suspicion at that point?

Ms. ELSEA. [The information referred to can be found in the Appendix on page 107.]

QUESTIONS SUBMITTED BY MR. SKELTON

Mr. SKELTON. Historically, did military commissions generally follow courts-martial procedures and rules and structures that were in effect at the time?

Mr. SCHARF. Yes. Early American military commissions, despite an absence of mandatory guidelines, closely modeled procedural rules on those used in courts-martial, and enforced common-law rules of evidence. The difference between the two was mainly jurisdictional. In WWII, many procedural rules were suspended in military commissions, and the two types of tribunals developed procedural differences.

Early American Military Commissions: The Mexican War

The first examples of U.S. military commissions occurred during the Mexican War of 1846–1848. The Mexican War was the first war fought by Americans wholly outside American territory, and as such the military had no practical access to American civilian magistrates. Common law crimes could not be tried by court-martial procedures because, at the time, court-martial jurisdiction was restricted to military crimes that could not be tried by civilian magistrates, such as desertion. David Glazier, *Precedents Lost: The Neglected History of the Military Commission,* 46 VA. J. INT'L L. 5 (2005). A gap formed, such that common-law offenses by American servicemen could not be easily brought to justice, yet it was important to reign in the soldiers' criminal behavior, because local resentment was dangerous to American war objectives. See *Id.* at 24. General Winfield Scott (who is credited with coining the term "military commission") ordered the creation of special courts that would fill this gap, with authority to try any criminal case in which a serviceman was a victim or accused perpetrator. Scott based the procedure of these early military commissions upon the model of the court-martial proceeding. He wrote that "such commissions will be duly recorded, in writing, reviewed, revised, disapproved or approved, and the sentences executed all, as in the cases of the proceedings and sentences of courts-martial." See *Id.* at 33. General Scott did not authorize his military commissions to use the same range of punishment available to courts-martial. He limited the commissions to "known punishments in like cases, in . . . one of the States of the United States of America." *Id.* at 33–34. Courts-martial were, at the time, only restrained by the Articles of War, and therefore utilized penalties including tarring and feathering, branding and other forms of physical brutality. See William Winthrop, *Military Law and Precedents 6–8* (2d ed. 1920) at 667–75.

Civil War

Thousands of military commissions took place during and just after the Civil War, trying both soldiers and civilians, and both war crimes and common-law crimes. See Timothy MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts,* 2002 ARMY LAWYER 19 (2002). There was a continuing "close conformance of the court-martial and the military commission, including identical post-trial review . . . [and] federal judicial review . . . on exactly the same terms." See Glazier, *supra* at 46.

Philippines

Military commissions figured prominently, from 1898 to 1902, in the U.S. involvement in the Philippines. The Philippine military commission procedures still closely resembled courts-martial procedures. This time, the scope of punishment available to military commissions was more broadly defined: they had to resemble civilian U.S. punishments "as far as possible" or alternately, could be modeled on the "custom of war." Court-martial procedures were not similarly restricted. See Glazier, *supra* at 50. Where the procedures of the two types of tribunals differed, the Philippine military commissions offered more procedural protections to the accused than did contemporary courts-martial. Importantly, the Philippines military commissions originally required commander review and approval for all punishments. See Glazier, *supra* at 49. (By contrast, courts-martial only provided for commander review in cases of cashiering an officer, trials where the accused was a general, or where the convicted was sentenced to death.) Later, military commission review was restricted to sentences involving ten years or more, but this still effectuated far more review than did courts-martial proceedings. See Glazier, *supra* at 50. Additional protections were introduced to military commissions, including a prohibition against cruel or unusual punishment and a guarantee of a trial unencumbered by unnecessary delay. See Glazier, *supra* at 49. Minor procedural errors "were typically not fatal" to either courts martial or military commissions, but both types of proceedings consistently applied the common law rules of evidence by, for example, heavily disfavoring hearsay evidence. See Glazier, *supra* at 53.

1916–WWI

"Prior to the enactment of 1916 language, military commissions and courts-martial were clearly differentiated on the basis of jurisdiction, not procedure". See Glazier, *supra* at 58. The 1916 Articles expanded concurrent jurisdiction between the military commissions and courts-martial, but even then, the choice of tribunal was made largely based on geographical or temporal convenience, not on procedural differences. Procedural differences were few and minor, and created little incentive for forum shopping. See Glazier, *supra* at 58. Military commissions and courts-martial were convened in American-occupied post-WWI Germany (Rhineland). U.S. command issued detailed procedural guidelines for the courts-martial, but rather than write out procedural rules for the military commissions, U.S. command simply advised that the commissions' procedures "will be in substance the same as in trial by General Courts-Martial." See David Glazier, *Kangaroo Court or Competent Tribunal: Judging the 21st Century Military Commission,* 89 Va. L. Rev. 2005 (2005) at 2048.

WWII

During WWII, there were significant departures from military commission procedural traditions. The most striking example is the military commission set up to try eight Nazi saboteurs caught on the East Coast of the U.S. in July 1942. President Roosevelt convened the military commission despite the availability of U.S. courts, because there was not a crime on the books that captured the saboteurs' conduct fully while offering sufficiently deterrent punishment. See *id.* at 2054. This military commission disregarded many of the rules of procedure and evidence that had been recognized in military commissions and courts-martial in the past. The President's order authorized the tribunal to improvise its own procedural rules, prohibited any form of judicial review, and stipulated a special, low evidence burden: 'probative to a reasonable man'. See *id.* at 2056. Despite the President's order suspending review, the Supreme Court reviewed the commission's jurisdiction in a special July term, and upheld the legitimacy of the commission. See *Ex Parte Quirin,* 317 U.S. 1 (1942).

After 1945, most of the WWII military commissions were Allied efforts, not exclusively under American control. Military commissions held in Germany were controlled by Control Council Law number 10, which outlined crimes and punishments but left rules and procedures to the discretion of Zone Commanders. See David Glazier, *Precedents Lost: The Neglected History of the Military Commission,* 46 Va. J. Int'l L. 5 (2005), at 71. Pacific military commissions were controlled by the Supreme Commander Allied Powers (SCAP), which outlined some procedural rules for military commissions and left the remaining procedural gaps to the discretion of the commission. See *id.* at 71. The specified procedural rules included significant departures from military commission procedural history. For example, confessions were admissible without proof that they were made voluntarily, potentially senile or insane defendants stood trial, and judges did not have to recuse themselves if biased. See Evan Wallach, *Afghanistan, Quirin, and Uchiyama, Does the Sauce Hit the Gander,* 2003 Army Law, 18 (2003).

UCMJ

In 1950, Congress enacted the Uniform Code of Military Justice (UCMJ) as a uniform military law for all branches of the U.S. Armed Forces, replacing the old Articles of War. Many sections of the Articles of War were largely adopted in the UCMJ. See MacDonnell, *supra* at 21. The UCMJ discusses military commissions and courts-martial, and it establishes a permanent court of appeals for courts-martial procedures. See Kevin Barry, *Military Commissions: Trying American Justice,* 2003 Army Law, 1 (2003). The UCMJ, in 1950 and today, continues to tie the procedures of military commissions to the model of courts-martial. It states that "military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial". See *id.* at 4.

Mr. SKELTON. Did the drafters of the Hague and Geneva Conventions have knowledge and experience with irregular warfare and asymmetric weapons and tactics?

Mr. SCHARF. Irregular forces, and those who engage in asymmetric warfare are not unique to the contemporary Global War on Terrorism. Irregular forces and the tactics of asymmetric warfare were used during the American Revolution, conflicts with Native Americans, the Franco-Prussian War, the Russian Civil War, the Second Boer War, and in the Eastern Front of World War II. The use of asymmetric warfare had also been employed by the U.S. and Britain in the nineteenth century through covert action to protect their commercial and security interests. See KINZER, STEPHEN. OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ, Times Books, New York, at 1–6, 35, 129. For these reasons, the drafters of the Hague and Geneva Conventions had a great deal of knowledge and experience with irregular warfare and asymmetric weapons and tactics.

