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## Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law

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### Introduction

The United States Department of Defense initiated military commissions as authorized by the Military Commissions Act ("MCA") of 2006 to try "unlawful enemy combatants" detained in the course of the War on Terror.<sup>1</sup> Enacted on October 17, 2006, the MCA's specific purpose is "to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission."<sup>2</sup> Congress passed the MCA as a renewed attempt at convening military commissions in response to the Supreme Court's ruling in *Hamdan v. Rumsfeld*,<sup>3</sup> where the Court held that the President's initial attempt at trying detainees<sup>4</sup> before military

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1. Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, sec. 3, § 948b(a), 120 Stat. 2601, 2602 (2007) (to be codified at 10 U.S.C. § 948b).

2. *Id.* § 948b, 120 Stat. at 2602.

3. 126 S. Ct. 2749 (2006).

4. Much has been written about the Bush administration's efforts to establish military commissions to try detainees. See generally INTERNATIONAL LAW CHALLENGES: HOMELAND SECURITY AND COMBATING TERRORISM (Thomas McK. Sparks & Glenn M. Sulmasy eds., 2006); JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER (2006); NAT'L INST. MILITARY JUSTICE, ANNOTATED GUIDE: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (2002); Keith S. Alexander, *In the Wake of September 11th: The Use of Military Tribunals to Try Terrorists*, 78 NOTRE DAME L. REV. 885 (2003); Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002); Joan Fitzpatrick,

commissions was not authorized either by congressional power or the President's war powers.<sup>5</sup>

The Secretary of Defense published the Manual for Military Commissions of January 18, 2007 ("the Manual"), in accordance with the MCA, to govern the commissions' proceedings. The Manual sets forth guidelines<sup>6</sup> for trials of detained "unlawful enemy combatants"<sup>7</sup> at Guantánamo Bay and other U.S. detention

*Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345 (2002); *Instructions for Military Commissions on Trying Aliens Charged with Terrorism*, 97 AM. J. INT'L L. 706 (Sean D. Murphy, ed.) (2003); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); Michael J. Matheson, *U.S. Military Commissions: One of Several Options*, 96 AM. J. INT'L L. 354 (2002); Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320 (2002); Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001); Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677 (2002); Alfred P. Rubin, *Applying the Geneva Conventions: Military Commissions, Armed Conflict, and Al-Qaeda*, 26 FLETCHER F. WORLD AFF. 79 (2002); Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent*, 76 S. CAL. L. REV. 1371 (2003); Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648 (2002); *U.S. Department of Defense Rules on Military Commissions*, 96 AM. J. INT'L L. 731 (Sean D. Murphy ed., 2002); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328 (2002); Richard J. Wilson, *Can U.S. Courts Learn from Failed Terrorist Trials by Military Commission in Turkey and Peru?*, 11 HUM. RTS. BRIEF 11 (2003); ABA Task Force on Terrorism and the Law, *Report and Recommendations on Military Commissions*, ARMY LAW., Mar. 2002, at 8.

5. *Hamdan*, 126 S. Ct. at 2753–55.

6. U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, pt. II, R. 103(a)(24) (2007), available at <http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf> [hereinafter MMC]. The Manual contains four parts: Preamble, Rules for Military Commissions, Military Commission Rules of Evidence, and Crimes and Elements.

7. Under Rule 103(a)(24), "Unlawful Enemy Combatant" means:

- (A) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, [A]l Qaeda, or associated forces); or
- (B) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

*Id.* pt. II, R. 103(a)(24). In June 2007, a military commission dismissed charges against a detainee because the prosecution had failed to show that the detainee, despite being an enemy combatant, was an *unlawful* enemy combatant. *United States v. Khadr*, Order on Jurisdiction (U.S. C.M. Comm'n, June 4, 2007), available at [http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder\(June%2004\).pdf](http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder(June%2004).pdf). On appeal, the United States Court of Military Commission Review remanded the case to the original commission indicating that the trial judge had to

sites. Pursuant to these guidelines, U.S. military prosecutors renewed their effort to charge detainees and bring them to trial.<sup>8</sup> Prosecutors now face the task of bringing the detainees to justice amidst their already prolonged detention and international pressure to comply with human rights and international humanitarian law obligations.<sup>9</sup>

Intense political debate continues over which rules of U.S. and international law should apply to those detained in the course of hostilities in the War on Terror and how the detainees should be handled.<sup>10</sup> Trying and convicting these detainees requires protection of the right to a fair trial for both political and legal reasons. The United States considers itself a leader in promoting human rights—to cease protection of fair trial rights would damage the United States' reputation. Furthermore, human rights treaties obligate the United States to guarantee the right to a fair trial. If the United States fails to provide fair trial protections to current detainees, U.S. soldiers captured in future conflicts may be unfairly treated.

In light of these considerations, sources of international law, such as the Geneva Conventions and the International Covenant on Civil and Political Rights ("Civil and Political Covenant"),<sup>11</sup> can provide necessary guidance for military commissions to protect fair trial rights. This Article explores how international human rights law can assist in navigating fair trial issues raised in the application and interpretation of the Manual for Military

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fully consider the prosecution's evidence regarding a detainee's alleged unlawful status before deciding the "critical jurisdictional matter." *United States v. Khadr*, No. 07-001, at 20 (U.S. Ct. Mil. Comm'n Rev. Sept. 24, 2007), available at [http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20\(24%20Sep%2007\)\(25%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20(24%20Sep%2007)(25%20pages).pdf); see also William Glaberson, *Court Advances Military Tribunals for Detainees*, N.Y. TIMES, Sept. 25, 2007, at A1 (describing the trial court and appellate decisions in the case of Canadian detainee Omar Ahmed Khadr).

8. See, e.g., Glaberson, *supra* note 7, at A1.

9. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 266 (2000) (stating that human rights law should be a part of the interpretation and application of international humanitarian law, specifically in the case of "regularly constituted courts" under Common Article 3); see also *The Military Commissions Act and the Continued Use of Guantánamo Bay as a Detention Facility: Hearing Before the House Committee on Armed Services*, 110th Cong. (2007) (written testimony of Elisa Massimino, Washington Director, Human Rights First) (discussing the negative effects of the manner and prolonged nature of the Guantánamo Bay detentions).

10. See *supra* note 4 and accompanying text.

11. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 (signed by the United States on Oct. 5, 1977; ratified on June 5, 1992) [hereinafter Civil and Political Covenant].

Commissions. Part I of the Article looks at the different legal statuses of the defendants before military commissions and the international law applicable to their proceedings. Part II analyzes the judicial guarantees necessary for a regularly constituted court under international law and Common Article 3. Part III explores whether military commissions uphold judicial guarantees “recognized as indispensable by civilized peoples.”<sup>12</sup> Finally, Part IV considers the role for international law in interpreting the Manual and sets forth the consequences of failing to provide internationally recognized fair trial guarantees.

This Article demonstrates that the Manual fails to assure a regularly constituted court that protects the requisite judicial guarantees. In order to provide these guarantees, the Manual should be interpreted in light of U.S. treaty obligations. Interpreting the Manual in such a way will help satisfy the United States’ international obligations, preserve consistency in domestic and international law, protect those responsible for the trials from prosecution in other countries for human rights violations, and possibly protect U.S. soldiers captured in future conflicts.

## **I. Who the Detainees Are and What Law Applies to Them**

### *A. The Legal Statuses of the Defendants and Applicable Law*

The War on Terror encompasses a number of international and non-international conflicts—the primary conflicts being in Afghanistan and Iraq.<sup>13</sup> Beginning on October 7, 2001, the United States bombed and sent troops to Afghanistan in response to the September 11, 2001 attacks by Al Qaeda on the United States.<sup>14</sup> The scope of the War on Terror increased dramatically with the inception of the war in Iraq on March 20, 2003, when an international coalition led by the United States invaded Iraq in an effort “to disarm Iraq of weapons of mass destruction, to end Saddam Hussein’s support for terrorism, and to free the Iraqi people.”<sup>15</sup> In both Afghanistan and Iraq, the United States

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12. *E.g.* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 3116–18, 75 U.N.T.S. 31, 32–34 [hereinafter First Geneva Convention]; accord *infra* notes 19–23 and accompanying text; see also MMC, *supra* note 6 (Executive Summary).

13. See MARGUILES, *supra* note 4, at 3.

14. See *id.*

15. President George W. Bush, Radio Address: President Discusses Beginning of Operation Iraqi Freedom (Mar. 22, 2003), available at

captured and detained enemy combatants; the United States now faces the dilemma of what to do with these detainees.<sup>16</sup>

In order to try detainees, it is necessary to understand their status in international law. The specific rights of detainees depend on who they are and which international law applies to them. The first year of the Afghan conflict—October 7, 2001 to June 9, 2002—qualifies as an international armed conflict.<sup>17</sup> Therefore, Taliban prisoners taken during the international armed conflict qualify as prisoners of war (“POWs”) covered under the Third Geneva Convention.<sup>18</sup> Individuals detained in Afghanistan following the close of this conflict were taken in the context of a non-international armed conflict and are thus covered under Article 3, common to all four Geneva Conventions.<sup>19</sup> Individuals taken during the initial stages of the war on Iraq are either covered under the Third Geneva Convention (“POW Convention”) if they are POWs<sup>20</sup> or under the Fourth Geneva Convention if they are civilians.<sup>21</sup> A 2005 United Nations Security Council decision declared the Iraq conflict to be officially over;<sup>22</sup> thus defendants taken in the context of the Iraq war after 2005 are covered under Common Article 3,<sup>23</sup> which deals with internationalized civil wars and other conflicts not falling within Common Article 2 of the Geneva Conventions. Further, some detainees who were initially detained outside of these conflicts, those detained in Bosnia for example,<sup>24</sup> are now under United States’ control and are thus

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<http://www.whitehouse.gov/news/releases/2003/03/20030322.html>.

16. See, e.g., Adam Liptak, *The Line Between Civilian and Soldier*, N.Y. TIMES, June 13, 2007, at A15.

17. See Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRIT. Y.B. INT’L L. 71, 76 (2004).

18. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 3318–20, 75 U.N.T.S. 135, 138–40 [hereinafter POW Convention]. Note, however, that this definition assumes the prisoner is part of the Taliban or regular army. The POW Convention would not apply to Al Qaeda or non-combatants, though Article 5 of the POW Convention gives them the same type of protection. *Id.* at 140–42.

19. First Geneva Convention, *supra* note 12, at 32–34; Geneva Convention for the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 3220–22, 75 U.N.T.S. 85, 86–88 [hereinafter Second Geneva Convention]; POW Convention, *supra* note 18, at 136–38; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 3518–20, 75 U.N.T.S. 287, 288–90 [hereinafter Fourth Geneva Convention]. For the remainder of this Article, these articles collectively will be referred to as “Common Article 3.”

20. POW Convention, *supra* note 18, at 138–40.

21. Fourth Geneva Convention, *supra* note 19, at 288–90.

22. S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005).

23. Common Article 3, *supra* note 19.

24. See, e.g., Boudellaa v. Bosnia & Herzegovina, Decision on Admissibility and

covered under the Civil and Political Covenant<sup>25</sup> and customary international law.<sup>26</sup>

### B. Fair Trial Rights Apply Universally

The defendants' differing legal statuses are irrelevant for the purposes of fair trial standards in international humanitarian and human rights law. The same standards for the purposes of fair trial rights apply in all cases: all defendants should receive a fair trial by a competent court. The U.S. Supreme Court decided in *Hamdan v. Rumsfeld* that Common Article 3's guarantees govern the relevant fair trial provisions for military commissions, and the Court did not exclude the consideration of other bodies of international law.<sup>27</sup> *Hamdan's* interpretation of Common Article 3

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Merits, Case No. CH/02/8679, Human Rights Chamber for Bosnia and Herzegovina, Oct. 11, 2002, ¶ 333. Extraordinary rendition is one source of detention outside of these conflicts. The New York Times editorial board has referred to extraordinary rendition as "the morally and legally unsupportable United States practice of transporting foreign nationals to be interrogated in other countries known to use torture and lacking basic legal protections." Editorial, *Supreme Disgrace*, N.Y. TIMES, Oct. 11, 2007, at A30.

25. Civil and Political Covenant, *supra* note 11, at arts. 10(3), 14(4). The United States has argued that since Guantánamo Bay is not located within U.S. territory, the Civil and Political Covenant does not apply to its treatment of detainees. See Leslie C. Green, *Is There a "New" Law of Intervention and Occupation?*, in INTERNATIONAL LAW CHALLENGES: HOMELAND SECURITY AND COMBATING TERRORISM, *supra* note 4, at 174-75. Article 2(1) of the Covenant indicates that a State party is obligated to respect and ensure the rights of the Covenant "to all individuals within its territory and subject to its jurisdiction." Civil and Political Covenant, *supra* note 11, at art. 2(1) (emphasis added); see U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United States of America*, ¶ 130, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005). The Human Rights Committee has, however, determined that a person need not be located within the territory of a State party in order for that State party to have obligations to that person; the person must merely be "within the power or effective control" of the State party. U.N. Human Rights Comm., *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). While the United States does not concur with this interpretation, the Human Rights Committee made it clear in reviewing the U.S. report in July 2006 that "effective control" would be the authoritative standard for evaluating U.S. conduct in Guantánamo and elsewhere. See U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, United States of America*, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

26. Customary international law includes the right to a "fair trial affording all essential judicial guarantees" and is examined in detail by the International Red Cross in 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 352 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

27. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795-96 (2006); see also Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 343 (2007) (advocating deference to Congress and the President because "it is far from clear that the military commissions as

takes its foundation from Article 75 of the first Additional Protocol,<sup>28</sup> the Civil and Political Covenant,<sup>29</sup> and customary international law. Furthermore, the Court of Military Commissions Review declared that “[t]he United States is a signatory nation to all four Geneva Conventions. The Geneva Conventions are generally viewed as self-executing treaties, . . . form a part of American law, and are binding in federal courts under the Supremacy Clause.”<sup>30</sup> These sources of international law contain in-depth and interrelated fair trial standards.

The following provisions illustrate the similarity of fair trial standards in humanitarian and international human rights law: Common Article 3, which governs armed conflicts not of an international character;<sup>31</sup> the POW Convention, which governs international armed conflicts;<sup>32</sup> Article 75 of the First Additional

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authorized by the MCA violate [C]ommon Article 3”); Patrick O. Gudridge, *An Anti-Authoritarian Constitution? Four Notes*, 91 MINN. L. REV. 1473, 1500–01 (2007) (analyzing the independence of the military commissions’ procedures as a response to Hamdan); Gregory E. Maggs, *Enemy Combatants After Hamdan v. Rumsfeld*, 75 GEO. WASH. L. REV. 971, 986 (2007) (explaining how the MCA “strives to eliminate objections under the Third Geneva Convention”); Stephen A. Saltzburg, *A Different War: Ten Key Questions About the War on Terror*, 75 GEO. WASH. L. REV. 1021, 1028–31 (2007) (arguing that the military commissions are not regularly constituted courts but are unique types of tribunals); Jennifer Trahan, *Military Commission Trials at Guantanamo Bay, Cuba: Do They Satisfy International and Constitutional Law?*, 30 FORDHAM INT’L L.J. 780, 820–21 (2007) (finding difficulty in construing the MCA provisions in harmony with Common Article 3 and noting that without being regularly constituted courts, such military commissions would constitute a war crime).

28. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 1125 U.N.T.S. 3, June 8, 1977 [hereinafter Additional Protocol]. The Protocol has not been ratified by the United States, but this has not prevented the Supreme Court from relying on it to interpret the meaning of Common Article 3 of the Geneva Conventions. See *Hamdan*, 126 S. Ct. at 2796.

29. *Hamdan*, 126 S. Ct. at 2797 n.66 (Stevens, J., concurring) (citing the Civil and Political Covenant as an additional source of legal protections mirroring those under Article 75).

30. *United States v. Khadr*, No. 07-001, at 4 n.4 (U.S. Ct. Mil. Comm’n Rev. Sept. 24, 2007), available at [http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20\(24%20Sep%2007\)\(25%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20(24%20Sep%2007)(25%20pages).pdf). For the difficulties found when defendants attempt to invoke treaty provisions that are not self-executing, see the U.S. Supreme Court Decision in *Medellín v. Texas*. No. 06-984, 2008 WL 762533 (Mar. 25, 2008) (holding that an International Court of Justice’s (“ICJ’s”) decision that the United States had violated the Vienna Convention on Consular Relations was not directly enforceable domestic federal law that preempted state limitations on filing of successive habeas petitions and that a Presidential memo requiring state courts to give effect to the ICJ’s decisions did not independently require states to reconsider and review the defendant’s claims without regard to state procedural default rules).

31. Common Article 3, *supra* note 19.

32. POW Convention, *supra* note 18.



Protocol, which also governs international armed conflicts;<sup>33</sup> and Article 14 of the Civil and Political Covenant, which governs civil and political rights in general.<sup>34</sup> Common Article 3 to the Third and Fourth Geneva Conventions requires:

In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions [prohibiting]: . . . (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.<sup>35</sup>

Fair trial provisions also derive from Article 75(4) of Additional Protocol I, which states: "No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure . . . ."<sup>36</sup> Article 75(4) then lists judicial guarantees considered fundamental to a fair trial under customary international law.<sup>37</sup> Article 14 of the Civil and Political Covenant similarly guarantees the right "to a fair and public hearing by a competent, independent and impartial tribunal established by law."<sup>38</sup> Hence, countries that wish to prosecute anyone for war crimes must provide a "regularly constituted court" that affords "all the judicial guarantees which are recognized as indispensable

33. Additional Protocol, *supra* note 28, at art. 75.

34. Civil and Political Covenant, *supra* note 11, at art. 14.

35. Common Article 3, *supra* note 19. Common Article 3 was considered by the drafters as proclaiming "the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built." OSCAR M. UHLER ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 14 (Jean S. Pictet ed., 1958); *see also* Derek Jinks, *Protective Parity and the Laws of War*, 79 NOTRE DAME L. REV. 1493, 1508 (2004) (outlining the purpose of Common Article 3 and arguing that the principles embodied therein "would pierce the veil of sovereignty").

36. Additional Protocol, *supra* note 28, at art. 75(4). *See generally* Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 377-80 (2005) (setting forth the sources of customary international law in times of conflict).

37. *See* Additional Protocol, *supra* note 28, at art. 75(4)(a)-(j).

38. Civil and Political Covenant, *supra* note 11, at art. 14; *see also* Human Rights Comm., *General Comment No. 32*, ¶¶ 15-29, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter *Gen. Comm. 32*]. The Human Rights Committee adopted General Comment Number 32 in 2007 to replace General Comment Number 13.

by civilized peoples.”<sup>39</sup>

### C. Guidance from Courts-Martial

The practices of courts-martial may provide additional guidance for interpreting the Manual. The POW Convention requires POWs to be tried by court-martial; therefore, courts-martial under the Uniform Code of Military Justice (“UCMJ”) generally provide a regularly constituted court, affording judicial guarantees as directed by Common Article 3.<sup>40</sup> It would benefit military commissions to draw on the fundamental principles of courts-martial when interpreting the Manual’s provisions.<sup>41</sup>

## II. What Is a Regularly Constituted Court?

Under the Civil and Political Covenant, a regularly constituted court must at a minimum be independent and impartial.<sup>42</sup> The requirement of independence protects a defendant’s right to judges that are not subject to political influence.<sup>43</sup> Impartiality requires judges to be free of “personal

39. Common Article 3, *supra* note 19; see also OSCAR M. UHLER ET AL., *supra* note 35, at 14; Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 81 (2005) (“Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflict of a non-international character. There is no doubt that [ . . . ] these rules also constitute a minimum yardstick [ . . . ] and they are rules which, in the [opinion of the International Court of Justice], reflect what the Court in 1949 called ‘elementary considerations of humanity.’” (alterations in original) (quoting *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 114 (June 29) (Merits))).

40. For more on the application of international law to this conflict, including discussion of military commissions and courts-martial, see David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT’L L.J. 55, 71–76 (2006) (acknowledging that U.S. service personnel could be tried under military commissions, which he states would “differ from a court-martial in nomenclature only,” but finding complications when military commissions are structured to exclude U.S. citizens under their jurisdiction).

41. For a more detailed analysis of how court-martial standards flow with international human rights standards in an actual military commission, see Brief for Respondent Omar Khadr Supporting Petitioners at 27–30, *Al Odah v. United States*, 2008 WL 695615 (2008) (No. 06-1196), 2007 WL 2428374.

42. Civil and Political Covenant, *supra* note 11, at art. 14. For a discussion of judicial procedural guarantees see *infra* Part III.

43. See U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Slovakia*, ¶ 18, U.N. Doc. CCPR/C/79/Add.79 (Aug. 4, 1997). The Human Rights Committee has the authority to review country compliance with the Civil and Political Covenant, which it does through periodic review and the issuance of Concluding Observations on country situations. Civil and Political Covenant, *supra* note 11, at art. 40.

bias or prejudice"<sup>44</sup> and viewed as impartial based on a country's domestic statutes.<sup>45</sup> In interpreting the Civil and Political Covenant, the Human Rights Committee notes that jurisdiction of military courts over civilians may raise serious problems regarding "the equitable, impartial and independent administration of justice."<sup>46</sup>

In the past, the United States vocally criticized military tribunals for their tendency towards bias and appearance of being subject to executive pressure.<sup>47</sup> Aspects of the current military commissions that are likewise questionable under international law include the commissions' ability to try individuals for acts that may not have been illegal when they were committed,<sup>48</sup> the creation of the commissions after the crimes were committed, the creation of the commissions for specific individuals, and the use of military officers to preside over commissions.<sup>49</sup> Allowing military officers to prosecute and judge their enemies in the War on Terror raises a question of judicial impartiality heightened by the fact that Congress created these commissions specifically for that

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44. *Gen. Comm.* 32, *supra* note 38, ¶ 21 (citing *Karttunen v. Finland*, U.N. Human Rights Committee, Communication No. 387/1989, ¶ 7.2, U.N. Doc. CCPR/C/46/D/387/1989 (1992)).

45. *Id.*

46. *Id.* ¶ 22. See generally William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 22–23 (2002) ("Military tribunals, depending on their structure and rules, may well violate core principles of international law, such as the right—enshrined in numerous international conventions—to a fair trial before an independent arbiter." (citation omitted)).

47. See Burke-White, *supra* note 46, at 23 ("The need for transparency, procedural regularity, and conformity with international obligations advises against the use of military tribunals."); see also Human Rights Watch, Fact Sheet: Past U.S. Criticism of Military Tribunals (Nov. 28, 2001), <http://www.hrw.org/press/2001/11/tribunals1128.htm> (last visited Mar. 29, 2008). In fact, the former chief prosecutor for the military commissions resigned in October 2007, and among his criticisms of the system were that the Pentagon was asserting too much power over the prosecutor's office. William Glaberson, *War Crimes Prosecutor Quits in Pentagon Clash*, N.Y. TIMES, Oct. 6, 2007, at A13.

48. Military commissions may punish individuals for offenses, such as conspiracy and "providing material support for terrorism," that do not appear to have been criminal acts under U.S. law prior to the adoption of the MCA and were not considered war crimes under international humanitarian law. Military Commissions Act (MCA) of 2006, Pub. L. 109-366, sec. 3, § 950v(b)(25)(A), 120 Stat. 2601, 2630 (2007) (to be codified at 10 U.S.C. § 950v(b)(25)(A)). Article 15 of the Civil and Political Covenant provides: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." Civil and Political Covenant, *supra* note 11, at art. 15.

49. See generally Koh, *supra* note 4, at 338–42 (describing deficiencies in the new military commissions).

purpose.<sup>50</sup> In addition, the military tries to take away civilian status from certain detainees by declaring them “unlawful enemy combatants.”<sup>51</sup> Unfortunately for the military, that status does not exist under international humanitarian law: either the detainees are POWs entitled to a trial by court-martial or they are civilians entitled to a civilian court.<sup>52</sup> For these reasons, military commissions do not qualify as “regularly constituted court[s]” required by Common Article 3<sup>53</sup> or as “competent, independent and impartial tribunal[s] established by law” required by the Civil and Political Covenant.<sup>54</sup>

In *Hamdan v. Rumsfeld*, a majority of the Supreme Court defined a “regularly constituted court” for purposes of Common Article 3 as one “established and organized in accordance with the laws and procedures already in force in a country.”<sup>55</sup> A “regularly constituted court” should therefore be understood as a tribunal employing the rules and procedures applicable in trial by courts-martial absent some “practical need” justifying deviation from court-martial practice.<sup>56</sup> Because the principal “need” justifying the procedures used by military commissions under the MCA is apparently the “need” to secure convictions using tainted evidence,<sup>57</sup> military commissions do not constitute regularly constituted courts.

Military commissions are also not regularly constituted courts “established in accordance with laws and procedures

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50. For a definition of “unlawful enemy combatants,” see *supra* note 7.

51. *Id.*

52. See *infra* Part III.E.1.

53. Common Article 3, *supra* note 19.

54. See U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Colombia*, ¶ 18, U.N. Doc. CCPR/C/79/Add.76 (May 3, 1997) (expressing concern that the broadened concept of service-related acts enabling the prosecution of civilians in military courts may result in human rights violations because of doubts about the independence and impartiality of military tribunals); see also U.N. Econ. & Soc. Council [ECOSOC], *Issue of the Administration of Justice through Military Tribunals*, ¶ 15, U.N. Doc. E/CN.4/Sub.2/2003/4 (June 27, 2003) (*prepared by Emmanuel Decaux*) (noting that, by removing civilians from ordinary courts and making them subject to special jurisdiction, “the equality of arms between the parties to the proceedings cannot be observed, nor can the principle of the impartiality of the tribunal be established”); *Gen. Comm.* 32, *supra* note 38, ¶ 22 (noting that jurisdiction of military courts over civilians may raise serious problems as far as the “equitable, impartial and independent administration of justice is concerned”).

55. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 (2006).

56. *Id.*

57. See, e.g., Emily Bazelon, *Tortured Rationale*, SLATE, Dec. 7, 2005, <http://www.slate.com/id/2131782/> (last visited Apr. 10, 2008).

already in force in a country,"<sup>58</sup> as required by *Hamdan*, because they are ex post facto.<sup>59</sup> Some alleged offenses took place before the MCA was adopted in 2006. Unlike the Nuremberg tribunals, which were presaged by the Hague Convention of 1907,<sup>60</sup> military commissions under the MCA prosecute newly defined offenses under newly defined jurisdiction over a new category of individuals in a foreign country. Traditionally, military commissions have prosecuted war crimes without triggering ex post facto concerns, because the offenses tried were already known under international law.<sup>61</sup> In contrast, despite its claim that it merely codifies existing offenses, the MCA adds new crimes to those previously known in international law.<sup>62</sup> This ex post facto prosecution violates the U.S. Constitution,<sup>63</sup> the Civil and Political Covenant,<sup>64</sup> the Additional Protocol,<sup>65</sup> and Common Article 3.<sup>66</sup>

Military commissions may also violate Common Article 3's regularly constituted court requirement because they are newly established and the judges/commission members are selected after the accused has been detained and the government has indicated its intent to prosecute. When a judge and/or finder of fact has been selected under such circumstances, justice cannot be done or at least cannot appear to be done. In defining a regularly

58. *Hamdan*, 126 S. Ct. at 2797.

59. See Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations*, 101 AM. J. INT'L L. 56, 61 (2007) (noting that the inclusion of new war crimes in the MCA could pose an ex post facto problem for U.S. officials under other countries' domestic legal systems); Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165, 1192–93 (2007) (finding that the MCA's definition of grave breaches of Common Article 3 "expands upon the preexisting content of substantive international criminal law, triggering ex post facto concerns"); Charles H. Rose III, *Criminal Conspiracy and the Military Commissions Act: Two Minds That May Never Meet*, 13 ILSA J. INT'L & COMP. L. 321, 326–27 (2007) (finding an ex post facto problem with the MCA's changing of the definition of conspiracy). *But see Hamdan*, 126 S. Ct. at 2764–65 (holding that merely changing the identity of a tribunal after the fact does not pose a retroactivity problem).

60. See, e.g., Theodor Meron, *Revival of Customary International Law*, 99 AM. J. INT'L L. 817–19 (noting that the Nuremberg Tribunals resulted in the acceptance of the Hague Convention as customary international law).

61. Rose, *supra* note 59, at 326–27.

62. See Beard, *supra* note 59, at 61; Drumbl, *supra* note 59, at 1192–93; Sean Riordan, *Military Commissions in America? Domestic Liberty Implications of the Military Commissions Act of 2006*, 23 TOURO L. REV. 575, 602–03 (2007).

63. U.S. CONST. art. I, § 9, cl. 3.

64. Civil and Political Covenant, *supra* note 11, at art. 15. The prohibition of ex post facto prosecution is non-derogable, in recognition of the fundamental nature of this requirement for a regularly constituted court and a fair trial. *Id.* at art. 4.

65. Additional Protocol, *supra* note 28, at art. 75(4)(c).

66. Common Article 3, *supra* note 19.

constituted court, the Civil and Political Covenant requires that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>67</sup> Unlike courts-martial, the procedures of the military commissions were principally established to try detainees who were incarcerated prior to the adoption of the MCA. Judges in courts-martial are detailed to a bench and hear cases as they arise, regardless of the issue.<sup>68</sup> They establish their independence and impartiality as they handle diverse cases. Such independence and impartiality cannot be established in the context of the military commissions.

### III. Judicial Guarantees Under the Military Commissions

#### A. Required Judicial Guarantees Under Common Article 3

A regularly constituted court under Common Article 3<sup>69</sup> must accord “judicial guarantees which are recognized as indispensable by civilized peoples”<sup>70</sup> that reflect an “evolving standard” of fair trial norms based on customary international human rights law.<sup>71</sup> Internationally recognized fair trial rights<sup>72</sup> include:

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67. Civil and Political Covenant, *supra* note 11, at art. 14.

68. See Uniform Code of Military Justice (UCMJ), art. 26(a), 10 U.S.C. § 826 (2000).

69. Common Article 3, *supra* note 19; see OSCAR M. UHLER ET AL., *supra* note 35, at 14; see also Additional Protocol, *supra* note 28, at art. 14; Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

70. Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367, 406–10 (2004) (suggesting that the use of military tribunals instead of “regularly constituted court[s]” and the relaxed due process protections of tribunal proceedings violate Common Article 3); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 119–20 (2004) (“[Common Article 3 establishes] an evolving standard that, by design, tracks relevant customary international law.” (citation omitted)).

