

**VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND
HUMANITARIAN LAW ARISING FROM PROPOSED TRIALS
BEFORE UNITED STATES MILITARY COMMISSIONS**

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HUMANITARIAN LAW ARISING FROM PROPOSED TRIALS BEFORE UNITED STATES MILITARY COMMISSIONS¹

A. Summary:

The President of the United States has authorized trial by military commission of foreign nationals alleged to be members of al Qaeda or otherwise involved in international terrorism. The commissions will be composed of military officers, only one of whom need be a lawyer, and are authorized to impose the death penalty. The first trial of a prisoner at the U.S. Naval Base at Guantanamo Bay, Cuba, is expected to begin in August 2004 (part B below).

Hundreds of prisoners have been held at Guantanamo for more than two years without charges, legal assistance, access to judges or judicial officers, trials, or hearings to determine their status under the Geneva Conventions (parts B and C).

U.S. military commission procedures violate international human rights and humanitarian law, including treaties to which the U.S. is a State Party, as well as customary international law and general principles of humanitarian law (part D), in at least the following ways:

- The commissions are not established by law (part E.1).
- They must defer to executive officials on certain dispositive issues (part E.2).
- They are not independent (part E.3).
- They are not impartial (part E.4).
- They discriminate against and among foreign nationals (part E.5).
- They deny prisoners of war the right to trial before the same courts using the same procedures as would try U.S. soldiers for the same offenses (part E.6).
- Prisoners at Guantanamo are subject to prolonged pretrial detention without notice of charges, access to counsel, appearance before a judge or judicial officer, judicial recourse, judicial investigation or trial (parts E.7 and E.10).
- Prisoners of war at Guantanamo are subject to pretrial detention far in excess of the three month limit imposed by the Geneva Convention (part E.7).

¹ The authors gratefully acknowledge the helpful review and comments on an earlier draft of this memorandum, provided by Daniel Bethlehem, Louise Doswald-Beck, Guy Goodwin-Gill, Frits Kalshoven, Vaughan Lowe and Marco Sassoli. The authors are solely responsible, of course, for any remaining shortcomings.

- Prolonged pretrial detention without charge in the conditions at Guantanamo constitutes cruel, inhuman or degrading treatment (part E.8).
- The military commission procedures authorize admission into evidence of statements taken from prisoners in these coercive conditions, even if taken under torture (part E.9).
- The procedures deny the accused timely access to legal assistance and to counsel of choice (part E.10).
- The procedures authorize the military to monitor communications between the accused and defense counsel (Part E.11).
- The procedures do not permit the accused to defend himself in person (part E.12).
- The procedures authorize exclusion of the accused and civilian defense counsel (if any) from secret hearings (part E.13).
- The procedures authorize denial of access by the accused and defense counsel to secret documents essential to the defense (part E.14).
- The procedures do not allow for judicial appeal (part E.15).
- The procedures do not permit recourse to a court to challenge the lawfulness of detention before, during and after trial (part E.16).
- For all these reasons, the procedures also violate minimum international standards for imposition of the death penalty (part E.17).
- Taken as a whole, the U.S. military commission procedures deprive an accused of a fair and regular trial in accordance with generally recognized principles of judicial procedure (part E.18).

B. The Proposed United States Military Commission Trials

In November 2001 the President of the United States issued a Military Order authorizing trials by military commission of persons he has reason to believe have been members of al Qaeda or involved in acts of international terrorism, or who knowingly harbor such persons.² The commissions are authorized to try only persons who are not

² Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 FED.REG. 57833 (Nov. 16, 2001), (hereafter ‘President’s Military Order’), sections 2(a) and 4(a). Section 2(a) makes subject to the Order “any individual who is not a United States citizen with respect to whom I determine from time to time in writing that: (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in

U.S. citizens.³ They may not, however, try all such persons, but only those for whom the President deems trial by military commission to be “in the interest of the United States.”⁴