With the adoption of the Hague Convention of 1899, fears of aerial combat by "the launching of projectiles and explosives from balloons, or by other new methods of a similar nature" were allayed by a five year ban. The Hague Conventions of 1899 and 1907 defined legitimate military targets. However, because of limited technology at the time and the height from which such bombs were dropped, indiscriminate bombing campaigns took great tolls on civilian populations during World War I. During this period military strategists supported attacking civilian populations to destroy the morale of their enemies, ignoring early principles exempting civilian populations from attack. Reynolds, Jefferson D., *Collateral Damage on the 21st century Battlefield: Enemy exploitation of The Law of Armed Conflict, and The Struggle For The Moral High Ground.* 56 A.F.L. REV. 1, at 9.

There was an attempt to develop rules for choosing aerial military targets, and to condemn the attack of civilians in the 1923 Hague Conference and the 1938 Amsterdam Conference, but indiscriminate air strikes were deemed too desirable to eliminate. *Hague Rules of Aerial Warfare,* Feb. 19, 1923, 32 A.J.I.L (Supp.) 12 (1938). Before World War II, the Italian strategist Guilio Douhet predicted that aerial warfare would mark the end to civilian immunity, regardless of treaty obligations. "We dare not wait for the enemy to begin using so called inhuman weapons banned by treaties before we feel justified in doing the same . . ." GIULIO DOUHET, THE COMMAND OF THE AIR 195 (Dino Ferrari Trans., 1942). Large scale German bombing raids targeted London in 1940, attacking ordinary civilians and British morale. Mass murder and mass rape of civilians were reported when the Germans invaded Poland. Later in 1945, civilians were targeted with nuclear weapons by the U.S. in the bombing of Hiroshima and Nagasaki. *Id.* at 16.

At the close of World War II, curbing civilian bombing, mass destruction, murder, rape and looting was then a central goal of the drafters of the Geneva Convention. It is true that conventional warfare was on the minds of the Geneva Conventions drafters, but they were also quite concerned with the asymmetric weapons and unconventional means of warfare so recently employed in the War. The Geneva Conventions were created to regulate armed conflict of all kinds.

Mr. SKELTON. Are you confident that military commissions can effectively try modern crimes against the laws of war with a new paradigm of al Qaeda and its affiliates in international terrorism?

Mr. SCHARF. Military commissions can effectively try modern crimes against the laws of war, including crimes committed by members of al Qaeda and other international terrorists if they adhere to the Geneva Conventions, which will ensure that the commissions enjoy public and international support. The international community has embraced the recent work of the international tribunals for the former Yugoslavia and Rwanda, as well as the International Criminal Court. The international acceptance of these institutions can be attributed to strictly adhering to the Geneva Conventions, being open to the public, and enabling the media to report on the fairness of the trials. At the same time, the international courts have been designed to protect sensitive material by the design of their courtrooms and the procedures by which they present evidence. Military commissions that follow the precedents and rules of the international tribunals would send a clear message to the

international community that detainees receive fair and open trials, that the United States respects its world allies and their institutions, and that terrorists cannot escape justice.

Mr. SKELTON. Are you aware of any other time in history since 1949 that any signatory nation made it a matter of policy that Common Article 3 of the Geneva Conventions would not apply to any captives? Did the U.S. make an exception for other non-signatories and irregular forces who did not qualify as POWs or follow the laws of war—Somalian warlords, Viet Cong, etc.?

Mr. SCHARF. I am not aware of any other time in history since 1949 that a signatory nation has made it a matter of policy that Common Article 3 of the Geneva Conventions would not apply to any captives in an armed conflict. The usual military answer is that the military trains to Geneva, a standard higher than Common Article 3; therefore, before the "War on Terror," Common Article 3 had never before been an issue. One passing reference can be found regarding the conflict in Somalia, but it pertains to the treatment of an American captured by the Somalians, not a Somalian in U.S. custody. When Michael Durant, a U.S. army helicopter pilot was captured, the United States at first demanded POW status for him, but then quickly recanted. The U.S. argued that it was operating under a UN mandate and therefore its personnel were immune from capture; As a UN peacekeeper, Durant was an internationally protected person; Durant should consequently be released immediately, rather than detained until the end of hostilities as a POW. Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis,* 18 HOUS. J. INT'L L 359, 361–365 (1996).

There are, in contrast, examples of States, including the U.S., according irregular forces the full protections of the Geneva Conventions. During the Vietnam conflict, for example, the National Liberation Front (NLF or Viet Cong) argued that it did not have to accord captured U.S. soldiers the protections of the Geneva Conventions because they were "pirates engaged in unprovoked attacks on North Vietnam." Consistent with this view, prisoners in the control of the NLF were often subjected to abusive treatment, including starvation, caging, and bare foot jungle marches which would have violated Common Article 3. The United States argued that the Geneva Conventions did apply to the NLF, and that the NLF was prohibited from engaging in acts of torture, humiliation, or summary execution. At the same time, the United States government urged the South Vietnamese to accord NLF prisoners POW status, despite the fact that the NLF fighters did not wear a distinctive uniform and employed acts of terrorism. See *Major General George S. Prugh, Vietnam Studies, Law at War: Vietnam 1964–1973* (U.S. Army Center of Military History 1974), available at http://www.army.mil/cmh-pg/books/vietnam/law-war/law-fm.htm).

Mr. SKELTON. Is there commentary or case law relevant to the laws of war addressing the meaning of the terms in Common Article 3 and the meaning of "coercion" indicating that transgressions must be of a "serious" nature to be considered violations of the laws of war or war crimes?

Mr. SCHARF. Prior to the first Appeals Chamber decision in *Prosecutor* v. *Tadic* of the International Criminal Tribunal for the Former Yugoslavia in 1995, most commentators believed the concept of individual criminal responsibility did not extend to internal armed conflicts. See *Preliminary Remarks of the International Committee of the Red Cross, reproduced in* 2 VIRGINIA MORRIS AND MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIVA 391, 392 (1995) (the ICRC "underlines the fact that, according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict."). By a four-to-one vote, the Appeals Chamber of the Yugoslavia Tribunal decided that the concept of individual criminal responsibility applied to "serious" violations of Common Article 3 in internal armed conflict because "the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned." *Prosecutor* v. *Tadic,* Case No. IT–94–1–AR72 (Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal of Jurisdiction, October 2, 1995), at para. 68. The Yugoslavia Tribunal defined "serious" as "a breach of a rule protecting important values, and the breach must involve grave consequences for the victim." *Id.* at para. 62. The example provided by the Tribunal as a transgression that is a violation, though not a serious one is that of a combatant appropriating a loaf of bread in an occupied village running afoul of the requirement of an occupying army to respect private property. *Id.*

Unlike the provisions of the Geneva Conventions applicable to POWs, Common Article 3 does not specifically prohibit "coercion" (use of interrogation techniques employed against an unwilling subject), though it does require that detainees be treated "humanely" and prohibits "cruel" or "humiliating and degrading treatment." Because the Yugoslavia Tribunal precedent indicates that Common Article 3 violations must be "serious" to be prosecutable as a war crime, only serious forms of coer-

cion amounting to inhumane, cruel, humiliating, or degrading treatment would be covered.

Mr. SKELTON. Please explain the genesis and meaning of the American Service Members Protection Act relative to 18 U.S.C. Section 2441 (War Crimes Act) and International law of war violations and the International Criminal Court (Rome Treaty)?

Mr. SCHARF.

Establishment of the War Crimes Act:

In 1996 Congress enacted the War Crimes Act (18 U.S. Code Section 2441), which "made punishable a grave breach of the Geneva Conventions whether committed within or outside the United States, if the victim or perpetrator is a U.S. service member or national." Robinson O. Everett, *American Service Members and the ICC,* in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 137, 143 (Sarah B. Sewall & Carl Kaysen eds., Rowman & Littlefield Publishers 2000). In 1997, Congress passed the Expanded War Crimes Act, which replaced "grave breach" with "war crime." The term "war crime" was defined to include violations of the Amended Protocol on Land Mines, certain articles of the Annex to Hague Convention IV and of Common Article 3 of the Geneva Conventions; as well as violations of the Geneva Conventions that were punishable in the War Crimes Act of 1996. *Id.* at 143. The War Crimes Act establishes U.S. criminal jurisdiction to prosecute accused war criminals in U.S. Federal Court or military courts-martial. The language of the statute applies to both foreigners who commit war crimes against U.S. nationals and personnel and U.S. citizens and personnel who commit war crimes. *Id.* at 144.