71. Jinks, *supra* note 70, at 406–10.

72. *Id.* at 409 (“Article 75 requires, in all circumstances, trials by impartial and regularly constituted courts that, at a minimum, afford the presumption of innocence; the right to counsel before and during trial; the right of defendants to be present at proceedings, call witnesses, and examine witnesses against them; the right to be promptly informed of the charges or reasons for detention; the right to a public judgment; and the right of defendants not to testify against themselves or to confess their guilt, among other rights.”); see also William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT’L L.J. 729, 760 (2003) (finding core judicial rights embedded in the Civil and Political Covenant, the Inter-American Convention on Human Rights, the Cairo Declaration on Human Rights in Islam, the African Charter on Human and People’s Rights, and the European Human Rights Convention).

1. the presumption of innocence,<sup>73</sup>
2. the right to counsel of choice before and after trial,<sup>74</sup>
3. the right of defendants not to testify against themselves or to confess their guilt,<sup>75</sup>
4. the right to a speedy trial, including the right to be promptly informed of charges or reasons for detention,<sup>76</sup>
5. the defendant's right to confront evidence and witnesses,<sup>77</sup> including the defendant's right
  - a. to be present at proceedings,<sup>78</sup>

73. See Additional Protocol, *supra* note 28, at art. 75(4)(d); *Gen. Comm. No. 32*, *supra* note 38, ¶ 30.

74. *Gen. Comm. No. 32*, *supra* note 38, ¶ 10 (citing *Kennedy v. Trinidad & Tobago*, U.N. Human Rights Committee, Communication No. 845/1998, ¶ 7.10, U.N. Doc. CCPR/C/74/D/845/1998 (2002), *Henry v. Trinidad & Tobago*, U.N. Human Rights Committee, Communication No. 752/1997, ¶ 7.6, U.N. Doc. CCPR/C/64/D/752/1997 (1998), *Taylor v. Jamaica*, U.N. Human Rights Committee, Communication No. 707/1996, ¶ 8.2, U.N. Doc. CCPR/C/62/D/705/1996 (1998), *Shaw v. Jamaica*, U.N. Human Rights Committee, Communication No. 704/1996, ¶ 7.6, U.N. Doc. CCPR/C/62/D/704/1996 (1998), and *Currie v. Jamaica*, U.N. Human Rights Committee, Communication No. 377/1989, ¶ 13.4, U.N. Doc. CCPR/C/50/D/377/1989 (1994)). These Human Rights Committee cases derive from communications submitted pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature*, Dec. 19, 1966, 999 U.N.T.S. 302. As of March 5, 2008, 111 countries were parties to the Optional Protocol, <http://www2.ohchr.org/english/bodies/ratification/5.htm> (last updated Mar. 5, 2008), and 161 nations were parties to the Covenant, <http://www2.ohchr.org/english/bodies/ratification/4.htm> (last updated Mar. 5, 2008). See UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, Optional Protocol to the International Covenant on Civil and Political Rights, at 235, U.N. Doc. ST/LEG/SER.E/25, U.N. Sales No. E.07.V3 (2007).

75. *Gen. Comm. 32*, *supra* note 38, ¶ 38 (citing *Kurbonov v. Tajikistan*, U.N. Human Rights Committee, Communication No. 1208/2003, ¶¶ 6.2–6.4, U.N. Doc. CCPR/C/86/D/1208/2003 (2006), *Shukurova v. Tajikistan*, U.N. Human Rights Committee, Communication No. 1044/2002, ¶¶ 8.2–8.3, U.N. Doc. CCPR/C/86/D/1044/2002 (2006), *Singarasa v. Sri Lanka*, U.N. Human Rights Committee, Communication No. 1033/2001, ¶ 7.4, U.N. Doc. CCPR/C/81/D/1033/2001 (2004), *Deolall v. Guyana*, U.N. Human Rights Committee, Communication No. 912/2000, ¶ 5.1, U.N. Doc. CCPR/C/82/D/912/2000 (2004), and *Kelly v. Jamaica*, U.N. Human Rights Committee, Communication No. 253/1987, ¶ 5.5, U.N. Doc. CCPR/C/41/D/253/1987 (1991)); see also Additional Protocol, *supra* note 28, at art. 75(4)(f).

76. *Gen. Comm. 32*, *supra* note 38, ¶ 27 (citing *Muñoz Hermoza v. Peru*, U.N. Human Rights Committee, Communication No. 203/1986, ¶ 11.3, U.N. Doc. Supp. No. 40 (A/44/40) (1988) and *Fei v. Columbia*, U.N. Human Rights Committee, Communication No. 514/1992, ¶ 8.4, U.N. Doc. CCPR/C/53/D/514/1992 (1995)); see also Additional Protocol, *supra* note 28, at art. 75(4)(a).

77. *Gen. Comm. 32*, *supra* note 38, ¶¶ 36, 39; see also Additional Protocol, *supra* note 28, at art. 75(4)(g); DAVID WEISSBRODT, *THE RIGHT TO A FAIR TRIAL* (forthcoming 2008) (manuscript at 53–57, on file with author) (revising DAVID WEISSBRODT, *THE RIGHT TO A FAIR TRIAL* (2001) and outlining other rights regarding witnesses).

78. *Gen. Comm. 32*, *supra* note 38, ¶ 36.

- b. to call witnesses,<sup>79</sup> and
- c. to examine witnesses against him/herself,<sup>80</sup>
- 6. the right to a public forum,<sup>81</sup> most importantly a public judgment,<sup>82</sup> and
- 7. the right to an appeal,<sup>83</sup> in the form of
  - a. a challenge to the legality of detention,<sup>84</sup> and
  - b. the right to review by a higher court.<sup>85</sup>

In order to meet Common Article 3's requirement of a regularly constituted court, any court or tribunal must, at a minimum, provide for the above rights and judicial guarantees,<sup>86</sup> the analogous requirements of the Civil and Political Covenant, or those of Article 75 of Additional Protocol I to the Geneva Conventions.

Secretary of Defense Robert Gates demonstrably intended

79. *Id.* ¶ 39.

80. *Id.*

81. *Id.* ¶¶ 28–29 (citing *Kavanagh v. Ireland*, U.N. Human Rights Committee, Communication No. 819/1998, ¶ 10.4, U.N. Doc. CCPR/C/76/D/1114/2002 (2002) (pre-trial decisions), *Van Meurs v. Netherlands*, U.N. Human Rights Committee, Communication No. 215/1986, ¶ 6.2, U.N. Doc. CCPR/C/39/D/215/1986 (1990) (regarding reasonable limits on public nature of trial proceedings), and *R.M. v. Finland*, U.N. Human Rights Committee, Communication No. 301/1988, ¶ 6.4, U.N. Doc. CCPR/C/35/D/301/1988 (1989) (regarding appellate hearings)).

82. Additional Protocol, *supra* note 28, at art. 75(4)(i).

83. *Gen. Comm.* 32, *supra* note 38, ¶ 45 (citing *Henry v. Jamaica*, U.N. Human Rights Committee, Communication No. 230/1987, ¶ 8.4, U.N. Doc. CCPR/C/43/D/230/1987 (1991)).

84. *Id.*

85. *Id.*

86. See Fitzpatrick, *supra* note 4, at 345, 352 (noting that judicial guarantees under the Civil and Political Covenant are non-derogable and that Human Rights Committee General Comment 29 indicates that “the military commissions under consideration here must comply with international humanitarian law and may not deny fair trial rights where not strictly required”); Melysa H. Spetber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 174–75 (2003) (commenting that the requirements established by Common Article 3 are minimum standards that must be met and should be viewed as inviting a greater level of protection); Luisa Vierucci, *Prisoners of War or Protected Persons Qua Unlawful Combatants? The Judicial Safeguards to Which Guantanamo Bay Detainees Are Entitled*, 1 J. INT'L CRIM. JUST. 284, 307, 314 (2003) (noting that Common Article 3 sets out basic judicial guarantees); cf. Derek Jinks, *The Applicability of the Geneva Conventions to the “Global War on Terrorism,”* 46 VA. J. INT'L L. 165, 185 (2005) (“[The dual purposes of Common Article 3 are] the minimization of human suffering and the respect for state sovereignty.”). But see Curtis A. Bradley, *Military Commissions and Terrorist Enemy Combatants*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 253, 256 (2006) (arguing that indispensable guarantees are presumably less than court-martial procedures and that the then current military commissions guarantee extensive rights).



<sup>87</sup> His choice of words tracks the language of Common Article 3 in several places, including in the Executive Summary, which states: "[This Manual] is intended to ensure that alien unlawful enemy combatants who are suspected of war crimes and certain other offenses are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people."<sup>88</sup> The Manual also notes in the Preamble that the rules "extend to the accused all the 'necessary judicial guarantees' as required by [C]ommon Article 3."<sup>89</sup> Simply tracking the language, however, is not sufficient to make the commissions compliant. Compliance is achieved by constituting the commissions in a manner that follows the internationally accepted norms concerning regularly constituted courts.<sup>90</sup> While the Manual does protect certain rights,<sup>91</sup> it contains several provisions which may not afford the procedural safeguards required for compliance with Common Article 3. Problematic provisions relate to the right to notice,<sup>92</sup> the right to confront witnesses,<sup>93</sup> the right to be present at trial,<sup>94</sup> the right to a public trial,<sup>95</sup> the right to review by a higher court,<sup>96</sup> and the exclusion of evidence obtained through torture or ill-treatment.<sup>97</sup>

### B. Protected Rights

The Manual guarantees several rights necessary for the military commissions to conform to internationally accepted norms. Rule 920(e)(5)(A) of the Rules for Military Commissions ("R.M.C.") establishes the proper standard for findings. "The accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt . . . ."<sup>98</sup> No definition of competent evidence is given in the Manual. This particularly raises concerns if the evidence is

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87. MMC, *supra* note 6 (Executive Summary).

88. *Id.*; see Common Article 3, *supra* note 19.

89. MMC, *supra* note 6, pt. I, § 2.

90. Common Article 3, *supra* note 19.

91. For example, the Manual protects the right to counsel. See *infra* Part III.B.

92. See *infra* Part III.C.

93. See *infra* Part III.D.1.

94. See *infra* Part III.D.2.

95. See *infra* Part III.D.3.

96. See *infra* Part III.E.

97. See *infra* Part III.F.

98. See MMC, *supra* note 6, pt. II, R. 920(e)(5)(A).

<sup>99</sup> R.M.C. 910(c) provides substantial protections regarding counsel for the defendant, including the right to be represented by counsel,<sup>100</sup> though that right may be hindered by restrictions invoked under the national security privilege.<sup>101</sup> Additionally, the new R.M.C. partially guarantee the defendant's right not to testify against him or herself through R.M.C. 910(a)(1), which allows the defendant to plead not guilty.<sup>102</sup>

### C. *The Right to Notice*

R.M.C. 308 addresses a defendant's right to notice and states: "Upon the swearing of the charges and specifications, the accused shall be informed of the charges against him as soon as practicable."<sup>103</sup> The language "as soon as practicable" leaves leeway for service of charges, especially considering that many of the current detainees in U.S. custody have spent months, if not years, detained without charges.<sup>104</sup> Once a defendant is charged, R.M.C. 707 provides adequate notice for pre-trial matters, ensuring arraignment for the defendant within thirty days of service of charges.<sup>105</sup> Thirty days for arraignment does not take into account the days of detainment before charges are brought; thus, the time between initial detention and trial may constitute undue delay. The Human Rights Committee's interpretation of "undue delay" varies in cases before it, but generally detention without charges for over three years is found to violate international norms.<sup>106</sup> Further, administrative difficulty has not

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99. *See infra* Part III.F.

100. *See* MMC, *supra* note 6, pt. I, § 1(f)(2), pt. II, R. 910(c).

101. *See infra* Part III.D.

102. *See* MMC, *supra* note 6, pt. II, R. 910(a)(1).

103. *Id.* pt. II, R. 308.

104. *See, e.g.,* Andrew Gray, *Guantanamo Trials on Track for Summer: Pentagon*, REUTERS, Feb. 28, 2007, <http://www.reuters.com/articlePrint?articleId=USN2816949620070228>; Stephen Labaton, *Court Endorses Curbs on Appeal by U.S. Detainees*, N.Y. TIMES, Feb. 21, 2007, at A1. Under U.S. law, prolonged detention without trial or delayed trial is unconstitutional under the Sixth Amendment. U.S. CONST. amend. VI. The appropriate remedy for violations of the right to a speedy trial is the dismissal of charges. *See* Strunk v. United States, 412 U.S. 434 (1973); *Barker v. Wingo*, 407 U.S. 514 (1972). When a defendant is detained without notice of charges, the federal courts and some states follow the exclusionary rule of *McNabb v. United States*, 318 U.S. 332 (1943), and exclude any statement that has a reasonable relationship to the unnecessary delay in arraignment. The rule is not a constitutional one, and not all states adopt it. *State v. Wiberg*, 296 N.W.2d 388, 393 (Minn. 1980). Rather the courts will consider it as a factor in whether the evidence will be suppressed. *Id.*

105. *See* MMC, *supra* note 6, pt. II, R. 707.

106. *See* Morrison v. Jamaica, U.N. Human Rights Committee, Communication

been accepted as an excuse for failure to give prompt notice.<sup>107</sup> The Appeals Chamber for the International Criminal Tribunal for Rwanda held that holding a suspect longer than twenty days without notice of the charges was a violation of the suspect's rights, as was holding a suspect longer than ninety days without indictment.<sup>108</sup>

In addition, prolonged detention without notification of charges may have serious implications for a defendant's mental capacity to stand trial at all.<sup>109</sup> The Third Geneva Convention

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No. 635/1995, U.N. Doc. CCPR/C/63/D/635/1995 (1998) (not finding a violation of prompt trial right when trial occurred approximately eighteen months after arrest and delay included a preliminary inquiry); *Leslie v. Jamaica*, U.N. Human Rights Committee, Communication No. 564/1993, U.N. Doc. CCPR/C/63/D/564/1993 (1998) (finding no prompt trial when trial occurred twenty-nine months after arrest); *Borroso v. Panama*, U.N. Human Rights Committee, Communication No. 473/1991, U.N. Doc. CCPR/C/54/D/473/1991 (1995) (finding an undue delay between indictment and trial when a murder suspect was held without bail for more than three and a half years before his acquittal); *Shalto v. Trinidad & Tobago*, U.N. Human Rights Committee, Communication No. 447/1991, U.N. Doc. CCPR/C/53/D/447/1991 (1995) (finding no prompt trial when there was a delay of almost four years between the judgment of the court of appeal and the beginning of the retrial, a period during which the petitioner was kept in detention); *Bozize v. Central African Republic*, U.N. Human Rights Committee, Communication No. 428/1990, U.N. Doc. CCPR/C/50/D/428/1990 (1994) (finding that trial did not take place within a "reasonable time:" military leader arrested in a foreign country, repatriated, imprisoned, held incommunicado for a period, and mistreated, as well as denied rights of access to counsel, of notice, and of prompt review of the legality of his detention; he had not yet been formally charged, let alone tried, four years after his arrest); see also WEISSBRODT, *supra* note 77 (manuscript at 45–47) (examining cases brought before the Human Rights Committee for violation of the undue delay provision of Article 14(3)(c)).