No U.S. legislation establishes military commissions.⁵ Instead, the Department of Defense has issued a series of Military Commission Orders and Instructions defining their appointment, composition, jurisdiction and procedures.⁶ The commissions are authorized to hear cases of war crimes, terrorism and related crimes.⁷ The commissions and their procedures differ markedly from courts-martial which hear cases of American soldiers charged with similar offenses.⁸

The commissions will be composed of three to seven military officers named by an “appointing authority.”⁹ Only one member need be a lawyer.¹⁰ They are instructed to be impartial, to guarantee certain rights to the accused and to afford a “full and fair trial.”¹¹ However, they have no final authority to exercise the normal judicial powers of granting interlocutory dismissal of charges or approving plea bargains; these decisions are made instead by the appointing authority, an executive officer appointed by and reporting to the Secretary of Defense.¹²

All accused will be assigned U.S. military lawyers to defend them.¹³ However, the right of an accused to counsel of his choice is restricted.¹⁴ He may engage civilian counsel only at his own expense, and only counsel who are U.S. citizens, and then only if the military grants them security clearances. Even then, civilian counsel may be denied

preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or the economy; or (iii) has knowingly harbored one or more [such] individuals ...; and (2) it is in the interest of the United States that such individual be subject to this order.”

³ President’s Military Order, section 2(a).

⁴ *Id.* section 2(a)(2). The Order provides no criteria for this determination.

⁵ See part E.1 below.

⁶ These directives are accessible at <http://www.dod.mil/news/commissions.html> (visited April 30, 2004). They include U.S. Department of Defense Military Commission Orders (hereafter “MCO”) No. 1 of March 21, 2002, No. 2 (now revoked) of June 21, 2003, No. 3 of Feb. 5, 2004, No. 4 (now revoked) of Jan. 30, 2004, No. 5 of March 15, 2004, and No. 6 of March 26, 2004; and Military Commission Instructions (hereafter “MCI”) 1 through 8 of April 30, 2003, No. 9 of Dec. 26, 2003, and revised Annex B of Feb. 5, 2004 to MCI 5, codified in 32 CFR Parts 9-17. MCI’s 3, 4 and 6 were modified in minor respects on April 15, 2004. All are further discussed in text below.

⁷ MCI No. 2, *Crimes and Elements for Trials by Military Commission*, April 30, 2003, pars. 6.A (war crimes) and 6.B (other offenses, including hijacking or hazarding a vessel or aircraft, terrorism, murder or destruction of property by an unprivileged belligerent, aiding the enemy, spying, perjury or false testimony, and obstruction of justice related to military commissions). Par. C adds various accessory offenses, such as aiding or abetting and conspiracy.

⁸ See notes 172 and 173 below.

⁹ MCO No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, March 21, 2002, pars. 2, 4 (A)(1) and (2).

¹⁰ *Id.* par. 4(A)(3) and (4).

¹¹ *Id.* pars. 1, 5, 6(B)(1) and (2).

¹² *Id.* par. 4(A)(5)(d); see also 6(H)(6). See notes 125-127 below.

¹³ *Id.* par. 4(c)(2).

¹⁴ *Id.* par. 4 (c)(3)(b).

access to secret evidence and excluded from secret hearings.¹⁵ In addition, the military reserves the right to monitor communications between the accused and his defense counsel, both civilian and military, “for security or intelligence purposes.”¹⁶

The rights of the accused to be tried in his presence and to have adequate facilities for his defense are similarly limited, since he, too, may be denied access to secret evidence and excluded from secret hearings.¹⁷

The commissions are instructed to admit all evidence with “probative value,” regardless of how it was obtained – even if by torture.¹⁸

The commissions may impose severe penalties, including the death penalty.¹⁹ Their decisions are subject to review by a “review panel” appointed by the Secretary of Defense and to final approval by the President or the Secretary.²⁰ No judicial appeal or recourse to courts of law is permitted.²¹

While these are the general procedures for military commissions, certain modifications have been negotiated on a bilateral basis with the governments of the United Kingdom and Australia, but only in regard to accused who are citizens of those countries.²²