Because the War Crimes Act applies to acts that occurred either inside or outside United States territory if the victim is a U.S. national or service member, the United States can prosecute members of al Qaeda and other terrorist organizations under this act. Al Qaeda and its operatives committed terrorist acts, in violation of the Geneva Conventions, against U.S. citizens and service members. Detainees at Guantanamo Bay and elsewhere are subject to jurisdiction in U.S. Federal Courts under the War Crimes Act.

The American Service Members' Protection Act and Obligations of Non-Party States

Congress enacted The American Service Members' Protection Act of 2002 in order to minimize the possibility that U.S. nationals and specifically U.S. Military personnel would be prosecuted by the International Criminal Court (ICC). Section 2002, paragraph 11 of the American Service Members' Protection Act states: "It is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for non-parties without their consent to be bound." This assertion is not wholly accurate in international law and if the United States adhered to that standard its capability to effectively fight terrorism and prosecute terrorists would be hindered. See Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States,* 35 New Eng. L. Rev. 363, 367 (2001).

Paragraph 11 of the Preamble of The American Service Members' Protection Act is based on a misreading of the Vienna Convention on the Law of Treaties, which provides: "A Treaty does not create either obligations or rights for a third state without its consent." *Vienna Convention on the Law of Treaties,* art. 34, (May 22, 1969). Article 35 states that, "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing." *Id.* at art. 35. This means that a Treaty cannot establish obligations on a Non-Party State, unless that State expressly assumes that obligation. "The legal objection to treaty-based jurisdiction over non-party nationals is perhaps better cast as a claim that such exercise of jurisdiction would abrogate the pre-existing rights of non-parties which, in turn, would violate the law of treaties." Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States,* 35 New Eng. L. Rev. 363, 376 (2001). However, States do not have a right to exercise exclusive jurisdiction over their nationals. Under international law a State and its nationals are two distinct legal entities, just as a corporation and its shareholders are distinct entities. Therefore a State is not infringing upon the sovereignty of another State by prosecuting the latter's national under treaty-based universal jurisdiction.

U.S. Use of Treaty-Based Universal Jurisdiction over Nationals of Non-Party States

The U.S. has exercised treaty-based universal jurisdiction over nationals of Non-Party States with respect to "stateless" vessels involved in narcotics trafficking. In

United States v. *Marino-Garcia,* the U.S. Eleventh Circuit Federal Court of Appeals held that the 1958 Law of the Sea convention gave the U.S. jurisdiction to prosecute Columbian and Honduran crew members whom were apprehended on the high seas by the U.S. Coast Guard. *United States* v. *Marino-Garcia,* 679 F.2d 1373 (11th Cir. 1982). "The Court was not troubled by the fact that neither Honduras nor Colombia were parties to the 1958 Law of the Sea Convention nor that customary international law did not authorize prosecution of crew members of a 'stateless' vessel." Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States,* 35 New Eng. L. Rev. 363, 379 (2001).

In *United States* v. *Yunis,* the D.C. Circuit Federal Court of Appeals addressed the question of universal jurisdiction under anti-terrorism treaties with respect to nationals of Non-Party States. *United States* v. *Yunis,* 924 F.2d 1086 (D.C. Cir. 1991). In *Yunis,* the U.S. government prosecuted a Lebanese national for hijacking a Jordanian airliner from the Beirut airport with two U.S. citizens as passengers. *Id.* The United States asserted jurisdiction over Yunis on the basis of the International Convention Against the Taking of Hostages, even though Lebanon was not a party to the treaty and did not consent to the prosecution of Yunis. Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States,* 35 New Eng. L. Rev. 363, 380 (2001). The Court upheld its jurisdiction based on domestic legislation implementing the Convention. *Id.* at 380. The *Yunis* decision was reaffirmed in *United States* v. *Ali Rezaq,* where the U.S. prosecuted a Palestinian for hijacking an Egyptian airliner, despite the fact that Palestine (Ali Rezaq's claimed country of nationality) is not a party to the Hague Hijacking Convention. *Id.* at 380. See also, *United States* v. *Ali Rezaq,* 134 F.3d 1121 (D.C. Cir. 1998).

"In light of these precedents, the claim that a treaty cannot lawfully provide the basis of criminal jurisdiction over the nationals of Non-Party States, while directed against the ICC, has the potential of negatively effecting existing U.S. Law enforcement authority with respect to terrorists." Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States,* 35 New Eng. L. Rev. 363, 381 (2001). Some might argue that if the U.S. government adopts the application of applying universal jurisdiction to nationals of Non-party states, the U.S. government will be subjecting its servicemen to jurisdiction before the ICC. But the ICC's "complementarity" regime prevents the ICC from asserting jurisdiction over any U.S. servicemember if the United States itself investigates the case and makes a decision about whether or not to pursue prosecution in good faith. *Rome Statute,* art. 17, (July 1, 2002). Robinson O. Everett, *American Service Members and the ICC,* in *The United States and the International Criminal Court* 137, 141 (Sarah B. Sewall & Carl Kaysen eds., Rowman & Littlefield Publishers 2000).

Mr. SKELTON. In response to a question from Congresswoman Sanchez, you said you would want to consider the expansion of military commissions' jurisdiction beyond the laws of war in Geneva and other international law to crimes under domestic law like "conspiracy" that could be tried by a Federal Court or a new Article III national security type court, you said you thought that might be problematic. Can you please provide a fuller response to this question for the record?

Mr. SCHARF. Consistent with the Geneva Conventions and customary international law, Military commissions have universal jurisdiction to try those accused of violations of the laws of armed conflict and other international law violations. *Ex Parte Quirin,* 317 U.S. 1, 27–8 (1942). In contrast to various universally-accepted bases of individual criminal responsibility such as aiding and abetting, incitement, and joint criminal enterprise liability, "conspiracy" to commit war crimes has not been recognized as a crime of universal jurisdiction by the international community. Warren Richey, "Is Conspiracy a War Crime?" *Christian Science Monitor,* August 14, 2006, at 2. Consequently, if a military commission, whose universal jurisdiction is based on the existing laws of armed conflict, were to prosecute conspiracy, this would be viewed as an exorbitant exercise of jurisdiction by the international community. The practical consequence would be that foreign countries would refuse to cooperate with such a prosecution. They would decline to provide evidence, supply witnesses, to extradite defendants. And they would lodge protests if their citizens were being prosecuted for conspiracy before a military commission exercising universal jurisdiction.

In contrast, foreign governments have no objection when the United States prosecutes conspiracy pursuant to its territorial or nationality-based jurisdiction. They understand that it is perfectly appropriate for the United States to prosecute conspiracies that are committed on U.S. territory or by U.S. citizens. Prosecuting conspiracy only becomes controversial when the United States is exercising universal jurisdiction over foreign citizens for actions committed abroad.

In the absence of a treaty creating universal jurisdiction over a particular offense (such as hijacking, airplane sabotage, or hostage taking), a U.S. federal court or Ar-

ticle III court can exercise universal jurisdiction only over offenses recognized as universal jurisdiction crimes under customary international law. This proposition was confirmed in the recent case of *United States* v. *Yousef,* 327 F.3d 56 (2003), in which the U.S. Court of Appeals for the Second Circuit dismissed those counts in the indictment that were based on "universal jurisdiction" because lacking an internationally accepted definition, "terrorism—unlike piracy, war crimes, and crimes against humanity—does not provide a basis for universal jurisdiction." Thus, the United States would be better off confining the prosecution of al Qaeda terrorists to internationally recognized crimes and universally recognized bases of accomplice liability.

Mr. SKELTON. In response to a question from the Chairman on Common Article 3 and questioning beyond name, rank and serial number, it appeared that all of the panelists agreed that POWs are only required to give this information but may be and usually are questioned persistently for more information. All panelists seemed to agree that the detainees probably did not warrant POW status under the Geneva Conventions, but that they did warrant the minimum protections required by Common Article 3 for non-POWs. The Chairman seemed to indicate there would be an issue of different religious or cultural definitions of the terms of Article 3 and that the U.S. had taken reservations to Common Article 3 either at the time of signing or through the DTA of 2005 (McCain Amendment).