107. WEISSBRODT, *supra* note 77 (manuscript at 45) (citing *Vivanco v. Peru*, U.N. Human Rights Committee, Communication No. 678/1996, U.N. Doc. CCPR/C/74/D/678/1996 (2002)).

108. *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19, Decision, ¶ 109 (Nov. 3, 1999). *Barayagwiza* was held twenty-nine days without being notified of the charges—nine days longer than allowed by rule 40*bis* of the tribunal. *Id.* ¶ 43. He was also held for 233 days without being indicted—143 days longer than allowed by rule 62 of the tribunal. *Id.* ¶ 45. Additionally, the International Criminal Tribunal failed to provide the necessary review of his detention by not providing a habeas corpus hearing. *Id.* ¶ 90. The court initially held that the appropriate remedy for these violations of *Barayagwiza's* rights, especially the latter two, was his immediate release and the dismissal of charges with prejudice. *Id.* ¶ 106. Upon review, the prosecutor submitted new evidence which the court found "diminish[ed] the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant." *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, ¶ 71 (Mar. 31, 2000). The remedy was reduced to commuting the sentence from life to thirty-five years imprisonment. *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 1107 (Dec. 3, 2003) (sentencing *Barayagwiza* at the same time as other defendants).

109. See generally Joanna Dingwall, *Unlawful Confinement as a War Crime: The Jurisprudence of the Yugoslav Tribunal and the Common Core of International*

allows for detention during periods of international armed conflict,<sup>110</sup> though the terms and limits of detention have been questioned in several international courts.<sup>111</sup> The new R.M.C. 909(b) presumes that the defendant has the capacity to stand trial,<sup>112</sup> establishing that a lack of mental capacity triggers a set of rules suspending trial and sentencing.<sup>113</sup>

*D. National Security Privilege: Jeopardizing the Right to Confront, the Right to be Present, and the Right to a Public Trial*

Two of the most troubling aspects of the new military commissions are R.M.C. 701(f) and its companion the Military Commissions Rules of Evidence ("M.C.R.E.") 505, which both concern national security and the treatment of classified information.<sup>114</sup> Information becomes classified for the purposes of M.C.R.E. 505(b)(3) through an in camera proceeding, which may exclude the defendant at the trial counsel's request, or may be made ex parte, in writing, "outside the presence of the accused and defense counsel."<sup>115</sup> National security may also be invoked under R.M.C. 806(b)(2)(A), which authorizes closure of a session for the

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*Humanitarian Law Applicable to Contemporary Armed Conflicts*, 9 J. CONFLICT & SECURITY L. 133, 177 (2004) ("[T]he recognition that isolation may amount to cruel treatment [is] evidence that inclusion of unlawful confinement as a war crime in internal armed conflict has a basis in customary international law.").

110. See POW Convention, *supra* note 18, at arts. 17–20.

111. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–36 (2004) (holding in part that separation of powers principles do not bar the U.S. Supreme Court from reviewing the executive branch's detention scheme for enemy combatants); see also *Brogan v. United Kingdom*, 145 Eur. Ct. H.R. (ser. A) (1988) (challenging the detention without charges of suspected terrorists); *Ireland v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1978) (finding no violation in the event of arbitrary detention during a public emergency).

112. See MMC, *supra* note 6, pt. II, R. 909(b).

113. See *id.* pt. II, R. 706 (inquiring into the mental capacity or mental responsibility of the accused); *id.* pt. II, R. 906 (relating to mental capacity or responsibility of the accused); *id.* pt. II, R. 916 (providing for lack of mental responsibility as a defense); *id.* pt. II, R. 1102A (providing for post-trial hearing for verdict of not guilty as a result of mental incapacity).

114. *Id.* pt. II, R. 701(f) ("Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. This rule applies to all stages of proceedings in military commissions, including the discovery phase."); *id.* pt. III, R. 505.

115. MMC, *supra* note 6, pt. III, R. 505(b)(3). While the former chief prosecutor for the military commissions Morris Davis defended the Manual rules by arguing that "the [Military Commissions Act] gives the accused the right to be present for all open sessions of the trial," he neglected to address the denial of an accused's rights at the point where trial procedures are closed. See Morris D. Davis, *In Defense of Guantanamo Bay*, 117 YALE L.J. POCKET PART 21, 30 (2007), <http://yalelawjournal.org/images/pdfs/579.pdf> (last visited June 2, 2008).

purpose of "protecting information the disclosure of which could reasonably be expected to damage national security . . . ." <sup>116</sup> While generally a state possesses the right to exclude the press and public from portions of hearings under exceptional circumstances, <sup>117</sup> these provisions, if taken to the extreme, threaten a defendant's rights to confront the witnesses and evidence against him, to be present at trial, and to have a public trial.

### 1. Right to Confront

The invocation of the national security privilege threatens a defendant's right to confront the evidence and witnesses against him. <sup>118</sup> While R.M.C. 701(f)(5) requires the prosecution to provide the defense with an "adequate substitute" <sup>119</sup> for classified information, there is no discussion of what an adequate substitute

116. See MMC, *supra* note 6, pt. II, R. 806(b)(2)(A). This closure includes information regarding "intelligence or law enforcement sources, methods, or activities . . . ." *Id.*; cf. William Schabas, *Fair Trials and National Security Evidence*, 4 INT'L COMMENT. ON EVID. (2006), <http://www.bepress.com/ice/vol4/iss1/art9> (pointing to the danger of drawing inferences in international criminal trials from state claims to withhold evidence on grounds of national security).

117. See Civil and Political Covenant, *supra* note 11, at art. 14 (allowing for the exclusion of the press and public for reasons of "public order (*ordre public*) or national security in a democratic society"); see also United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) ("In the name of security the police state justifies its arbitrary oppressions on evidence that is secret . . . ."). For more on accommodating national security via in camera inspection and the exclusion of the general public, see POW Convention, *supra* note 18, at art. 105 (stating that in camera review should only be used in exceptional cases in "the interest of State security"), Fourth Geneva Convention, *supra* note 19, at art. 74 ("[A]s an exceptional measure, to be held in camera."), Rome Statute of the International Criminal Court art. 68(2), July 17, 1998, 2187 U.N.T.S. 90 ("[T]o protect victims and witnesses or an accused, [the court may] conduct any part of the proceedings in camera."), and *id.* at art. 72 (regarding protection of national security information).

118. For Human Rights Committee jurisprudence on the right to confront witnesses, see *Peart v. Jamaica*, U.N. Human Rights Committee, Communication Nos. 464/1991, 482/1991, U.N. Doc. CCPR/C/54/D/464/1991 (1995) (finding a violation where the prosecution failed to give defense access to a crucial witness statement) and *Pratt v. Jamaica*, U.N. Human Rights Committee, Communication Nos. 210/1986, 225/1987, U.N. Doc. A/44/40 at 222 (1989) (finding no violation when defense lawyer's decision not to call a witness was a tactical one within the professional judgment of the defense). For a detailed discussion of the right to confront under U.S. jurisprudence in contemporary context, see Brian McEvoy, *Classified Evidence and the Confrontation Clause: Correcting a Misapplication of the Classified Information Procedures Act*, 23 B.U. INT'L L.J. 411, 411, 424-25 (2005) (focusing on the implications of *United States v. Moussaoui*, 382 F.3d 453, 482-83 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005)).

119. See MMC, *supra* note 6, pt. II, R. 701(f).

would entail.<sup>120</sup> Presumably, it would be at the judge's discretion.<sup>121</sup>

If the military judge decides not to grant classified status to the information at issue, R.M.C. 908 provides a complete and expedited procedure for appeal by the United States.<sup>122</sup> A similar provision is not available to the defendant; this raises the question of whether these military commission procedures guarantee "equality of arms,"<sup>123</sup>—the principle that prohibits any distinctions between parties in procedural rights unless those distinctions are "based on law and [can be justified] on objective and reasonable grounds."<sup>124</sup>

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120. A military judge may also use the Classified Information Procedures Act ("CIPA") as precedent in her decision whether or not to exclude the defendant from access to classified information, but the case-by-case nature of limiting access and the requirement of fairness in the decision transcends the switch from a government employee issue to a terrorist suspect case. See generally DEPT OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL, CRIMINAL RESOURCE MANUAL § 2054, pt. III.B, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm02054.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02054.htm) ("[T]he provision does not provide grounds for excluding or excising part of a writing or recorded statement which ought in fairness to be considered contemporaneously with it. Thus the court may admit into evidence part of a writing, recording, or photograph only when fairness does not require the whole document to be considered."); James Nicholas Boevig, *The Right to be Present Before Military Commissions and Federal Courts: Protecting National Security in an Age of Classified Information*, 30 HARV. J.L. & PUB. POL'Y 463, 556 (2007) (finding CIPA procedures have been upheld as consistent with the Sixth Amendment right to confrontation); Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 81, 99–103 (2003) (analyzing CIPA and finding constitutional errors in its use to deprive a defendant and its counsel of access to information); McEvoy, *supra* note 118, at 422 ("[T]he question of whether limiting access to cleared defense counsel is permissible will depend on the facts of each case.").

121. See MMC, *supra* note 6, pt. II, R. 913(c)(4) (allowing a judge discretion to "bring the matter to the attention of the parties [or,] in the interest of justice, exclude the evidence without an objection by a party").

122. *Id.* pt. II, R. 908(d) ("Interlocutory appeal of orders or rulings related to the protection of classified information, the closure of proceedings from the public, or the exclusion of the accused from certain proceedings."). Such a review may not result in a written opinion of the decision pursuant to R.M.C. 908(d)(2)(D), which authorizes the Court of Military Commission Review to "dispense with the issuance of a written opinion in rendering its decision." *Id.* pt. II, R. 908(d)(2)(D).

123. See *Fei v. Colombia*, U.N. Human Rights Committee, Communication No. 514/1992, U.N. Doc. CCPR/C/53/D/514/1992 (1995) (finding unequal treatment of the parties and undue delay); *Robinson v. Jamaica*, U.N. Human Rights Committee, Communication No. 223/1987, ¶¶ 2.1, 10.3–10.4, U.N. Doc. A/44/40 (1989) (finding inequality of arms as to witness access and lack of legal representation).

124. See *Gen. Comm. No. 32*, *supra* note 38, ¶ 9; see also Additional Protocol, *supra* note 28, at art. 75(4)(g) ("Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions

The use of the national security privilege to infringe on a defendant's right to cross-examine witnesses also diverges from the adequate provisions guaranteed by courts-martial. In courts-martial, the accused has a broad right to cross-examine witnesses against him—a right that is derived from principles of the Sixth Amendment to the U.S. Constitution.<sup>125</sup> The right to cross-examine may be narrowed by concerns such as “harassment, prejudice, confusion of issues, witness safety, repetitiveness, or marginal relevancy.”<sup>126</sup> Courts-martial, despite dealing with cases involving classified information and danger to witnesses, have no provision for screening witnesses from the accused and defense counsel.<sup>127</sup> Instead, the accused and defense counsel are aware of the identity of the witness and are able to cross-examine unhindered.<sup>128</sup>

In short, the R.M.C. include a loophole that could prevent the defendant from knowing who and where evidence came from and by what means it was procured; this is problematic both under international law and in light of the court-martial procedures that could inform the process.<sup>129</sup> Such information could well form the crux of the government's case<sup>130</sup> and could be of questionable reliability, particularly if there is reason to believe that the evidence was procured by torture or ill-treatment.<sup>131</sup>

The absence of such critical information would violate international fair trial norms.<sup>132</sup> For example, the European Court

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as witnesses against him.”); Civil and Political Covenant, *supra* note 11, at art. 14(3)(e) (allowing the defendant the right “[t]o 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”).

125. *United States v. Velez*, 48 M.J. 220, 226 (C.A.A.F. 1998).

126. *Id.*

127. *See* UCMJ, 10 U.S.C. §§ 801–946 (2000).

128. *Id.* art. 46, § 846.

129. Additionally, infringement on a defendant's confrontation right may raise due process concerns. *Pointer v. Texas*, 380 U.S. 400, 404 (1965). The extent to which these concerns are at issue for these particular defendants is beyond the scope of this Article; however, if due process does apply it may override this statutory analysis. *Cf. Rasul v. Bush*, 542 U.S. 466, 480–81 (2004).

130. *See US: Mark Five Years of Guantanamo by Closing It*, H.R. WATCH, Jan. 5, 2007, <http://hrw.org/english/docs/2007/01/05/usdom14974.htm>; *see also* Gregory S. McNeal, *Unfortunate Legacies: Hearsay, Ex Parte Affidavits and Anonymous Witnesses at the IHT*, 4 INT'L COMMENT. ON EVID. (2006) <http://www.bepress.com/ice/vol4/iss1/art5>.

131. The exclusionary rule for evidence procured by torture and ill-treatment is discussed *infra* Part III.F.2.

132. *See* Civil and Political Covenant, *supra* note 11, at art. 14; Fourth Geneva Convention, *supra* note 19, at arts. 3(1)(d), 72; POW Convention, *supra* note 18, at art. 105; *see also* *Delta v. France*, 191 Eur. Ct. H.R. (ser. A) 6, 15–16 (1990) (holding that domestic courts may not rely on evidence obtained from anonymous sources

of Human Rights has interpreted the fair trial protections of the European Convention of Human Rights to provide that an accused should be given "an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings."<sup>133</sup>

## 2. Right to be Present

The defendant's right to be present at trial is another right at risk.<sup>134</sup> Under court-martial procedures, "a military accused has both a constitutional and a statutory right to be present during the conduct of his trial."<sup>135</sup> The right to be present at one's trial is derived from the Fifth Amendment of the U.S. Constitution and from UCMJ article 39, which directs that "[p]roceedings . . . shall be conducted in the presence of the accused."<sup>136</sup> Although the right is not unlimited, the Supreme Court in *Hamdan* described the right to be present as "one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself . . . ."<sup>137</sup> Military Rule of Evidence ("M.R.E.") 505(i) provides an example of the balance between the strong right to be present and the need for security in courts-martial. Under this

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that the defendant has not had the opportunity to challenge); *Kostovski v. Netherlands*, 166 Eur. Ct. H.R. (ser. A) 4, 20 (1989).

133. *Kostovski*, 166 Eur. Ct. H.R. (ser. A) at 20; see also *Delta*, 191 Eur. Ct. H.R. (ser. A) at 15. For an argument that military commissions' procedures as written would not hinder a defendant in mounting an adequate defense, see Captain Nikiforov Mathews, *Beyond Interrogations: An Analysis of Protection Under the Military Commissions Act of 2006 of Technical Classified Sources, Methods and Activities Employed in the Global War on Terror*, 192 MIL. L. REV. 81, 114–15 (2007).