As of May 2004 approximately 600 foreign nationals from about 40 countries were in detention at the U.S. Naval Base at Guantanamo Bay, Cuba.²³ Nearly all have been detained for periods of up to two and a half years without access to counsel or courts, without being charged, and without being granted prisoner of war status or provided status hearings under article 5 of the 1949 Geneva Convention on prisoners of war.²⁴ The military claims the right to imprison them indefinitely, until the “war on terrorism” is over -- even in the event they were to be tried by a military commission and found not guilty.²⁵

¹⁵ *Id.* par. 4 (c)(3)(b), 6(B)(3).

¹⁶ MCO No. 3, Feb. 5, 2004, *Special Administrative Measures for Certain Communications Subject to Monitoring*, section 3.

¹⁷ MCO No. 1, par. 6(B)(3).

¹⁸ *Id.* par. 6(D)(1).

¹⁹ President’s Military Order, sec. 4(a).

²⁰ MCO No. 1, par. 6(H)(4), (5) and (6); MCI No. 9 section 4(B).

²¹ President’s Military Order, section 7(b).

²² See Part E.5 (b) below.

²³ International Committee of the Red Cross (“ICRC”), 14 May 2004 Operational Update, *US Detention Related to the Events of 11 September 2001 and its Aftermath*, accessible at www.icrc.org (visited May 26, 2004); N. Lewis, *Australian May Face U.S. Tribunal*, NEW YORK TIMES, June 2, 2004, p. A16 (594 prisoners at Guantanamo).

²⁴ See generally Brief for the Respondents in *Rasul et al. v. Bush et al.*, U.S. Supreme Court Nos. 03-334 and 03-343, March 4, 2004, pp. 4-12 (accessible at www.jenner.com/gitmo, visited June 1, 2004).

²⁵ U.S. Dept. of Defense News Briefing, March 21, 2002, transcript published by M2 Presswire, March 22, 2002 (accessible in www.lexis.com, news library). The following question in regard to military commission trials was put to Defense Dept. General Counsel William J. Haynes, and he answered as follows:

The International Committee of the Red Cross has expressed concern about the effects of this continuing legal uncertainty on the psychological health of the prisoners,²⁶ many of whom have attempted suicide.²⁷ Press reports suggest that some prisoners in these coercive conditions may plead guilty in exchange for limited sentences and release once their sentence is served.²⁸

Only six prisoners to date have been designated by the President as eligible for trial by military commission.²⁹ Civilian defense counsel were first permitted to meet with a Guantanamo prisoner in December 2003.³⁰ Military defense counsel were first assigned to two of the six in December 2003.³¹ Charges against those two prisoners were first announced in February 2004,³² and a third prisoner was charged in June 2004.³³ As of mid-June 2004, no military commissions have been convened and no trials have begun. Recent press reports suggest that the first trial may begin in August 2004.³⁴

The proposed trials by military commission violate basic rights guaranteed by international human rights and humanitarian law. Part B summarizes the legal status of prisoners at Guantanamo. Part C identifies applicable sources of international law. Part D specifies ways in which the proposed military commission trials would violate international law.

Q: "Does that mean that if you are acquitted, there is a chance that you will not be set free?"

Haynes: "... If we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge, but may not necessarily automatically be released. The people that we are detaining, for example, in Guantanamo Bay, Cuba, are enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies, and they're dangerous people. At the moment, we're not about to release any of them unless we find that they don't meet those criteria. At some point in the future - ..."

²⁶ ICRC, note 23 above. "ICRC Concerns" include that "the persons held in Guantanamo Bay are still facing seemingly indefinite detention beyond the reach of the law. ... Beyond the legal arguments, the ICRC believes that knowledge of their fate could play a large part in addressing mental and emotional health problems among the detainees at Guantanamo Bay observed by its delegates and reported by other sources."