Please provide your understanding of case law or commentary on Common Article 3 and Additional Protocol I, Article 75 as to what would constitute a violation of Common Article 3 standards of treatment of detainees who are not POWs and what reservations, understandings, or declarations the U.S. has taken since 1949 on these international treaties?

Mr. SCHARF.

Reservations, Declarations, Understandings

The United States ratified the Geneva Conventions of 1949 on August 2, 1955. While the United States made several reservations to the Geneva Conventions, none were directly related to Common Article 3. Most of the United States' reservations were limited to objections to other countries' reservations. Of the substantive reservations, the first reservation relates to the use of the Red Cross emblem and the second relates to the right of the United States to impose the death penalty. International Committee on the Red Cross—Geneva Conventions 1949: United States of America reservation text, http://www.icrc.org/ihl.nsf/0/D6B53F5B5Dl4F35AC1256402003F9920?OpenDocument (last visited August 31, 2006). Neither of these reservations directly refers the text of Article 3, leaving the United States little legal ground to stand on in the event that it chooses to override the provisions of Article 3.

The United States has signed but not yet ratified Protocol I Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I"). Although the United States has persistently objected to the operation of several articles of Protocol I, it has not stated any objections to Article 75. International Committee on the Red Cross—Addition Protocol I 1977, http://www.icrc.org/ihl.nsf/COM/470-750096?OpenDocument. Moreover, the standards set forth in Article 75 of Protocol I and Article 3 are now regarded as part of customary international law. KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 188 (2001).

The McCain Detainee Amendment (MDA) prohibits the inhumane treatment of prisoners, including detainees, by limiting interrogation techniques to those listed in the United States Army Field Manual on Intelligence Interrogation. President George W. Bush approved the legislation on December 30, 2005. At the time, the President issued a signing statement, declaring that he will view the interrogation limits in the context of his broader powers to protect national security. Boston Globe, Jan. 4, 2006. Some experts have opined that President Bush believes he can still authorize harsh interrogation tactics when he sees fit. *Id.*

Religious or Cultural Requirements of Common Article 3 and Article 75

Common Article 3, so called because it was common to each of the Geneva conventions, is often referred to as a "convention in miniature" or a "convention within a convention" that provides a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization the parties to a conflict might give it. See JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 32 (1975). Common Article 3 applies in cases of armed conflict not of an international character and provides minimum standards of treatment of persons taking no active part in the hostilities, including detainees. It requires that all persons be treated humanely and prohibits at any time or any place: "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel

treatment and torture; (b) taking of hostages; **(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;** (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." This standard has been held out as "a minimum yardstick of protection" in all conflicts. See The Army JAG School Law of War Handbook at 144 (quoting *Nicaragua* v. *U.S.* (1986), I.C.J. Rep. 14, p. 218, 25 I.L.M. 1023) and JAG Course Deskbook at I–15 (citing *Prosecutor* v. *Dusko Tadic* (1995), Case No. IT–94–1–AR72, Int'l Crim. Trib. For Fmr. Yugoslavia, reprinted in 35 I.L.M. 32.

In *Hamdan* v. *Rumsfeld,* the Supreme Court ruled that Hamdan was protected under the Geneva Conventions, which require more procedural protection than the military commissions provide. Since the Supreme Court has recently held that the provisions of the Geneva Convention apply to detainees such as Hamdan, not only are detainees required to have a minimum level of due process, but they must also be accorded the rights ensured in subset (c) of Article 3. Detainees must not be made to suffer "outrages upon personal dignity" or "humiliating and degrading treatment".

Article 75 of Additional Protocol I builds upon the standards set forth in Article 3 and provides more detail as to what acts are specifically prohibited. In particular, Article 75(2)(b) prohibits "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault" regardless of status. Although the United States has not ratified the Additional Protocol I, in *Hamdan,* Justice Stevens noted that Article 75 reflected an accepted expression of customary international law.

Certain practices unlikely to humiliate United States military personnel such as being shaved or being forced to shave may, in fact, be considered humiliating and degrading treatment with respect to detainees of certain religious and cultural backgrounds. Capt. Stephen Erikkson, *Humiliating and Degrading Treatment Under International Humanitarian Law: Criminal Accountability, State Responsibility, and Cultural Considerations,* 55 A.F.L. REV. 269, 271 (2004). In deciding degrading treatment cases arising under the European Convention for the Protection of Human Rights (whose provisions are similar to Common Article 3 and Article 75), the European Court of Human Rights has indicated that such treatment "must [have] attain[ed] a minimum level of severity." *Republic of Ireland* v. *United Kingdom,* 2 E.H.R.R. 25 (ser. A) (1978) at P 162. For purposes of Common Article 3 and Article 75, "Humiliation is not a form of mild embarrassment, which marked by momentary awkwardness, fades into humorous memories with the passage of time. Humiliation is a piercing arrow that wounds the heart and, in the worst of cases, kills healthy esteem. Although eliminating all humiliation from war is Utopian, prosecuting those who consciously decide to violate the protective categories is not." Erikkson, *supra,* at 288. Humiliation requires malicious intent, that is the actions must either serve no legitimate purpose or an apparently legitimate purpose (such as forced shaving to prevent the spread of head lice) which can be shown to have been intentionally fabricated to inflict injury.

Mr. SKELTON. You mentioned ICTY Rule 89(d) in your testimony. Would you please provide a copy for the record and further explain how it operates and how it might apply to modern military commissions?

Judge WALD. A copy of ICTY Rule 89(d) (attached) and an explanation of how it operates and how it might apply to military commissions. Rule 89(d) allows a trial chamber to exclude evidence, even though it is probative, if its value is substantially outweighed by the need to ensure a fair trial. This rule currently operates, for example, to exclude evidence that may have been secured by coercion, physical, or mental, or by other methods that would be considered antithetical to universal notions of a fair trial. It is underscored by Rule 95 which states in even stronger language "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings". These rules provide leeway for judges to rule inadmissible evidence secured by torture or inhumane treatment or even trickery and deceit that so offends the judges' notions of fairness that they do not believe a fair trial can be held on the basis of it. In practice the judges at the ICTY have been careful to draw the line between evidence that has been obtained merely in violation of a national rule such as wiretapping but is not inherently offensive and that which is secured by means that will render the trial a farce or reprehensible in the eyes of the world, such as torture, or threats to the defendant's family or intimidation of a minor. The rule if applied to military commissions would work similarly; it would disallow testimony obtained for instance in violation of the McCain

Amendment in the DTA or Common Article 3 or that "shocks the conscience" as in the U.S. Constitution due process clause.

[The information referred to can be found in the Appendix on page 113.]

Mr. SKELTON. The Chairman asked if "unprivileged belligerents" upon capture might refuse to answer questions if they learned that it was a right under military commissions to have an attorney and not to incriminate oneself. You did not fully answer this question due to time constraints. To respond more fully now, given your experience with alleged war criminals tried under the International Criminal Tribunal for Yugoslavia, were captives completely unaware of due process rights to not self-incriminate or to be assigned an attorney before they were given an explicit rights advisement? Did that impact on any interrogation or prosecution that you are aware of?

Judge WALD. In relation to advice to suspects on "capture" about their rights to counsel and to remain silent. As you know ICTY suspects are taken into custody generally only after indictment although there is a provision in the rules for provisional detention for questioning pursuant to a judge's order if it is shown that the suspect may have committed a crime and may flee or destroy evidence (Rule 40 bis). Either way the suspect may not be questioned by the Prosecutor until he has appeared before the judge, been appointed a lawyer, told of his right to be silent, provided an interpreter and told of his right to be silent. All questioning is recorded. There is of course always a practical judgement to be made in field interrogations of potential witnesses at what point a witness becomes a suspect and the notice of rights comes into being since not every potential witness is warned before questioning. My impression is that higher level suspects, military officers, civilian mayors or prefects etc. did know of their rights certainly by the time they were apprehended after indictment but that some of the lower level suspects, prison guards etc. may not have. I was also quite surprised by the fact that even with lawyers, defendants did agree to be questioned by prosecutors before trial, probably in the hopes that their version might result in the prosecutors taking a more lenient attitude toward them. This was especially true with the advent of the guilty plea rule which permitted prosecutors to recommend lowered sentences for pleas and cooperation and to drop counts in the original indictment. I have not personally heard prosecutors complain they were hindered by the requirement of notice.