134. For more Human Rights Committee jurisprudence on the right to be present, see *Wolf v. Panama*, U.N., Human Rights Committee, Communication No. 289/1988, ¶ 6.6, U.N. Doc. CCPR/C/44/D/289/1988 (1992) (finding a lack of fair trial rights where the accused was not allowed to attend his trial or to give instructions to his counsel and where the absence of a duly motivated indictment violates the principle of the equality of arms) and *Conteris v. Uruguay*, U.N. Human Rights Committee, Communication No. 139/1983, ¶ 10, U.N. Doc. A/40/40 (1985) (finding a violation where the accused was denied any opportunity to appear in person before a judge and was subsequently convicted by a military tribunal in absentia). But see *Gordon v. Jamaica*, U.N. Human Rights Committee, Communication No. 237/1987, ¶¶ 1, 6.2, 7, U.N. Doc. CCPR/C/46/D/237/1987 (1992) (finding no violation where the accused was adequately represented by attorneys, though not physically present himself).

135. *United States v. Rembert*, 43 M.J. 837, 838 (A. Ct. Crim. App. 1996).

136. UCMJ, 10 U.S.C. art. 39(a)(4) (2000). But see Boevig, *supra* note 120, at 571–77 (arguing for a flexible approach to the right to be present and advocating for the use of military commissions as a possible forum for defendants who ought to be denied access to portions of their trial).

137. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2792 (2006).



rule, trial counsel can move ex parte for an in camera review of classified information, but if such a hearing is granted, the defense has a right to be present and make arguments.<sup>138</sup> Similarly, M.R.E. 505(g)(3) allows for an ex parte exclusion of classified evidence, but only if it is duplicative of statements already made in open court.<sup>139</sup>

Generally, R.M.C. 804 guarantees the defendant's right to be present at all pertinent stages of trial with exceptions for voluntary absence, express waiver, disruption of the court, and national security.<sup>140</sup> R.M.C. 702 and 703 assure the defendant's right to call and cross-examine witnesses, and R.M.C. 906(b)(1) allows the judge to grant a continuance should an essential witness be unavailable.<sup>141</sup> These provisions could ensure a fair right to confront, but they are jeopardized by the national security privilege, through the same exclusions explained earlier.<sup>142</sup>

### 3. Right to a Public Trial

A third fair trial right at risk from the national security privilege is the right to a public forum.<sup>143</sup> In its first General Comment on Article 14, the Human Rights Committee stressed the significance of publicity of hearings as "an important safeguard in the interest of the individual and of society at large."<sup>144</sup> While acknowledging exceptional circumstances under

138. MIL. R. EVID. 505(i); see also 10 U.S.C. art. 39(a), § 839.

139. MIL. R. EVID. 505(g)(3).

140. See MMC, *supra* note 6, pt. II, R. 804. Military judges are prohibited from consulting with the Commission except in the presence of the accused. *Id.* pt. II, R. 502(c)(2); see also *id.* pt. II, R. 701(f) (classifying information if disclosure would be detrimental to the national security).

141. *Id.* pt. II, R. 702, R. 703, R. 906(b)(1). R.M.C. 914A(a) also allows for the use of remote live testimony for witnesses "whose presence at trial cannot be procured by legal process." *Id.* pt. II, R. 914A(a).

142. See *supra* Part III.D.1. See generally Jinks & Sloss, *supra* note 70, at 120 nn.117, 118 (analyzing provisions of the previous Department of Defense military commissions that raise similar issues of confrontation as the current military commissions).

143. See generally *Van Meurs v. Netherlands*, U.N. Human Rights Committee, Communication No. 215/1986, ¶¶ 6.1, 6.2, U.N. Doc. A/45/40, vol. 2 (1990) (holding that, where a party is entitled to a public trial, the court must make information about time and venue of the proceedings available to the public and must provide adequate facilities, within reasonable limits, for the attendance of interested members of the public); *Estrella v. Uruguay*, U.N. Human Rights Committee, Communication No. 74/1980, ¶ 10, U.N. Doc. A/38/40 (1983) (finding that a trial in camera violates Article 14 if the State fails to provide a reason for not accordng a public trial).

144. U.N. Human Rights Comm., *General Comment 13*, reprinted in U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 6, U.N. Doc. HRI/GEN/1/Rev.1

which courts have the power to exclude the public, the Committee noted that hearings must be open to the public in general—journalists included—and must not be limited to a particular category of persons.<sup>145</sup> In rare cases when the public is excluded, the Committee noted that the judgment must, except in strictly defined circumstances, be made public.<sup>146</sup>

While R.M.C. 806 provides for a “public trial” and R.M.C. 808 and 1103 concern the creation of a record of trial, both R.M.C. 806 and 1103 contain exceptions that limit a defendant’s public trial right.<sup>147</sup> R.M.C. 806(a) notes that access to trials may be constrained by national security concerns,<sup>148</sup> and 806(b)(2) provides for closure of the trial to the public in the interests of national security or to ensure the physical safety of individuals.<sup>149</sup> R.M.C. 1103(c) provides for security classification of each page “on which classified material appears.”<sup>150</sup> R.M.C. 1104(d)(B) requires the convening authority to delete any classified or government information from the defendant’s copy of the record of trial,<sup>151</sup> and R.M.C. 1104(d)(C) requires the attachment of a certificate listing removed information.<sup>152</sup> Hence, when combined with the blanket national security privileges of R.M.C. 701(f) and R.M.C.E. 505,<sup>153</sup> the commission rules could serve to deprive the defendant of a public record that accurately represents the trial and that holds the government accountable for its case.<sup>154</sup> The lack of an adequate record deprives the defendant of the right to appeal since a defendant cannot appeal from an inadequate record.<sup>155</sup>

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[hereinafter *Gen. Comm.* 13]. The Committee retained this language in General Comment 32, which replaced General Comment 13. *Gen. Comm.* 32, *supra* note 38, ¶ 28.

145. *Gen. Com.* 13, *supra* note 144, ¶ 6; *see also Gen. Comm.* 32, *supra* note 38, ¶ 29.

146. *Gen. Com.* 13, *supra* note 144, ¶ 6; *see also Gen. Comm.* 32, *supra* note 38, ¶ 29.

147. MMC, *supra* note 6, pt. II, R. 806, R. 808, R. 1103.

148. *Id.* pt. II, R. 806(a).

149. *Id.* pt. II, R. 806(b)(2).

150. *Id.* pt. II, R. 1103(c).

151. *Id.* pt. II, R. 1104(d)(B).

152. *Id.* pt. II, R. 1104(d)(C).

153. *See supra* Part III.D.1 (discussing the treatment of classified information under R.M.C. 701(f) and R.M.C.E. 505).

154. In examining cases under Article 14(1), the Human Rights Committee has held that a public opinion must be in writing. *See, e.g.,* *Touren v. Uruguay*, U.N. Human Rights Committee, Communication No. R.7/32, ¶¶ 2.1, 12, U.N. Doc. A/36/40 (1981) (finding Article 14 violations in the case of a defendant who had not been allowed to attend the hearing of his case, whose trial was not held in public, and who had never received the texts of any court decisions).

155. *See id.* (finding that, in the absence of a judgment in writing, the Human

### E. Right to Review

Another important fair trial guarantee necessary for a regularly constituted court is the right to review by a higher court. While the current military commissions contain improved appeal procedures as compared with the original 2002 commissions, they lack adequate protections for the right to appeal or explicit habeas corpus procedures.<sup>156</sup>

#### 1. Habeas Corpus

The Manual does not directly address habeas corpus considerations; they appear only once—in the discussion section following R.M.C. 202, which deals with “[p]ersons subject to the jurisdiction of the military commissions.”<sup>157</sup> According to the Manual, military commissions only have personal jurisdiction over “alien unlawful enemy combatants.”<sup>158</sup> The Combatant Status Review Tribunal (“C.S.R.T.”) process, which “provides detainees with the opportunity to challenge their status,” determines an individual’s status as an alien unlawful enemy combatant.<sup>159</sup> The MCA deems that status dispositive for purposes of personal jurisdiction.<sup>160</sup> Accordingly, in theory, a defendant will already

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Rights Committee could not examine whether the proceedings or the severity of the sentence complied with the Covenant); *Henry v. Jamaica*, U.N. Human Rights Committee, Communication No. 230/1987, ¶ 8.4, U.N. Doc. CCPR/C/43/D/230/1987 (1991) (holding that the accused has a right to access duly reasoned written judgments within a reasonable time for all instances of appeal). *But see* *Bailey v. Jamaica*, U.N. Human Rights Committee, Communication No. 709/1996, ¶ 7.4, U.N. Doc. CCPR/C/66/D/709/1996 (1999) (finding that an oral decision and written notes were sufficient for a written judgment).

156. See Fitzpatrick, *supra* note 4, at 345 & n.2 (outlining issues regarding the legality of the appeals process under the November 13, 2002 order, which negated the possibility of a review of the outcome of military commission proceedings).

157. The Supreme Court has granted certiorari to review the denial of habeas corpus actions brought by detainees. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007). The Supreme Court heard oral arguments in the case on Dec. 5, 2007. Emily Bazelon, *Don't Know Much About History*, SLATE, Dec. 4, 2007, <http://www.slate.com/id/2179174/>.

158. See MMC, *supra* note 6, pt. II, R. 202(b) note (citing 10 U.S.C. § 948(c) (2006)). The limited use of military commissions solely for alien combatants may violate the POW Convention’s requirement that military commissions also be used or be able to be used to try U.S. soldiers. See Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW., Mar. 2002, at 19, 32.

159. MMC, *supra* note 6, pt. II, R. 202(b) note.

160. *Id.* At least one military commission, however, has questioned a defendant’s classification as an unlawful enemy combatant, dismissing the charges for lack of jurisdiction. See *United States v. Khadr*, Order on Jurisdiction (U.S. Ct. Milit. Comm’n, June 4, 2007), available at [http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder\(June%204\).pdf](http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder(June%204).pdf).

have had the opportunity to challenge his or her detention prior to coming before a military commission. In fact, a defendant's status is questionable, as the C.S.R.T. process inherently violates the POW Convention.<sup>161</sup> A larger problem is the deprivation of the right to habeas corpus for these detainees under the Detainee Treatment Act.<sup>162</sup>

Article 9(4) of the Civil and Political Covenant guarantees detainees the right to habeas corpus. "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."<sup>163</sup> The Human Rights Committee notes:

The right of a person deprived of her liberty to take proceedings before a court to challenge the lawfulness of her detention is a substantive right, and entails more than the right to file a petition—it contemplates a right for a proper review by a court of the lawfulness of the detention.<sup>164</sup>

A detainee must also be able to challenge a detention that violates the Covenant. Judicial review under Article 9(4) is "not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is

161. In determining a detainee's status, the C.S.R.T. review asks whether the detainee is an "unlawful enemy combatant" under 10 U.S.C. § 948a(1)(ii) (2006). See MMC, *supra* note 6, pt. II, R. 202(b) note. This is not the correct question under the POW Convention, which requires a review of a detainee's status under Article 4 of the POW Convention. See POW Convention, *supra* note 18, at arts. 4–5.

162. Detainee Treatment Act, Pub. L. No. 109-163, § 1405(e), 119 Stat. 3477 (2006) (codified as amended sections in 28 U.S.C. § 22401 (2005)) ("[N]o court, justice, or judge shall have jurisdiction to hear or consider—(1) an application for a writ of habeas filed by or on behalf of an alien detained . . . at Guantanamo Bay, Cuba; or (2) any other action against the United States . . . relating to any aspect of the detention . . . of an alien at Guantanamo Bay, Cuba, who—(A) is currently in military custody; or (B) has been determined . . . to have been properly detained as an enemy combatant."); see also Labaton, *supra* note 104, at A1, A17 (discussing the MCA's explicit elimination of federal court jurisdiction over habeas challenges by Guantánamo prisoners).

163. See Civil and Political Covenant, *supra* note 11, at art. 9(4).

164. Smirnova v. Russian Federation, U.N. Human Rights Committee, Communication No. 712/1996, ¶ 10.1, U.N. Doc. CCPR/C/81/D/712/1996 (2004). In this case, the accused was detained on fraud charges and she challenged the lawfulness of her detention. *Id.* ¶¶ 2.2, 4. A judge received her petition for release on September 1, 1995 and rejected the petition in an *ex parte* decision on September 13, 1995. *Id.* ¶ 10.1. Because of the lack of proper review and the accused's lack of access to a court, the Committee found a violation of the right to be brought promptly before a judge under Article 9(3) of the Civil and Political Covenant. *Id.* ¶¶ 10.1, 10.2; see Civil and Political Covenant, *supra* note 11, at art. 9(3).

incompatible with the requirements of the Covenant."<sup>165</sup>

## 2. Right to Review by a Higher Court

The military commissions seem to guarantee the right to review by a regularly constituted court—the United States Court of Appeals for the District of Columbia Circuit and, if necessary, the Supreme Court.<sup>166</sup> Under R.M.C. 1201, the Court of Military Commission Review performs the initial review of decisions by military commissions; the military court's decisions can subsequently be appealed in regular U.S. courts.<sup>167</sup> Unfortunately, R.M.C. 1201 provides that "[n]o relief may be granted unless an error of law prejudiced a substantial trial right of the accused."<sup>168</sup> This limitation might be construed to restrict appeals to issues of law and would not permit challenges to convictions for insufficient evidence to support the conviction or review of sentences. That provision must be compared with the requirement in Article 14(5) of the Civil and Political Covenant, which states: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."<sup>169</sup> The Human Rights Committee has interpreted the Article 14(5) right to review by a higher tribunal to require complete review of factual determinations made by the trial court.<sup>170</sup>

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165. See *Baban v. Australia*, U.N. Human Rights Committee, Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (2003). In this case, an Iraqi national of Kurdish ethnicity was detained after arriving in Australia without travel documentation. *Id.* ¶¶ 1.1, 2.2. Although Australia permitted judicial review of his detention, the review was limited to whether Mr. Baban was in fact a non-citizen without valid entry documentation. *Id.* ¶¶ 6.1–6.8. The Committee found Australia to be in violation of Article 9(1), (4). *Id.* ¶ 7.2; see also *Civil and Political Covenant*, *supra* note 11, at art. 9(1), (4).

166. MMC, *supra* note 6, pt. II, R. 1205.

167. *Id.* pt. II, R. 1201, R. 1205.

168. *Id.* pt. II, R. 1201(d)(1).

169. *Civil and Political Covenant*, *supra* note 11, at art. 14(5).

170. See *Saidova v. Tajikistan*, U.N. Human Rights Committee, Communication No. 964/2001, U.N. Doc. CCPR/C/81/D/964/2001 (2004) (finding a violation of Article 14(5) where the defendant had an opportunity to appeal to a military commission but the review was not mandatory and the military commission could only consider legal issues); see also *Cabriada v. Spain*, U.N. Human Rights Committee, Communication No. 1101/2002, U.N. Doc. CCPR/C/82/D/1101/2002 (2004); *Terrón v. Spain*, U.N. Human Rights Committee, Communication No. 1073/2002, U.N. Doc. CCPR/C/82/D/1073/2002 (2004); *Semey v. Spain*, U.N. Human Rights Committee, Communication No. 986/2001, U.N. Doc. CCPR/C/78/D/986/2001 (2003); *Fernández v. Spain*, U.N. Human Rights Committee, Communication No. 1007/2001, U.N. Doc. CCPR/C/78/D/1007/2001 (2003); *Vázquez v. Spain*, U.N. Human Rights Committee, Communication No. 701/1996, U.N. Doc. CCPR/C/69/D/701/1996 (2000); *Perera v. Australia*, U.N. Human Rights Committee, Communication No. 536/1993, U.N. Doc. CCPR/C/53/D/536/1993

The D.C. Circuit Court also reviews interlocutory appeals “related to the protection of classified information, the closure of proceedings from the public, or the exclusion of the accused from certain proceedings.”<sup>171</sup> The defendant may waive or withdraw appellate review for any military commission “except one in which the approved sentence includes death.”<sup>172</sup>

#### F. Evidence Obtained Through Coercive Means

The use of evidence procured through torture constitutes a violation of Common Article 3,<sup>173</sup> customary international law,<sup>174</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”),<sup>175</sup> and the Civil and Political Covenant.<sup>176</sup> The use of evidence procured through coercive methods raises similar concerns because the definition of coercion may include impermissible methods that rise to the level of cruel, inhuman,

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(1995).