Mr. SKELTON. In response to a question from Congresswoman Sanchez about expanding the jurisdiction of military commissions beyond those recognized as violations of the laws of war in international laws and treaties to domestic crimes, you said specifically that "conspiracy" was a problem and even ruled out by U.S. Ambassador Francis Biddle for Nuremberg. Could you give a fuller answer as to the challenges or benefits of expanding the jurisdiction of military commissions to domestic crimes and give your recommendation?

Judge WALD. In the inclusion of conspiracy and other domestic crimes within the jurisdiction of the military tribunals, as I mentioned in my testimony, the crime of "conspiracy" is not familiar to most countries outside the U.S. and the U.K. Although included in the original Nuremberg indictment the non-American judges were suspicious of it and even Francis Biddle in his own words, said "I would not at present vote any defendants guilt on the conspiracy charge I had learned to distrust conspiracy indictments, which in our country were used too often by the government to catch anyone however remotely connected with the substantive crime". (Biddle, In Brief Authority, p. 468). In its final judgement, the Nuremberg court limited conspiracy to the crime of aggressive war. Subsequently no international court has included conspiracy in its jurisdiction except for conspiracy to commit genocide which is in the Genocide Convention. In most cases the listing of the manner in which war crimes or crimes against humanity can be committed, i.e. planning, instigating, ordering, attempting, aiding and abetting along with the doctrines of "criminal enterprise" and "common purpose" is ample to cover all kinds of participation in these crimes. Command responsibility, holding a superior officer liable for the crimes of his subordinates if he knew or should have known about them before the fact or failed to take action to punish them after the fact, is also available for highly placed officials who inspire but do not themselves execute the crimes. Conspiracy except for genocide and aggressive war is not generally recognized as an international crime, and conspiracy to commit a war crime or crime against humanity is not part of customary international law. (See, e.g., Werle, Principles of International Criminal Law, pars. 488–90). Justice Stevens in the Hamdan v Rumsfeld opinion cited the eclusion of conspiracy in the original military commission jurisdiction as outside the law of war.

Clearly in defining the jurisdiction of military commissions Congress has the authority to include domestic crimes but in my view it should think long and hard before doing so. The concept of military commissions of the type considered in this con-

text, to try suspected beligerants, is best kept as much as possible to the trial of crimes recognized in international humanitarian law, the law of war. The substantive scope of conspiracy can well be handled by the other forms of participation mentioned above and its chief value appears to be the evidentiary rule that the statements and acts of any conspirator can be used against any other conspirator. In a situation like al Qaeda and terrorist groups, the danger is precisely the one Biddle feared, the conspiracy can be defined so broadly it includes anyone and everybody with some connection to the terrorists, no matter how attenuated. Where the alleged crimes are not really connected with an armed conflict, i.e. giving aid to a terrorist group through diverted charity funds (an example taken from a D.C. district court hearing on Guantanamo inmates) or persons captured far from the battlefield, the use of military tribunals is treading on unchartered territory and the use of regular civilian courts preferable. Military commissions even if defined to include basic rights such as presence of the accused and his access to evidence against him, are not the equivalent of a regular civilian court trial and investing them with large amounts of non-law of war crimes raises the spectre of loss of civilians control over justice machinery and the impugnment of the military justice machinery as well which now enjoys a sterling reputation.

Mr. SKELTON. As to "vague" terms or culturally specific definitions of terms in international treaties and customary law, are interpretations and rulings issued by foreign tribunals ever binding on the U.S.? Is the U.S. obliged under domestic law (18 U.S. Code Section 2441, The War Crimes Act) or military commissions to adopt an international tribunal's definition of the terms within Common Article 3 unless it wanted to do so?

Judge WALD. Common Article 3 is part of the Geneva Conventions to which the U.S. is a signatory. It embodies customary international law. That law is to be discerned from sources such as treaties, learned commentators, and decisions but primarily it is the practices of a majority of civilized countries which are adhered to out of obligation as a recognition of the requirements of international law. Thus were the U.S. or its nationals to be taken before a foreign or international court its adherence to its treaty obligations under common Article 3 would be judged by the standards laid down in international law. This standard would also apply if other parties to the treaty challenged our adherence in diplomatic or non-judicial channels. When the U.S. adopts its own domestic law defining crimes to be tried in our own courts, it obviously has the power to modify international interpretations, since basically congressional laws trump treaties and other international law sources. Whether it should do so is another matter and one in which the U.S. perception in the international community is a relevant consideration. (It should be noted here, though not directly on point for this discussion that some treaties require the parties to abide by the interpretation of its terms by a stated voice, i.e. in the case of the Vienna Treaty the International Court of Justice and the Alien Tort claims Act speaks of "Violations of the Law of Nations"; in these cases unless Congress directed otherwise U.S. courts would likely look to interpretations by international tribunals of the terms of the treaty or the scope of the violations). As to the military commissions, the Military Commission Instruction on Crimes and elements for Trials (draft Feb. 28, 2003) states that;

These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission.

This strongly suggests that the "body of law" used to interpret the triable crimes and which consists principally of foreign and international law would be consulted in interpreting the crimes in the military commissions. Indeed Justice Stevens opinion in Hamdan used as his benchmark in finding the commissions unlawful the fact that they did not adhere to the "law of war" in some of their procedures and possibly in the inclusion of conspiracy.

Now that the congress has entered the scene and will likely decide what crimes to include in the jurisdiction of commissions, it can choose whether to follow the route of confining the commissions to interpretation and implementation of the international law of war or to make them hybrid "law of war plus" tribunals, interpreting those crimes according to our own dictates. I think the latter course has dangers. The legitimacy of our apprehension, detention, and subsequent trial of the Guantanamo detainees at least depends on international law, as recognized in the case of detention by Justice O'connor in the Hamdi decision a few years ago. The legitimacy of our trying those detainees for war crimes in turn also depends on international law of war bases; indeed if we are not to violate the nullum crimen sine lege principle (the act must have been a crime when committed) commission trials cannot stray too far from the interpretation of the war crimes accepted in

international law at the time they were committed. Let me also add here that the reported consideration of listing in 18 U.S.C. 2241 (the domestic war crimes act) of a selected number of war crimes defined in the U.S. terms is extremely troubling to me; not only does the circulated draft define "cruel treatment" for Common Article 3 purposes as basically just torture but its definitions of intentionally causing great suffering or injury and even rape and sexual assault are more stringent than the international definitions.

Mr. SKELTON. The DTA of 2005 offers an affirmative defense to military personnel accused of violations of the Geneva Conventions Common Article 3 acting pursuant to the President's direction and SECDEF policies from November 2001 until the 29 June 2006 Supreme Court ruling in *Hamdan*. In your experience would a charge likely be brought in federal court? Would the affirmative defense stand up against a charge under 18 U.S. Code Section 2441 (The War Crimes Act)? Would it stand up in an international tribunal?

a. What would be the effect if Congress chooses to more narrowly define the terms of Common Article 3 in domestic law to allow for more aggressive interrogations or narrowing the due process protections of detainees (Article 75, Protocol I, customary law) in the interest of national security?

Judge WALD. First, I think it highly unlikely, however the political winds blow, that military officers or soldiers who participated in setting up the now illegal military commissions pursuant to Presidential order would be prosecuted under the domestic act and in the unforeseeable situation, that they were, section 1004(a) of the DTA would not protect them. Its standard that "they did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful" would likely be met by the Presidential and Attorney General opinions that they were lawful. I also think an international standard would be met as well by this defense.

As to torture, cruel treatment, humiliating or degrading treatment, the situation could be more complicated. If a government official did in fact sanction or participate in torture, cruel and inhuman treatment during this period, when Common Article applied through 18 U.S.C. 2441, it is quite possible that he would not meet the defense standard of "a person of ordinary sense and understanding" not knowing the practices were unlawful. "Unlawful" under what law, domestic or international? The Nazi atrocities were authorized and "lawful" under German law (I am not comparing the practices but only the legal norms). Thus a well educated upper level official who sanctioned the kind of torture or cruel treatment covered by Article 3 or even who authorized it might not meet the standard even though there was an order authorizing it. (If this were not so, what would be the purpose or use of international humanitarian law banning extreme practices). In short whether use or authorization of cruel or inhuman treatment would qualify under 18 U.S.C. 2441 might depend as would the availability of the DTA defense on the level of the official and the blatantness of the practice. Whether such a case would be brought I suspect would in turn depend on how grievous was the abusive treatment and how far up the ladder was the defendant. I believe that the same standards would apply in an international tribunal but that there would be if anything less deference given to the law that granted impunity after the fact. On the last point if Congress revised 2241 to define article 3 in ways that allowed for "more aggressive interrogations of detainees" or "narrowing due process protections" in trials, those new definitions would trump the international definitions for purposes of domestic war crimes prosecutions, though their retroactive application to offenses committed before the revisions could well be disputed. The revisions would not affect the liability of any Americans brought before an international tribunal for Article 3 violations except insofar as they might be used as evidence by the defendants to show that they met the exception in international law to the general principle that obedience to unlawful orders is not a defense to a war crime or crime against humanity. That exception is not universally recognized but where it is, it covers situations where the defendant did not know the order was unlawful or it was not manifestly so, and very abusive practices are not included in that category. According to Werle (pars. 454-) "national courts tend to presume the manifest illegality of orders aimed at the commission of crimes under international law" as do the international tribunals.

Mr. SKELTON. How did the commissions that General MacArthur ran in Japan compare to the Tokyo and Nuremberg International Military Tribunals? Generally, what was the outcome of these trials?

Ms. ELSEA. The Tokyo Trials, officially known as the International Military Tribunal for the Far East (IMTFE), were commenced by order of General MacArthur and employed procedural rules similar in many respects to the rules employed at Nuremberg. General MacArthur appointed eleven judges, one from each of the victorious Allied nations who signed the instrument of surrender and one each from India and

the Philippines, to sit on the tribunal. General MacArthur also appointed the prosecutor. Of the twenty-five people indicted for crimes against peace, all were convicted, with seven executed, sixteen given life imprisonment, and two others serving lesser terms. Two others died before they could be brought to trial, and one was declared mentally unfit to stand trial. Some 300,000 Japanese nationals were tried for conventional war crimes (primarily prisoner abuse) and crimes against humanity in national military tribunals. For more information about the procedures employed during the Tokyo and Nuremberg tribunals, please see CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts.*

Mr. SKELTON. Who wrote the rules and procedures for courts-martial and the Manual for Courts-martial after 1951? Typically, who advises the Presidents on promulgating Executive Orders changing the Manual for Courts-Martial?

Ms. ELSEA. The Judge Advocates General of the Army, Navy, and Air Force met with the General Counsel, Office of the Secretary of Defense, to establish a joint committee comprised of legal experts representing all three services to draft the original 1951 version of the Manual for Courts-Martial (MCM).[1] Today, revisions of the MCM are drafted by the Joint Service Committee (JSC), comprised of senior judge advocates from the Navy, Marine Corps, Army, Air Force, and Coast Guard, under the direction of the Office of General Counsel at the Department of Defense. Representatives of the Court of Appeals for the Armed Forces (CAAF), DOD General Counsel, and the Joint Chiefs of Staff serve in an advisory capacity. The organization and responsibilities of the JSC are found in DOD Directive 5500.17. The JSC performs an annual review of the MCM and proposes changes to DOD for the President's consideration. The proposed changes are first printed in the Federal Register for public comment, under procedures similar to (but not controlled by) the Administrative Procedures Act (APA).

Mr. SKELTON. The Chairman asked for you to examine the case law around advisement of rights (Article 31, *UCMJ*) and providing an attorney under battlefield conditions for U.S. personnel as well as, historically, for POWs and for a terrorist act. I would be interested in these responses as well. Specifically whether such evidence can be admitted in a trial if under battlefield conditions and for intelligence or military operational necessity a prisoner was not advised of their rights or provided an attorney when they were questioned? And does it matter if the suspected offense is a terrorist act?

Ms. ELSEA. It has not been the practice in the military to require that prisoners captured on the battlefield who are suspected of committing any criminal act be given a warning regarding their right against self-incrimination or access to an attorney. I am not aware of any cases in which captured enemy combatants were tried under the UCMJ, so it is impossible to say whether Article 31 would be interpreted to require the suppression of evidence obtained through questioning without first providing a warning. In other contexts, unwarned statements have been admitted into evidence when the questions were asked for reasons related to operational necessity intelligence gathering rather than for law enforcement or disciplinary purposes. While there is no special rule that applies only in cases involving terrorist acts, such situations could conceivably qualify for a public safety exception.

Mr. SKELTON. Does the case law indicate whether there is a difference in whether the primary purpose of interrogation or questioning was for intelligence or military operational purposes or for prosecutorial purposes? Can interrogations for any of these purposes be ongoing together? For instance, one day a prisoner might be interrogated for intelligence purposes without an attorney and the next day a prosecutor may ask other questions with counsel present? And in either case, the detainee can choose to answer questions or not answer questions?

Ms. ELSEA. The case law does indicate a difference in the application of Article 31 to interrogations for intelligence and military operational purposes, at least in cases where the suspect is not in custody and has not yet been charged with an offense. Whether the interrogations for such purposes can be ongoing together probably depends on the extent to which the inquiries are intertwined. If information is shared between the intelligence agents and law enforcement officers so that the investigations merge, or if it appears that the intelligence agents are acting on behalf of the military prosecutor, Article 31 would likely apply with respect to all questioning. If the inquiries are kept apart, questioning unrelated to the prosecution might be permitted to continue. But if the suspect has been charged with a crime and is in custody, it seems unlikely that statements made to intelligence investigators would be admissible at court-martial.

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[1] The drafting history is available at [http://www.loc.gov/rr/frd/Military—Law/pdf/CM-1951.pdf].

Mr. SKELTON. Ms. Davis asked you to provide information on statistics for convictions between Federal Courts and courts-martial. I would like that information but narrowed to the most serious crimes, such as those with penalties of death sentence or life sentences. Can you also provide evidence for the conviction rates for serious crimes under the historic military commissions and current international tribunals? If possible, for both questions, include information on whether the statistics change significantly upon appeals.

Ms. ELSEA. I have been unable to locate data compiled in such a way that would make such a comparison feasible. The Bureau of Justice Statistics issues an annual report containing statistics from the federal criminal justice system. The most recent edition compiles statistics covering the period October 1, 2002 through September 30, 2003. The current report and the reports for the previous eleven years are available online at [http://fjsrc.urban.org/fjs.cfm?p=pubs—ann,—rpt&t=h]. More specifically, the *Compendium of Federal Justice Statistics* provides statistics on the disposition of criminal cases by offense. For example, Table 4.2 in the 2003 edition includes the number of convictions for the following violent offenses (felonies): murder, negligent manslaughter, assault, robbery, sexual abuse, kidnaping, and threats against the president. The Code Committee on Military Justice, the U.S. Court of Appeals for the Armed Forces, and the Judge Advocates General of the Armed Forces jointly submit to Congress each year an annual report that includes basic courts-martial statistics. The most recent report covers the period from October 1, 2004 through September 30, 2005 and is available online, along with the previous eight years, at [http://www.armfor.uscourts.gov/Annual.htm]. While each branch of the military provides separate statistics for the report, including the total number of convictions, the numbers are not broken down by offense. Instead, the statistics are divided into three categories: General, BCD [bad-conduct discharge] Special, and Non-BCD Special. Thus, it is possible to compare overall conviction rates between federal courts and military courts; however, it is not possible to compare conviction rates for serious crimes inasmuch as the reported military statistics are not defined by offense.

Mr. SKELTON. In response to a question from the Chairman on Common Article 3 and questioning beyond name, rank and serial number, it appeared that all the panelists agreed that POWs are only required to give this information but may be, and usually are, questioned persistently for more information. All panelists seemed to agree that the GTMO detainees did not warrant POW status under the Geneva Conventions, but that they did warrant the minimum protections required by Common Article 3 for non-POWs. The Chairman seemed to indicate that there would be an issue of different religious or cultural definitions of the terms of Common Article 3 and that the U.S. had taken reservations to Common Article 3 either at the time of signing or through the DTA of 2005 (McCain amendment).