171. MMC, *supra* note 6, pt. II, R. 908(d).

172. *Id.* pt. II, R. 1110(f)(2).

173. Common Article 3, *supra* note 23.

174. See Rome Statute of the International Criminal Court, *supra* note 117, at art. 69(7) (excluding admission of evidence that would be “antithetical to and would seriously damage the integrity of the proceedings”); *Regina v. Bartle, Ex Parte Pinochet*, 38 I.L.M. 581 (H.L. 1999) (finding that the Convention Against Torture precluded any state immunity for torture); Tobias Thienel, *The Admissibility of Evidence Obtained by Torture Under International Law*, 17 EUR. J. INT’L L. 349, 351 (2006) (arguing that the inadmissibility of evidence procured by torture is “generally understood to be without any exceptions whatsoever” under international law). *But see* *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 281–83 (E.D.N.Y. 2006) (holding that a remedy for alleged detention incommunicado and torture was foreclosed by national security and foreign policy concerns).

175. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Convention Against Torture*]. Article 15 of the Convention Against Torture states: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” *Id.* at art. 15. An additional burden of inquiry is placed on State Parties under Article 12 to investigate information that torture may have been used “in any territory under its jurisdiction,” a duty which the United States may not be upholding under these trials, as no provision in the R.M.C. requires such an investigation. *Id.* at art. 12.

176. The Human Rights Committee stated in *Higginson v. Belarus* that, “[i]rrespective of the nature of the crime that is to be punished or the permissibility of corporal punishment under domestic law, it is the consistent opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant.” U.N. Human Rights Committee, Communication No. 792/1998, ¶ 4.6, U.N. Doc. CCPR/C/74/D/792/1998 (2002).

and degrading treatment.<sup>177</sup> With the recent debate over the United States' definition of these terms,<sup>178</sup> the language of the new rules presents another concern about the legality of the commissions and their procedures.

### 1. The Manual for Military Commissions Allows Coerced Evidence

The Preamble to the Manual<sup>179</sup> rightly excludes statements obtained by torture but specifically allows for "statements 'in which the degree of coercion is disputed' . . . if reliable, probative, and the admission would best serve the interests of justice"<sup>180</sup> and "admission of an accused's allegedly coerced statements if they comport with § 948r."<sup>181</sup>

R.M.C.E. 304 concerns "confessions, admissions, and other statements" and sets forth the overall standard for determining whether a statement is the product of coercion: the "totality of the circumstances under which the contested statement was produced

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177. See Rosemary Pattenden, *Admissibility in Criminal Proceedings of Third Party and Real Evidence Obtained by Methods Prohibited by UNCAT*, 10 INT'L J. OF EVID. & PROOF 6 (2006) (examining international standards of what constitutes torture and noting that "it is a grave crime to extract information from prisoners or civilians by torture or ill-treatment"); see also Rome Statute of the International Criminal Court, *supra* note 117, at art. 8, § 2(a)(ii) (declaring that grave breaches of the Geneva Convention include torture or inhuman treatment); Fourth Geneva Convention, *supra* note 19, at arts 3, 31, 147; POW Convention, *supra* note 18, at arts. 3, 17, 130. Human Rights Committee jurisprudence further elucidates the parameters of what constitutes cruel, inhuman, and degrading treatment. In *Conteris v. Uruguay*, the Human Rights Committee found that a confession obtained after ill-treatment violated the accused's right not to be compelled to confess guilt under Article 14(3)(g) of the Civil and Political Covenant. U.N. Human Rights Committee, Communication No. 139/1983, ¶ 10, U.N. Doc. A/40/40 (1985). Arrested by security police for crimes associated with subverting the constitution, the victim spent three months in *incommunicado* detention. *Id.* ¶ 1.4. Subjected to various forms of torture, he eventually signed a confession. *Id.* The Human Rights Committee held that he did not voluntarily sign the confession. *Id.* ¶ 9.2; see also *El-Megreisi v. Libyan Arab Jamahiriya*, U.N. Human Rights Committee, Communication No. 440/1990, ¶ 5.4, U.N. Doc. CCPR/C/50/D/440/1990 (1994) ("[The detainee,] by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment, in violation of Articles 7 and 10 . . .").

178. See, e.g., Jennifer Daskal, Op-Ed, *Detainee Legislation Clearly Outlaws "Alternative" Interrogation Techniques*, NARRAGANSETT TIMES (R.I.), Nov. 8, 2006, available at <http://hrw.org/english/docs/2006/11/08/usdom14702.htm>. For further discussion of problems with the military commissions' evidentiary rules, see Eun Young Choi, *Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism*, 43 HARV. C.R.-C.L. L. REV. 139 (2007).

179. MMC, *supra* note 6, pt. I, § (1)(g).

180. *Id.* (citing 10 U.S.C. § 948r(b)–(c) (2006)).

181. *Id.* pt. I, § (1)(h)(3) (citing 10 U.S.C. § 949a(b)(2)(B) (2006)).

or obtained.”<sup>182</sup> R.M.C.E. 304(c) further provides a dual standard for “statements allegedly produced by coercion,” creating one test for statements procured by interrogation methods that amount to cruel, inhuman, or degrading treatment before the enactment of the Detainee Treatment Act on December 30, 2005,<sup>183</sup> and a stricter test for statements obtained thereafter.<sup>184</sup>

The current U.S. administration has authorized “coercive” interrogation conduct<sup>185</sup> “so brutal that it essentially amounts to torture.”<sup>186</sup> The international prohibition applies to evidence procured through these means. In *A v. Secretary of State for the Home Department*,<sup>187</sup> the United Kingdom House of Lords observed:

It may well be that the conduct complained of in a . . . memorandum dated October 11, 2002 addressed to the Commander Joint Task Force 170 at Guantanamo Bay, Cuba, (see *The Torture Papers: The Road to Abu Ghraib*, ed. K. Greenberg and J. Dratel, (2005), p. 227-228), would now be held to fall within the definition [of torture] in Art. 1 of the Torture Convention.<sup>188</sup>

Even if evidence was not procured by torture, but rather by cruel, inhuman, or degrading treatment, the rationale for the exclusion of evidence adduced by torture is the same as the rule that makes evidence procured by other forms of ill-treatment inadmissible.<sup>189</sup> Information obtained by either torture or ill-

182. See *id.* pt. III, R. 304(a) note.

183. See Detainee Treatment Act, Pub. L. No. 109-163, 119 Stat. 3474 (2006) (codified as amended throughout 10 U.S.C., 28 U.S.C., 42 U.S.C.).

184. MMC, *supra* note 6, pt. III, R. 304(c)(1)–(2).

185. Memorandum from William J. Haynes II, Gen. Counsel, Dep’t of Def., to Donald Rumsfeld, Sec’y of Def. (Nov. 27, 2002), *available at* <http://www.slate.com/features/whatistorture/LegalMemos.html> (discussing counter-resistance techniques).

186. See Press Release, Sen. John McCain, Statement of Senator John McCain on Detainee Amendments on (1) The Army Field Manual and (2) Cruel, Inhumane, Degrading Treatment (Nov. 4, 2005), *available at* <http://mccain.senate.gov> (follow “Press Office” hyperlink; then follow “Press Releases” hyperlink; then enter the words “November 2005” in “Recent Press Releases” search field) (arguing for the passage of the Detainee Treatment Act because without it the United States “is the only country in the world that asserts a legal right to engage in cruel and inhumane treatment”). See generally Daskal, *supra* note 178.

187. *A v. Sec’y of State for the Home Dep’t*, [2005] UKHL 71, [2005] 3 W.L.R. 1249, *rev’g*, [2004] EWCA 1123, [2005] 1 W.L.R. 414.

188. *Id.* at 1285.

189. *Sahadeo v. Republic of Guyana*, U.N. Human Rights Committee, Communication No. 728/1996, ¶ 9.3, U.N. Doc. CCPR/C/73/D/728/1996 (1996) (dictum) (“The Committee recalls the duty of the State party to ensure the protection against torture and cruel, inhuman or degrading treatment as provided for in Article 7 of the Covenant. The Committee considers that it is important for the prevention of violations under Article 7 that the law must exclude the



treatment is unreliable since a witness will say whatever he or she believes may stop the infliction of pain—rather than telling the truth.<sup>190</sup> There is an absolute prohibition of torture as well as cruel, inhuman, or degrading treatment or punishment. To admit information adduced by either torture or other ill-treatment outrages the values of civilization and could be perceived as an unacceptable incentive to engage in such severe abuse. Further, by admitting confessions that are uncorroborated and possibly adduced without warning, the Manual provides insufficient protection from self-incrimination.<sup>191</sup> Admitting such information also undermines the right to a fair and impartial trial.

## 2. International Prohibitions on Evidence Obtained by Ill-Treatment

While the Convention Against Torture<sup>192</sup> specifically prohibits the use of evidence adduced by torture, other international instruments and authoritative interpretations also forbid the use of evidence obtained by either torture or other ill-treatment. For example, Principle 16 of the Guidelines on the Role of Prosecutors

admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.”).

190. See Center for Victims of Torture, Eight Lessons of Torture, <http://www.cvt.org/main.php/Advocacy/TheCampaignToStopTorture/WhatCVTKnowsaboutTorture> (last visited Feb. 13, 2008) (explaining why torture does not yield reliable information).

191. See *United States v. Bin Laden*, 132 F. Supp. 2d 168, 181–88 (S.D.N.Y. 2001) (holding that a non-resident alien interrogated abroad is nonetheless entitled to Fifth Amendment protection against self-incrimination); see also *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (“*Miranda* [v. *Arizona*, 384 U.S. 436 (1966)], announced a constitutional rule that Congress may not supercede legislatively.”); Kim Lane Schepple, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 PA. J. CONST. L. 1001, 1025 n.84 (2004) (noting that the application of a constitutional right to counsel to noncitizens interrogated abroad was an issue of first impression in *Bin Laden*); Carrie Truehart, *United States v. Bin Laden and the Foreign Intelligence Exception to the Warrant Requirement for Searches of “United States Person” Abroad*, 82 B.U. L. REV. 555, 557–58 (2002) (noting that in the *Bin Laden* case the court suppressed statements by a non-citizen defendant because he was given an insufficient *Miranda* warning). But see Linda M. Keller, *Alternatives to Miranda: Preventing Coerced Confessions via the Convention Against Torture*, 10 CHAP. L. REV. 745, 747–48 (2007) (citing several reasons why the *Miranda* warnings may not apply to War on Terror detainees); Benjamin J. Priester, *Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants*, 37 RUTGERS L.J. 39, 93–94 (2005) (noting that *Miranda* warnings may give way to military authority in an enemy combatant detention); Frank J. Williams, *Still a Frightening Unknown: Achieving a Constitutional Balance Between Civil Liberties and National Security During the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675 (2007) (finding it unrealistic to expect *Miranda* warnings to apply to “alien enemy combatants arrested in a desert in the Middle East”).

192. Convention Against Torture, *supra* note 175.

states:

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.<sup>193</sup>

Similarly, Article 12 of the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides: "Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings."<sup>194</sup>

In 1982, the Human Rights Committee authoritatively interpreted the broad prohibition of Article 7 of the Civil and Political Covenant against torture and ill-treatment<sup>195</sup> as incorporating the exclusionary rule.

The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. . . . Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees; provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives; *provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court*; and measures of training and instruction of law enforcement officials not to apply such treatment.<sup>196</sup>

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193. U.N. Secretariat, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, ¶ 16, U.N. Doc. A/CONF.144/28/Rev.1 (Aug. 27, 1990–Sept. 7, 1990).

194. G.A. Res. 3452 (XXX), Annex, art. 13, U.N. Doc. A/RES/3452(XXX) (Dec. 9, 1975).

195. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Civil and Political Covenant, *supra* note 11, at art. 7.

196. U.N. Human Rights Comm., *General Comment 7* (emphasis added), reprinted in U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

The Human Rights Committee repeated this interpretation of Article 7 of the Covenant when it replaced General Comment 7 with General Comment 20 in 1992. "It is important for the discouragement of violations under [A]rticle 7 that the law must prohibit the . . . admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."<sup>197</sup>

Furthermore, Article 14(3)(g) of the Civil and Political Covenant provides that an accused may not be compelled to testify against himself/herself or to confess guilt.<sup>198</sup> The Human Rights Committee stated in General Comment 32 that, under this provision, "it is unacceptable to treat an accused person in a manner contrary to Article 7 of the Covenant in order to extract a confession."<sup>199</sup> State laws should therefore require that evidence provided through such methods or any other form of compulsion be entirely inadmissible.<sup>200</sup>

In its jurisprudence, the Committee found coterminous violations of Articles 7 and 14(3)(g) in the case of a murder suspect forced under threats of death to sign a confession.<sup>201</sup> The Committee recalled:

[T]he wording of [A]rticle 14, paragraph 3(g), namely that no

197. U.N. Human Rights Comm., *General Comment 20*, reprinted in U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 12, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

198. Civil and Political Covenant, *supra* note 11, at art. 14.

199. *Gen. Comm. 32*, *supra* note 38, ¶ 41. Article 7 provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.*; see also U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Georgia*, ¶ 13, U.N. Doc. CCPR/C/79/Add.75 (May 5, 1997) (deploring the fact that capital sentences appeared to be imposed in Georgia cases where confessions were obtained under torture or duress).

200. The Human Rights Committee applied these principles in *Khalilov v. Tajikistan*, where the government accused Khalilov of being a member of an "anti-constitutional" gang. U.N. Human Rights Committee, Communication No. 973/2001, ¶ 2.1, U.N. Doc. CCPR/C/83/D/973/2001 (2005). Khalilov claimed that he had been forced to join the gang. *Id.* Prior to his trial, the government compelled Khalilov—using beatings and threats to his family—to confess on national television to murder. *Id.* ¶¶ 2.5–2.6. He was later convicted of murder and a variety of other crimes and sentenced to death. *Id.* ¶ 2.8. The Committee found a number of fair trial violations, including that Tajikistan had violated the prohibition on forced confessions. *Id.* ¶ 8.