Please provide your understanding of case law or commentary on Common Article 3 and Additional Protocol I, Article 75 as to what would constitute a violation of Common Article 3 standards of treatment, including persistent questioning, of detainees who are not POWs and what reservations, understanding, or declarations the U.S. has taken since 1949 on these international treaties.

Ms. ELSEA. The United States did not enter any reservations with respect to Common Article 3 at the time it ratified the Geneva Conventions. The United States has not ratified Additional Protocol I to the Geneva Conventions; however, past Administrations have indicated that Article 75 is a manifestation of customary international law, and that its prohibitions are nonetheless binding on the United States as well as all others.

Persistent questioning of detainees not entitled to POW status, by itself, has not been found by any court to constitute a violation of Common Article 3. Unlike the parts of the Geneva Conventions that apply to POWs and protected persons in the context of an international war, Common Article 3 does not explicitly forbid coercion. However, questioning that is conducted continuously over a long period of time could result, for example, in excessive sleep deprivation, which may amount to cruel, inhumane, or degrading treatment within the meaning of Common Article 3. Such questioning may also be combined with other methods that fall below the threshold established by Common Article 3.

Prolonged questioning has been found to be inherently coercive for purposes of the Fifth and Fourteenth Amendments to the Constitution.[2] Therefore, prolonged ques-

[2] Haynes v. Washington, 373 U.S. 503 (1962) (written confession obtained from suspect after 16-hour incommunicado interrogation inadmissible as involuntary); Watts v. Indiana, 338 U.S. 49 (1949) (six days of persistent interrogation without arraignment rendered confession involuntary for due process purposes); Ashcraft v. State of Tennessee, 322 U.S. 143 (1944) (confession

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tioning may violate the McCain amendment, likely depending on the totality of circumstances surrounding the interrogation.

Mr. SKELTON. Of the ten detainees at Guantanamo (GTMO) who are charged with war crimes, how many were captured under battlefield conditions? a. You said in testimony that the UCMJ provides an exception for rights advisement and provision of counsel in emergencies. Would you expand on this answer please as to the exceptions for Article 31 under the UCMJ?

Colonel DAVIS. All of those ten persons who previously had been charged with war crimes were captured in either Afghanistan or Pakistan, both of which are designated as combat zones. If by "battlefield conditions" you mean active armed hostilities at the point of capture (i.e., an exchange of gunfire), then five of the ten detainees were captured under such conditions. Four of the other five detainees were captured while attempting to flee Afghanistan or Pakistan. The fifth was captured by U.S. forces in a raid on the detainee's home following an intelligence tip.

(a) The courts have recognized for more than 50 years (see *United States* v. *Gibson,* 14 C.M.R. 164, 170 (C.M.A. 1954)) that the literal application of Article 31 in every instance would have unintended consequences on day-to-day military life and military operations. As a result, the courts consider the surrounding facts and circumstances to determine if Article 31 warnings are required. A key factor the courts will consider is whether the person asking the questions is conducting a law enforcement investigation to gather evidence for use in a disciplinary proceeding. The case I was thinking of during my testimony was *United States* v. *Loukas,* 29 M.J. 385 (C.M.A. 1990). In that case, an aircrew member started behaving erratically while flying a mission and other crew members asked if he had taken drugs. The court held Article 31 warnings were not required in that case because the questioning was to protect the safety of the aircraft and the aircrew, not to obtain evidence for use against the accused. The same rationale may apply in the battlefield scenario Chairman Hunter presented at the hearing. For a comprehensive analysis of when Article 31 warnings are required, see *United States* v. *Cohen,* 63 M.J. 45 (C.A.A.F. 2006).

Mr. SKELTON. What percentage of the other detainees at GTMO were captured under battlefield conditions? Turned over by a third party? What specifically are the challenges with evidence given that these were not battlefield captures by infantrymen or special forces?

Colonel DAVIS. The prosecution has focused on the cases that are likely candidates for trial, so I do not have information on how all of the detainees were captured.

The greatest challenge, regardless of whether a case involves a classic battlefield capture by U.S. forces, is that these cases are not the result of traditional U.S. law enforcement investigations of ordinary crimes. Things that are routine in domestic law enforcement investigations—evidence tags, chain of custody documents, prompt securing of crime scenes for subsequent investigations, detailed witness statements under oath, constitutional rights warnings, etc.—are generally absent in these war crimes cases. Additionally, most of the events took place halfway around the world in places where it was and still is dangerous to canvas for witnesses and look for evidence. The point that seems to be overlooked by many is that these cases are war crimes prosecutions under Title 10, not domestic criminal trials under Title 18. Looking at these cases through the Title 18 filters that apply to trials of persons accused of crimes in our domestic courts distorts the reality that these are unlawful enemy combatants being brought to justice as part of the war effort, not domestic petty criminals being held to account while afforded full constitutional protections applicable in Article III courts.

Mr. SKELTON. Your testimony on the record said that for military commission panels most officers had master's degrees if not doctorates. What percentage of military line officers have each? What is the percentage of line 0–1s through 0–3s in the military have each? What is the percentage of line 0–1s through 0–3s among line officers in total? What are the ranks of individuals who usually serve on panels?

Colonel DAVIS. I do not have access to data on the education levels of officers from all services. The Under Secretary of Defense for Personnel and Readiness may have that information. I do have data from the Air Force Personnel Center on Air Force officers and I would expect the data for officers from the other services to be comparable.

As a starting point, all Air Force officers have at least an undergraduate degree. For Air Force officers from 0–1 (Second Lieutenant) through 0–6 (Colonel), the percentage with an advanced degree is 51.5 percent. That includes 41.3 percent with master's degrees and 10.2 percent with doctorate or professional degrees. As would

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made by defendant after he was held incommunicado and interrogated for 36 hours, without sleep or rest, by relays of officers, experienced investigators, and highly trained lawyers, was not voluntary).

be expected, the percentages increase significantly as the groups grow more senior and thus older. Air Force officers in the grades 0–1 through 0–3 constitute 57.4 percent of the officers in the 0–1 to 0–6 range, and 24.3 percent of the 0–1 to 0–3 group have an advanced degree (18 percent with master's degrees and 6.3 percent with doctorate or professional degrees). On the other end of the spectrum, for Air Force 0–6s, more than 99.95 percent (3,519 out of 3,521 colonels) have an advanced degree (76.4 percent with master's degrees and 23.5 percent with doctorate or professional degrees).

In a memorandum to the Military Department Secretaries on May 24, 2005, the General Counsel of the Department of Defense, the Honorable Jim Haynes, defined the criteria for court member nominees as: grade of 0–5 (Lieutenant Colonel/Navy Commander) and above, a reputation for integrity and good judgment, and a top secret security clearance. In the ten cases referred to trial prior to the Supreme Court's Hamdan decision, all court members selected by the convening authority were in the grades 0–5 and 0–6 (Colonel/Navy Captain). (Information on the ten cases, including redacted court member lists, is available at the military commissions' web site: http://www.defenselink.mil/news/commissions.html.) For 0–5s and 0–6s combined, based upon the Air Force data, 98.1 percent have an advanced degree (81.2 percent with master's degrees and 16.9 percent with doctorate or professional degrees).

A recent study of the education levels of juries in the U.S. District Court for the District of Connecticut found that 46 percent of jurors had completed four years of college. The authors noted that it is generally accepted that jurors with college degrees are better able to follow judges' instructions and remain focused on complex evidence than jurors without college degrees. (Hillel Y. Levin & John W. Emerson, *Is There a Bias Against Education in the Jury Selection Process?,* 38 Conn. L. Rev. 325, 330 (2006)).

Mr. SKELTON. Are the rules of evidence for hearsay and classified information part of the UCMJ passed by Congress or part of the Military Rules of Evidence in the Manual for Courts-Martial changed by Executive Order of the President? a. In testimony you mentioned that under the UCMJ hearsay can only come in "by exception"? Can you describe the "exceptions" in the MRE? In your experience as either a prosecutor or defense counsel in general courts-martial cases under the UCMJ, are the exceptions difficult to establish? b. If hearsay exceptions are difficult to establish in general courts-martial trial procedures, can you propose an additional hearsay exception for military commissions in general that would provide the flexibility prosecutors desire in order to provide a fair (by international LOAC standards), but effective trial for detainees in the war on terror (related to the Afghanistan conflict and/or 9/11)? c. Can you propose an additional rule(s) prosecutors desire relating to classified evidence (MRE 505, etc.) that would provide for a far but effective trial? For instance should all panel members (line officers) be cleared for TS/SCI evidence as well as Special Access Programs information on sources and methods? Is it necessary for the panel (rather than just the judge and counsel) to know sources and methods beyond the underlying information in classified documents (i.e., explain once again for the record why declassification, redaction, tear line reports, write for release reports, and summaries, all without identification of highly classified sources and methods) would not suffice for the panel to do the "fact finding" necessary for fair but effective trials?

Colonel DAVIS. In the UCMJ, Congress authorized the President to prescribe rules of evidence for courts-martial (Article 36, 10 U.S. Code § 836). The rules of evidence for hearsay (800 series) and classified information (Rule 505) are in the Military Rules of Evidence, which the President has the authority to issue and modify. Because the Secretary of Defense has not yet issued a Manual for Military Commissions or the rules of evidence for the military commissions, it is uncertain how the commission rules of evidence will implement the hearsay rule of § 949a(b)(2)(E) of the Military Commissions Act of 2006 (MCA), or whether those rules of evidence will track verbatim with the Military Rules of Evidence.

(a) The hearsay section of the Military Rules of Evidence (MRE) is patterned after the same section of the Federal Rules of Evidence (FRE). MRE 803 and 804, which are the same as FRE 803 and 804, list a number of exceptions to the prohibition on the admissibility of hearsay, including excited utterances, statements against interest, statements under belief of impending death, and other commonly recognized hearsay exceptions. MRE 807, like FRE 807, is the residual hearsay exception, which allows a judge to admit a hearsay statement not covered by a recognized exception in MRE 803 or 804 if it has "equivalent circumstantial guarantees of trustworthiness." My experience as both a prosecutor and defense counsel in courts-martial, as an appellate counsel for the government, and as a staff judge advocate to both special and general court-martial convening authorities, is that military judges

take their duties very seriously and rigidly hold the parties to their respective burdens of persuasion. As in the Federal courts, this results in hearsay being admitted in some instances and excluded in others.

(b) I believe the MCA gives us the flexibility necessary to effectively prosecute alleged terrorists in military commissions. Section 949a(b)(2)(E) of the MCA allows a military judge to admit hearsay that would not otherwise be admissible in a court-martial unless the party objecting to the admission of such evidence proves it is unreliable or lacking in probative value. Additionally, § 949a(b)(2)(F) requires a military judge to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. These two provisions, in my view, appropriately place the burden on the party objecting to the admission of a hearsay statement to prove why it should not go to the court members for them to weigh in their evaluation of all the evidence.

(c) Some, but not all, court member panels may require special clearances because of possible exposure to compartmented information. Counsel, in conjunction with the convening authority and his or her staff, should be able to identify cases in advance where that is likely. I do not believe court member panels need access to all sources and methods of obtaining information in order to fully and fairly perform their fact-finding duties. Section 949d(f)(2) of the MCA gives the military judge the authority to hold a closed hearing—a hearing outside the presence of the court members, the media, the public, and, if appropriate, the accused—to address with counsel, on the record, how to handle classified information at trial. The military judge has the discretion to determine how information will be presented to the members (in whole, redacted, summary, etc.) and how members will be instructed on their evaluation of such evidence. In the end, the accused will see and hear *all* the same evidence the court members see and hear, including classified information if some evidence is presented in classified form; so any notion that an accused can be convicted and not have the chance to confront all the evidence is mistaken. Military court members are competent to take the evidence in whatever form it is presented to them and obey the judge's instructions concerning how they are to evaluate such evidence and reach a fair and just determination.

Mr. SKELTON. Can you provide information, classified if necessary, on the six Algerians turned over by the Bosnians (not captured on the battlefield) who remain at GTMO without charge?

Colonel DAVIS. Prior to the enactment of the Military Commissions Act of 2006 these cases had been assessed as possible military commissions. Additional investigative and preparatory work is necessary before more definite prosecutorial decisions under the military commission procedures established by and pursuant to the Military Commissions Act of 2006 can be made in these cases.

Mr. SKELTON. Who can be tried by courts-martial according to the UCMJ, Article 2? Only U.S. military personnel? a. Do DOD and DOJ have a Memorandum of Agreement or Understanding that U.S. service personnel accused of war crimes will be tried under the UCMJ rather than in Federal Courts under 18 U.S. Code?

Colonel DAVIS. The coverage of Article 2 includes: active duty service members, cadets at service academies, members of the reserve component while in federal status, retired service members, persons serving courts-martial sentences, personnel from federal agencies (NOAA and Public Health Service, for example) assigned to and serving with the armed forces, prisoners of war, persons accompanying the armed forces in the field during a time of war, and persons serving with the armed forces outside the U.S. and its territories or outside the U.S. but in an area over which the U.S. exercises control (subject to any treaty or rule of international law). Note that this last category of persons over whom a military court-martial may assert jurisdiction has been limited by the U.S. Supreme Court.

(a) I am not aware of any memorandum, agreement, or understanding between DOD and DOJ concerning the trial of U.S. service members for alleged war crimes.

Mr. SKELTON. Without an explicit ban on the admission of coerced testimony, do you think the rules for treatment of captured and detained persons by infantry soldiers, special forces, military police, detention forces, intelligence professionals and others will be clear? (a) How would you define "coerced" evidence that is acceptable and that which is not? (b) Do you think the impulse to "save lives" by gaining intelligence and operational information through "aggressive" interrogations not bound by the ban on coercion might cause some of the aforementioned individuals to "cross the line"? (c) Would this be hard for commanders to hold their personnel responsible for such transgressions or for prosecutors to use intelligence information gained through such interrogations as evidence with a clear conscience?

Colonel DAVIS. (a) I believe that the rules for the treatment of captured enemy combatants are clear: captured and detained personnel will be treated humanely. I am confident that U.S. forces understand this rule. I do not believe that U.S. armed

forces personnel who capture and detain enemy combatants condition their treatment of those individuals on whether statements that they might make will be admissible at a possible future trial.

(b) The polar ends of the spectrum of coerced evidence are simple and subject to little debate: a statement is admissible if it resulted from minimal coercion and inadmissible if it resulted from extreme coercion. The more difficult question is where to strike the balance between the two polar ends. My personal opinion is that § 948r of the Military Commissions Act of 2006 (MCA) establishes the appropriate standard to strike a proper balance and achieve justice. It requires the judge to find a statement is, based on a totality of the circumstances, reliable and probative, and its admission into evidence serves the ends of justice before the judge allows the statement to go to the court members for their consideration. I believe that this threshold standard of admissibility, coupled with the ability of the court members to evaluate the evidence and attach such weight as they deem appropriate, and then four layers of post-trial review, ensures a fair trial that meets or exceeds the standards accepted in similar international tribunals.

(c) No.

I do not believe that commanders doubt their ability to discipline their personnel. I am confident the standard of admissibility discussed in (b) above permits each prosecutor to go forward with a clear conscience. I have instructed the prosecutors that they will not offer any evidence that they question on legal, ethical, or moral grounds. Additionally, the prohibitions against unlawful command influence found in § 949b(a)(2)(C) of the MCA provide an additional layer of protection. No member of the prosecution team wants to secure a conviction in such a way that casts doubt on our commitment to fairness and justice.

Mr. SKELTON. Can you provide the Committee with a copy of the Manual for Military Commissions drafted for the original (and revised Military Commission Orders before Hamdan)?

Colonel DAVIS. I have had no involvement in the creation of the draft Manual for Military Commissions, I have never seen any parts of it, and I do not have a copy.

Military Commission Orders are available at: http://www.defenselink.mil/news/Aug2004/commissions—orders.html.

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