201. *Berry v. Jamaica*, U.N. Human Rights Committee, Communication No. 330/1988, ¶ 11.7, U.N. Doc. CCPR/C/50/D/330/1988 (1994). The European Court of Human Rights has similarly found that admission of evidence obtained by compulsion breached the defendant's right to a fair trial. *Saunders v. United Kingdom*, (No. 24), 1996-IV Eur. Ct. H.R. 2044, 2066.

one shall 'be compelled to testify against himself or to confess guilt,' must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.<sup>202</sup>

Similarly, the International Criminal Tribunal for Yugoslavia adopted Rule 95 of its Rules of Procedure and Evidence, which reads: "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."<sup>203</sup>

The Parliamentary Assembly of the Council of Europe called on the U.S. government

to respect its obligations under international law and the Constitution of the United States to exclude any statement established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment from any proceedings, except against a person accused of such ill-treatment as evidence that the statement was made.<sup>204</sup>

In that resolution, the Parliamentary Assembly called on its Member States of the Council of Europe to do the same.<sup>205</sup> If the United States intends to portray its military commissions as being equal to or better than international tribunals in its protection of fair trial rights,<sup>206</sup> it would do well to ensure that evidence gathered through the use of cruel, inhuman, and degrading treatment is likewise strictly excluded.

### 3. The Admissibility of Coerced Evidence Violates Internationally Recognized Fair Trial Protections

In addition to the national security privilege discussed above, other procedures prevent both defendants and the public from

202. *Johnson v. Jamaica*, U.N. Human Rights Committee, Communication No. 588/1994, ¶ 8.7, U.N. Doc. No. A/51/40 (1994) (quoting the Civil and Political Covenant).

203. Int'l Criminal Tribunal for the Former Yugo., Rules of Procedure and Evidence, R. 95, U.N. Doc. IT/32/Rev.40 (2007). The International Criminal Tribunal for Rwanda employs an identical exclusionary rule. Int'l Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, R. 95, U.N. Doc. ITR/3/Rev.1 (1995). For a similar exclusionary rule, see Rome Statute of the International Criminal Court, *supra* note 117, at art. 69(7).

204. PARL. ASS., RES. 1433, ¶ 8(vi) (Apr. 26, 2005).

205. *Id.* ¶ 10(iv).

206. See Davis, *supra* note 115, at 34 (challenging "anyone to review the MCA and MCC, compare them to the rules for . . . the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, . . . and then explain why military commissions provide an inferior standard of justice by comparison").

knowing what methods were used to extract the information for the government's case. This situation makes the determination of admissibility more difficult and places a nearly impossible burden of proof on the defense. The government cannot put the burden on the defendant to prove a confession was involuntary; it would violate the prohibition against forced confessions under Article 14(3)(g) as well as the presumption of innocence under Article 14(2).<sup>207</sup>

Judge Neuberger of the United Kingdom Court of Appeals explained the difficulty faced by the accused when the government presents evidence about a statement extracted from an individual other than the accused.

[T]he detainee will normally know of all the circumstances in which the confession was extracted, and will be able to give evidence in court to explain those circumstances, and possibly to give other evidence to rebut the reliability of the confession. However, it will be a very rare case where the detainee would know very much about the circumstances in which the statement was extracted from a third party, or where the detainee would be able to arrange for evidence to be given about those circumstances. Almost by definition, he will not be able to call or cross-examine the third party with a view to the third party explaining or rebutting the statement.<sup>208</sup>

Similarly, the procedures of the military commissions violate the Civil and Political Covenant and Common Article 3.

On the whole, the judicial guarantees prescribed by the Manual have the potential to go very much awry. There is a significant risk that these proceedings will be used in a way that flouts fundamental precepts of international law. The United States recently denied habeas corpus protections to detainees, and

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207. See Civil and Political Covenant, *supra* note 11, at art. 14. For example, in *Singarasa v. Sri Lanka*, a Tamil man claimed he was forced to confess to causing the death of army officers and engaging in other terrorist activities. See U.N. Human Rights Committee, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (2004). At trial, the government put the burden of proving that the confession was involuntary on Mr. Singarasa. *Id.* ¶ 210. The confession was admitted and Singarasa was convicted. *Id.* ¶¶ 2.10–12. Among other issues, the Human Rights Committee considered whether the burden of proof could be placed on Singarasa under the Civil and Political Covenant. *Id.* ¶ 7.4. The Committee reasoned that it was implicit in Civil and Political Covenant Article 14(3)(g), which prohibits forced confessions, that the prosecution must prove the confession was made without duress. *Id.*; see also *Deolall v. Guyana*, U.N. Human Rights Committee, Communication No. 912/2000, U.N. Doc. CCPR/C/82/D/912/2000 (2004).

208. *A v. Sec'y of State for the Home Dep't*, [2004] EWCA (Civ.) 1123 [464], [2005] 1 WLR 414, 548. The U.K. House of Lords reversed the Court of Appeals and sustained the views expressed by Judge Neuberger. *A v. Sec'y of State for the Home Dep't*, [2005] UKHL 71, [2005] 1 WLR 1249, 1285.

courts have not extended constitutional protections to them.<sup>209</sup> As written, the Manual might allow the following trial strategy for the prosecution: first, three days of uncontested prosecution witnesses describing a well-documented case about the crimes of the Al Qaeda organization;<sup>210</sup> second, presentation of one witness tying the accused to Al Qaeda through a heavily redacted summary of information from unrevealed sources. That single witness might well take advantage of the national security privilege to deny the accused and his counsel any indication as to the identity of the source of the testimony, the context in which the information was collected, the treatment meted out to the source of the information, and the reliability of assurances that the information was not procured by the use of torture. Such a situation would deny the accused the following rights: the right to cross-examine, the right to confrontation, the right to be judged on the basis of the facts on the record, and the right to equality of arms. This situation would constitute an unfair trial.

#### **IV. Interpreting the Manual for Military Commissions Using International Law Regarding the Right to a Fair Trial**

To summarize the conclusions of this Article thus far: as set forth in the Manual for Military Commissions, the military commissions would not qualify as regularly constituted courts and could fail to afford the requisite judicial guarantees, unless the Manual is interpreted in a manner consistent with international law.<sup>211</sup> For example, prosecutors could claim national security as a basis for denying confrontation and cross-examination and may use evidence procured through methods that amount to torture or forbidden ill-treatment unless the military commissions interpret the Manual to require the protections guaranteed by Common Article 3 and the Civil and Political Covenant.<sup>212</sup>

One approach to dealing with the potential inadequacies of the fair trial guarantees in the Manual is to use international fair trial norms in evaluating and interpreting the broad federal statutory and regulatory provisions. International law and jurisprudence could assist the military commissions and reviewing courts in interpreting the Manual to protect fair trial rights.

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209. See Editorial, *Too Many Secrets*, N.Y. TIMES, Mar. 20, 2007, at A12; Labaton, *supra* note 104, at A1.

210. See generally MMC, *supra* note 6, pt. II.

211. See *supra* Part II.

212. See *infra* Part IV.B.

Treaties and their authoritative interpretations provide guidance on how to guarantee the protections necessary for fair trials.<sup>213</sup> U.S. courts have often relied on international standards and jurisprudence in resolving delicate legal issues and the military commissions should be no different, especially considering the international nature of the problems they confront.<sup>214</sup>

### A. Treaty Obligations

The United States ratified the four Geneva Conventions of 1949 and the Civil and Political Covenant—all of which protect fair trial rights for detainees.<sup>215</sup> The Constitution mandates respect for these treaties, which impose obligations on the United States and its courts. Article VI of the U.S. Constitution establishes:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>216</sup>

A treaty ratified by the United States is part of the supreme law of the land, equal in dignity to federal statutes.<sup>217</sup> Despite the Constitution's statement that treaties shall be the supreme law of the land, U.S. courts have developed a doctrine making only self-executing treaties judicially enforceable.<sup>218</sup>

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213. See *infra* Part IV.B.

214. See *infra* Part IV.B.

215. See *supra* Part I.B.

216. U.S. CONST. art. VI.

217. Conflicts between treaty clauses and existing law are resolved according to three rules. First, a treaty will not have domestic effect if it infringes certain clauses of the U.S. Constitution. *Reid v. Covert*, 354 U.S. 1, 16–17 (1957). Second, if a treaty and a federal statute conflict, the more recent prevails. *Chinese Exclusion Case*, 130 U.S. 581, 599–600 (1889). Third, if a treaty and state law conflict, the treaty controls. *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924); see also *Missouri v. Holland*, 252 U.S. 416, 433–35 (1920) (stating that the validity of the treaty was not undermined by possible infringement on states' rights under the Tenth Amendment). Before applying a treaty, courts must: (1) determine whether certain treaty provisions are self-executing; (2) interpret the language of the treaty; and (3) consider the effect of reservations made when the treaty was adopted. See *Frolova v. U.S.S.R.*, 761 F.2d 370, 373–76 (7th Cir. 1985).

218. The Supreme Court introduced the requirement of self-execution in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). It declared that a treaty clause is self-executing and hence “equivalent to an act of the legislature, whenever it operates by itself without the aid of any legislative provision.” *Id.* *Foster* held the treaty to be non-self-executing, on the assumption that the parties anticipated a need for

The District Court for the District of Columbia discussed congressional action regarding the Geneva Conventions in *Hamdan v. Rumsfeld*.<sup>219</sup> The Senate articulated its advice and consent regarding the Geneva Conventions in 1955 without making an explicit statement about self-execution.<sup>220</sup> In looking to the Senate's intent in consenting to the ratification of the Geneva Conventions, the court found that the 1955 Senate carefully considered what legislation would be required to give effect to the provisions of the conventions and determined that only four provisions—none relevant to a military commission—required implementing legislation.<sup>221</sup> The court also noted that Congress enacted the War Crimes Act in response to a concurring opinion from the D.C. Circuit Court in 1984, which suggested that persons could not be prosecuted for grave violations of the Geneva Conventions.<sup>222</sup> The court concluded that the legislative branch had confirmed that the Geneva Conventions were intended to be

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implementing legislation to make the obligations sufficiently definite to be judicially enforceable. *Id.* Four years later, however, the Court found the same bilateral treaty to be self-executing based upon a review of the Spanish text and the history of negotiations. *See United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88 (1833). Subsequent decisions have focused on the intent of the parties. *See, e.g., Cook v. United States*, 288 U.S. 102, 119–20 (1933) (finding no evidence of congressional intent to abrogate the treaty). In *Frolova v. U.S.S.R.*, the court compiled a list of factors to be consulted in determining whether a treaty provision is self-executing, including:

- (1) the language and purposes of the agreement as a whole;
- (2) the circumstance surrounding its execution;
- (3) the nature of the obligations imposed by the agreement;
- (4) the availability and feasibility of alternative enforcement mechanisms;
- (5) the implications of permitting a private right of action; and
- (6) the capability of the judiciary to resolve the dispute.

761 F.2d at 373 (citations omitted). For a similar list, see *People of Saipan v. U.S. Department of Interior*, 502 F.2d 90, 97 (9th Cir. 1974). In *Jogi v. Voges*, the Seventh Circuit relied on the first three of these factors to hold that Article 36 of the Vienna Convention is self-executing and confers an individual right to consular notification. 425 F.3d 367, 377, 384 (7th Cir. 2005). *But see Medellin v. Texas*, No. 06-984, 2008 WL 762533 (Mar. 25, 2008) (holding that an International Court of Justice's decision finding a violation of U.S. obligations under the Vienna Convention on Consular Relations is not automatically binding domestic law due to lack of implementing legislation and that the President cannot "unilaterally [convert a] non-self-executing treaty into a self-executing one"); *United States v. Emuegbunam*, 268 F.3d 377, 391 (6th Cir. 2001) ("[T]he Vienna Convention does not create rights individually enforceable in the federal courts."); *United States v. Jiminez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001) (holding that the Vienna Convention does not create judicially enforceable rights).

219. *See Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 164–65 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006).

220. *Hamdan*, 344 F. Supp. 2d at 164.

221. *See id.*

222. *Id.* at 164–65.



the law of the land, enforceable by the courts.<sup>223</sup> On appeal, the Supreme Court noted that, in as much as the Geneva Conventions are a part of the law of war, they do confer rights enforceable in U.S. courts.<sup>224</sup> In contrast, with regard to the military commissions, the MCA includes a clause limiting the force of the Geneva Conventions.<sup>225</sup>

In ratifying the Civil and Political Covenant, the Senate gave its advice and consent on the understanding "[t]hat the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."<sup>226</sup> In *Sosa v. Alvarez-Machain*,<sup>227</sup> the Supreme Court addressed this declaration when it reviewed a suit brought by a Mexican national alleging violation of his rights under the Alien Tort Claims Act after he was abducted and transferred to the United States to stand trial.<sup>228</sup> In dicta, the Court stated:

[A]lthough the [Civil and Political] Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. . . . Accordingly, Alvarez cannot say that the [Universal] Declaration [of Human Rights] and Covenant themselves establish the relevant and applicable rule of international law.<sup>229</sup>

While not essential to the Court's holding, this passage suggests that enforcement of a treaty in federal courts may be more difficult given an explicit Senate statement that a treaty is not self-executing.

It follows that directly enforcing the Geneva Conventions and the Civil and Political Covenant in U.S. courts may be challenging because of the uncertain self-executing nature of treaties. The language of the MCA further diminishes the binding force of the Geneva Conventions as it states that "[n]o alien unlawful enemy combatant subject to trial by military commission . . . may invoke the Geneva Conventions as a source of rights."<sup>230</sup> These

223. *Id.* at 165.

224. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2845 (2006) (Thomas, J., dissenting) ("The Court concludes that petitioner may seek judicial enforcement of the provisions of the Geneva Conventions because 'they are . . . part of the law of war.'" (quoting the majority opinion)).

225. Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, sec. 5, 120 Stat. 2601, 2631-32 (2007) (to be codified at 10 U.S.C. § 948b(g)).

226. 138 CONG. REC. S4781, 4784 (1992).

227. 542 U.S. 692 (2004).

228. *Id.* at 692.

229. *Id.* at 735.

230. MCA, § 948b(g).

impediments do not, however, render the treaties useless since they do not exclude using the Geneva Conventions or the Covenant as a means of interpreting the Manual, rather than a “source of rights.”<sup>231</sup> Hence, a federal statute can be a “source of rights,” and may make use of the Geneva Conventions and other international norms only as interpretive tools rather than as independent sources of rights. Article 75 of Additional Protocol I, the Civil and Political Covenant, and the interpretations of the Human Rights Committee could be relied upon as a way of interpreting federal statutes and regulations, such as the War Crimes Act and the Manual.

The MCA states that “[a] military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of [C]ommon Article 3 of the Geneva Conventions.”<sup>232</sup> Merely stating that it is compliant does not make it so. It does, however, support the likelihood that Congress intended the military commissions to provide the fair trial guarantees required in the Geneva Conventions by interpreting the Manual in light of Common Article 3.

### B. Interpretive Approach

A treaty’s relevance to interpretation of federal statutes, such as the MCA, is reflected in the long-standing rule of statutory construction known as the *Charming Betsy*<sup>233</sup> rule of interpretation. Chief Justice Marshall first enunciated this rule, stating that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”<sup>234</sup>

The Manual reiterates the principle that the commissions should accord with international law.<sup>235</sup> The preamble states: “Just as importantly, [the Manual] provides procedural and evidentiary rules that not only comport with the [MCA] and ensure protection of classified information, but extend to the accused all the ‘necessary judicial guarantees’ as required by

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231. *See id.*

232. § 948b(f). For more information on enforcing treaties in courts, see David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT’L L. 20 (2006).

233. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

234. *Id.* at 118.

235. *See MMC, supra* note 6, pt. I.

Common Article 3.<sup>236</sup> This preamble indicates the authors' intent that the Manual should be interpreted in a manner that ensures protection of the fair trial guarantees required by Common Article 3.

The Defense Secretary's statements also track the language of Common Article 3 in several places in the Manual, including the Executive Summary, which states that "[this Manual] is intended to ensure that alien unlawful enemy combatants who are suspected of war crimes and certain other offenses are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people."<sup>237</sup> In understanding the meaning of "regularly constituted court[s] affording all the judicial guarantees which are recognized as indispensable,"<sup>238</sup> the military commissions and courts should take into account the sources set forth in this Article, including Article 75 of Additional Protocol I, the Civil and Political Covenant, and the interpretations of the Human Rights Committee.

Interpreting the Manual in light of the human rights treaties and the related international law so as to ensure fair trial protections reflects the Supreme Court's approach in a number of landmark cases. In *Lawrence v. Texas*,<sup>239</sup> the Court relied on the jurisprudence of the European Court of Human Rights to assist in determining "the values we share with a wider civilization."<sup>240</sup> As support for her concurrence in *Grutter v. Bollinger*,<sup>241</sup> Justice Ginsburg cited the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>242</sup> In examining the protections guaranteed by the Eighth Amendment,<sup>243</sup> the Supreme Court looked to treaties and foreign law to assist in its determination of what constitutes cruel and unusual punishment in both *Roper v. Simmons*<sup>244</sup> and *Thompson v. Oklahoma*.<sup>245</sup> In

236. *Id.*

237. *Id.* (Executive Summary).

238. Common Article 3, *supra* note 19.

239. 539 U.S. 558 (2003).

240. *See id.* at 576.

241. 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

242. *See id.*

243. U.S. CONST. amend. VIII.

244. 543 U.S. 551, 578 (2005) ("It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.").

245. 487 U.S. 815, 830-31 (1988).

*Hamdan v. Rumsfeld*,<sup>246</sup> the Court relied upon the Geneva Conventions and the international law of war to analyze the authority of the President to convene the military commissions.<sup>247</sup> The Court noted that the military commission could only try crimes acknowledged as an offense against the law of war<sup>248</sup> and that "international sources confirm that the crime charged here is not a recognized violation of the law of war."<sup>249</sup> The Court observed that the President's use of military commissions was conditioned upon compliance with "the rules and precepts of the law of nations."<sup>250</sup>

### C. Policy Considerations

Not only has international law been used to interpret U.S. law, but it can also be a very effective means of persuasion when considering national policy. As discussed by Judge Linde of the Oregon Supreme Court,

an advocate wishing to invoke international human rights norms reasonably could argue that an applicable domestic law already contains the protections that the claimant contends, but that, if the court were not to accept this view, then the court might well find itself running afoul of national policy as expressed by the United States government through its participation in international human rights activities and declarations.<sup>251</sup>

Linde further noted that such an approach is most successful "where other countries and international agencies have had greater experience than has the United States. Examples may include . . . the treatment of detained persons."<sup>252</sup> Given the international nature of the capture and detention of "unlawful enemy combatants," it is especially important to interpret the Manual in light of relevant treaties when considering its possible impact on the officials responsible for commission proceedings, as well as U.S. soldiers captured in future conflicts.<sup>253</sup>

Interpreting the Manual using Common Article 3 in a way that provides for a fair trial of the detainees will also help the

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246. 126 S. Ct. 2749 (2006).

247. *See id.* at 2774, 2781.

248. *Id.* at 2780.

249. *Id.* at 2784.

250. *Id.* at 2786 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)); *see also* David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 522 (2007).

251. Hans A. Linde, *Comments*, 18 INT'L LAW. 77, 81 (1984).

252. *Id.*

253. *See infra* Part IV.C.1-2.

military commissions protect involved officials from prosecution by foreign courts and promote policies that may serve to protect U.S. soldiers in future conflicts.

# 1. Protecting Involved Officials from Prosecution in Foreign Countries

In deciding on the procedures to be followed in the military commissions, responsible officials should be aware that “[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” would constitute a war crime and/or a crime against humanity.<sup>254</sup>

Post-World War II trials establish precedent for prosecuting judges and other government officials responsible for conducting unfair trials.<sup>255</sup> The post-Nuremberg case of *In re Alstotter*<sup>256</sup> involved the trial, sentencing, and imprisonment of a number of presiding judges and German officials who participated in show trials that resulted in executions.<sup>257</sup> The officials and judges had supported or played a role in arbitrary judicial proceedings initiated by Hitler that resulted in thousands of executions.<sup>258</sup> In the Pacific, Japanese military authorities were also convicted for their participation in show trials.<sup>259</sup>

Hence, failures to afford the judicial guarantees of Common Article 3 in a non-international armed conflict could also be the

254. See Common Article 3, *supra* note 19.

255. See Robert Cryer, *Accountability of Armed Opposition Groups in International Law*, by Liesbeth Zegveld, 53 INT’L & COMP. L.Q. 268, 270 (2004) (book review) (arguing that Zegveld makes “unsupported statements” when she implies that Common Article 3(d) “should not impose criminal responsibility on individuals” and makes no mention of “numerous trials in the Pacific sphere after the Second World War relating to the failure to grant minimal fair trial rights to defendants”).

256. 14 Ann. Dig. 278 (U.S. Milit. Tribunal 1947).

257. *Id.* at 278. These individuals were prosecuted for participation in genocide. *Id.*

258. *Id.*

259. See, e.g., Trial of Lieutenant-General Shigeru Sawada, Case No. 25, 5 L.R. TRIALS WAR CRIMS. 1, 7–8 (U.S. Milit. Comm’n Apr. 15, 1946) (highlighting a trial that ended in the conviction of members of a military tribunal for various failures to provide for fair trials). See generally Matthew Lippman, *Prosecutions of Nazi War Criminals Before Post-World War II Domestic Tribunals*, 8 U. MIAMI INT’L & COMP. L. REV. 1, 80–88 (describing crimes and trial in the *Sawada* case). On a more contemporary note, a judge in Iraq was recently executed for crime against humanity for presiding over a series of sham trials. See Karen O’Brien, *Executed Judge’s Case*, B.B.C. NEWS, Jan. 15, 2007, [http://news.bbc.co.uk/2/hi/middle\\_east/6262091.stm](http://news.bbc.co.uk/2/hi/middle_east/6262091.stm).

basis for prosecution. Originally, the ad-hoc tribunals established by the United Nations for the former Yugoslavia did not include prosecutions under Common Article 3.<sup>260</sup> They have since evolved to include Common Article 3 in the subject matter jurisdiction of the International Criminal Tribunal for Rwanda.<sup>261</sup> Additionally, the Appeals Chamber of the International Criminal Court for the Former Yugoslavia held that a criminal prosecution could be founded upon conduct arising from the mixed international and internal conflict taking place in the former Yugoslavia,<sup>262</sup> allowing prosecution under Common Article 3.<sup>263</sup>

Should the Manual be found to violate the provisions of Common Article 3,<sup>264</sup> prosecutors and other U.S. citizens responsible for the unfair military trials would be at risk of being prosecuted.<sup>265</sup> The U.S. War Crimes Act of 1996 defined a war

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260. In his 1993 report, the Secretary-General indicated that the principle of *nullum crimen sine lege* demanded that the subject matter of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") be limited to violations of international humanitarian law that were recognized under customary international law as it existed at that time. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 35, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993).

261. Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 4, U.N. Doc. S/RES/955 (Nov. 8, 1994), reprinted in 33 I.L.M. 1598, 1600 (1994).

262. See *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 22 (Oct. 2, 1995), reprinted in 35 I.L.M. 32, 41 (1996).

263. *Id.* ¶¶ 89–93.

264. See Burke-White, *supra* note 46, at 22–23 ("Military tribunals, depending on their structure and rules, may well violate core principles of international law, such as the right—enshrined in numerous international conventions—to a fair trial before an independent arbiter." (citation omitted)); Neal Kumar Katyal, Hamdan v. Rumsfeld: *The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 71 (2006) ("[Hamdan's] practical meaning is clear: military trials have to take place with essential elements of military justice intact and must comply with the minimal protections enshrined in Common Article 3 of the Geneva Conventions."); Geoffrey S. Corn, Hamdan, *Fundamental Fairness, and the Significance of Additional Protocol II*, ARMY LAW., Aug. 2006, at 1 ("[T]he message [in Hamdan] was clear: the military commissions are not as 'full and fair' as the government has been asserting since their inception. In a rejection of the course of action chosen by President George W. Bush to provide criminal sanction to Al Qaeda operatives, the Court held that the procedural construct of the military commission violated both domestic constitutional limits on executive authority and the international law of war reflected in Common Article 3 of the four Geneva Conventions of 1949." (footnote omitted)); Posting of John Bellinger to *Opinio Juris*, The Meaning of Common Article Three, <http://www.opiniojuris.org/posts/1168814555.shtml> (Jan. 16, 2007, 7:05 CST) (outlining the U.S. government's interpretation of Common Article 3 via U.S. domestic law). But see Bradley, *supra* note 86, at 255 (arguing that the military commissions originally set up at Guantánamo are not necessarily in conflict with the POW Convention).

265. See Christopher C. Burris, *Time for Congressional Action: The Necessity of Delineating the Jurisdictional Responsibilities of Federal District Courts, Courts-*

crime to include "a violation of [C]ommon Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict . . . ."<sup>266</sup> Accordingly, between 1996 and 2006, a trial in violation of Common Article 3 could have resulted in a criminal prosecution in U.S. courts for those officials responsible.<sup>267</sup> The MCA,<sup>268</sup> however, redefined "war crime" to exclude both lack of a fair trial and/or outrages upon personal dignity under Common Article 3.<sup>269</sup> Even though the United States now limits its definition of "war crime," other countries continue to define "war crime" to include violations of Common Article 3; these countries also allow prosecution of U.S. nationals.<sup>270</sup>

It may not be popular to suggest that the activities of military commission officials and prosecutors may one day result in criminal prosecutions somewhere in the world. In order to provide for their safety, however, the possibility of such prosecution should be considered. Former Secretary of State Colin Powell warned that failure to follow the requirements of the Geneva Conventions "may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops."<sup>271</sup> It would be an unfortunate result of fulfilling their duty

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*Martial, and Military Commissions to Try Violations of the Laws of War*, 2005 FED. CTS. L. REV. 4, 29 ("It has also become generally accepted that the protections of Common Article 3 of the Geneva Conventions of 1949, which applies during non-international armed conflicts, have become part of customary international law." (citing *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 129–36 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996) (holding in paragraph 134 that "customary international law imposes criminal liability for serious violations of [C]ommon [A]rticle 3")); Jinks, *supra* note 70, at 409 ("The procedural rights recognized in the ICTY, ICTR, and the ICC—tribunals empowered to try persons for serious violations of humanitarian law, including war crimes—provide further evidence of a broad consensus as to the essential (or 'indispensable') attributes of fair trials.")).

266. War Crimes Act of 1996, Pub. L. No. 104-192, ch. 118, 110 Stat. 2104 (1996) (current version at 18 U.S.C. § 2441(c)(3) (2006)). The U.S. Naval Handbook also notes that "failure to provide a fair trial for the alleged commission of a war crime is itself a war crime." DEPT OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, § 6.2.6.3 (2007), *available at* [http://www.nwc.navy.mil/cnws/ild/documents/1-14M\\_\(Jul\\_2007\)\\_\(NWP\).pdf](http://www.nwc.navy.mil/cnws/ild/documents/1-14M_(Jul_2007)_(NWP).pdf).

267. See Pub. L. No. 104-192, ch. 118, 110 Stat. 2104, 2104.

268. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

269. *Id.* § 6, 120 Stat. at 2632–35.

270. See Ian Fisher, *Italy Indicts C.I.A. Operatives in '03 Abduction*, N.Y. TIMES, Feb. 17, 2007, at A1.

271. Memorandum from Colin L. Powell, Sec'y of State, to Counsel to the President, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), *available at* <http://www.slate.com/features/whatistorture/LegalMemos.html>.

if members of the military commission were told that, like Henry Kissinger, they may one day need to engage in a prosecution risk assessment before traveling to Italy, Germany, Spain, Switzerland, Canada, or elsewhere.

## 2. Protecting U.S. Soldiers in Future Conflicts

The impact of the military commissions on international law and practice must also be considered. It is an unfortunate reality that U.S. soldiers or citizens may be captured in future conflicts with foreign nations or armed opposition groups. Upon capture, their captors may cite current U.S. military commissions as support for criminal prosecutions and the use of unfair trial practices.<sup>272</sup> The military commissions should strive to protect every judicial guarantee protected by Common Article 3 and the Civil and Political Covenant so that the military commissions cannot be used to justify the unlawful prosecution of U.S. soldiers.

In a 1999 Foreword to a collection of essays on comparative constitutional law, Chief Justice of the U.S. Supreme Court William H. Rehnquist wrote:

[F]or nearly a century and a half, courts of the United States exercising the power of judicial review [for constitutionality] had no precedents to turn to except their own, because our Court alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries . . . it [is] time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process.<sup>273</sup>

This passage underscores the importance of considering international law in judicial decision making and points out the importance of U.S. jurisprudence on developing international law and practice. For example, U.S. Supreme Court decisions played a fundamental role in the International Criminal Tribunal for Rwanda's decisions determining what constitutes a violation of a detainee's rights.<sup>274</sup> The military commissions and reviewing

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272. See Beard, *supra* note 59, at 64–69.

273. William H. Rehnquist, *Foreword* to *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* v, viii (Vicki C. Jackson & Mark Tushnet eds., 2002). The foreword is based on an edited transcript of introductory comments delivered at the conference *Comparative Constitutional Law: Defining the Field*, held at Georgetown University Law Center on September 17, 1999. *Id.* at ix n.1.

274. See *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19, Decision, ¶¶ 96, 111 (Nov. 3, 1999).



courts must bear in mind the jurisprudential effect of their decision on case precedent, future U.S. military commissions, and commissions or tribunals convened by other countries. The United States must provide an example that promotes the fair and just treatment of future U.S. POWs. This goal can be accomplished by interpreting the Manual in a manner that accords with human rights treaties and international jurisprudence regarding fair trials.

### **Conclusion**

Congress, in its pursuit of justice, created military commissions that compromise the very values Congress seeks to enforce. The Manual for Military Commissions, as literally read, may lack sufficient guarantees for fair trials by compromising the right to confront witnesses, the prohibition of evidence adduced by torture or ill-treatment, and access to review by higher courts, among other rights. Should the military commissions fail to protect these fair trial rights, the commissions will be an albatross around the neck of U.S. international relations and world image in the years to come. To avoid these unfortunate consequences, the military commissions and reviewing courts should construe the MCA and the Manual to require the fair trial guarantees prescribed by Common Article 3 of the Geneva Conventions, the International Covenant on Civil and Political Rights, and Article 75 of the Additional Protocol I to the Geneva Conventions. Interpreting the Manual in such a manner would be consistent with the requirements of the treaties as well as the Supreme Court's treatment of international law in its jurisprudence. In some cases, referencing the courts-martial procedures would be a good step towards interpreting the Manual consistently. Failure to implement proper fair trial protections may one day subject the officials involved to prosecution overseas, threaten the safety of U.S. soldiers in future conflicts, and damage the notion of justice the United States has fought so hard to develop, protect, and uphold.