²⁷ "In 18 months, 21 detainees have made 32 suicide attempts, and human rights groups have said the high incidence of such events, as well as the number of detainees being treated for clinical depression, was a direct result of the uncertainties of their situations." N. Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, NEW YORK TIMES, Oct. 10, 2003, p. A1.

²⁸ J. Mintz, *Deals Reported Afoot for Detainees; But Lawyers Question Pacts for Clients Without Access to Counsel*, WASHINGTON POST, Dec. 6, 2003, p. A6; M. Dunn, *Hicks considers pleading guilty*, HERALD SUN (Sydney, Australia), 27 May 2004, at 5.

²⁹ J. Mintz, *6 Could Be Facing Military Tribunals, U.S. Says Detainees Tied to Al Qaeda*, WASHINGTON POST, July 4, 2003, p. A1.

³⁰ M. Garcia, *Australian at Guantánamo in 'Legal and Moral Black Hole,' Lawyer Says*, WASHINGTON POST, Dec. 18, 2003, p. A20.

³¹ U.S. Dept. of Defense News Release Nos. 912-03, Dec. 3, 2003, *DOD Assigns Legal Counsel for Guantanamo Detainee*, and 961-03, *Defense Counsel Assigned to Salim Ahmed Hamdan*, Dec. 18, 2003, both accessible at www.defenselink.mil (visited May 18, 2004).

³² K.L. Vantran, *Guantanamo Detainees Charged with Conspiracy to Commit War Crimes*, American Forces Information Service, Feb. 24, 2004, accessible at www.defenselink.mil (visited May 18, 2004). As of June 1, 2004, no other prisoners have been charged.

³³ U.S. Dept. of Defense, News Release No. 564-04, June 10, 2004, *Guantanamo Detainee Charged*.

³⁴ N. Lewis, *Australian May Face U.S. Tribunal*, NEW YORK TIMES, June 2, 2004, p. A16.

C. Status Under International Law of Prisoners at Guantanamo

All prisoners at Guantanamo are foreign nationals, representing more than 40 nationalities.³⁵ Their legal status cannot now be ascertained with certainty, because the U.S. has not publicly identified the vast majority, and refuses to conduct article 5 status hearings under the Geneva Convention,³⁶ on the ground that the President has determined that there is “no doubt” that they are all “unlawful enemy combatants” not entitled to treatment as prisoners of war.³⁷ Some lower U.S. courts have ruled that American courts have no jurisdiction to hear *habeas corpus* petitions filed on behalf of the prisoners; the question of whether they have jurisdiction is pending before the U.S. Supreme Court, which is expected to rule by late June 2004.³⁸

Based on available public information, prisoners at Guantanamo may fall into four categories, as follows.³⁹

1. Unprivileged Participants in Hostilities. Al Qaeda combatants captured in the Afghan war may well not qualify as POW’s.⁴⁰ They are nonetheless entitled either to the fair trial safeguards for “protected persons” under the Geneva Convention on civilians,⁴¹ or, if not, then to the “minimum rules of protection” of fair trial provided by Protocol I,⁴² or to the fair trial safeguards of international human rights law, whichever norms are more favourable, as discussed in part D.2 below.
2. Prisoners of War. Taliban combatants captured in the Afghan war may qualify as prisoners of war.⁴³ They are thus entitled to the fair trial safeguards of the Third Geneva Convention, including trial before the same courts with the same procedures as would be used for U.S. soldiers, as discussed in part E.6 below.

³⁵ ICRC, note 23 above.

³⁶ Article 5 of the 1949 Geneva Convention on prisoners of war, note 48 below, provides in part, “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, ... [are prisoners of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

³⁷ Brief for the Respondents in *Rasul et al. v. Bush et al.*, U.S. Supreme Court Nos. 03-334 and 03-343, March 4, 2004, pp. 4-12 (accessible at www.jenner.com/gitmo, visited June 1, 2004).

³⁸ *Al Odah v. U.S.*, 321 F.3d 1134 (D.C.Cir), cert. granted sub nom. *Rasul v. Bush*, 124 S.Ct. 534 (2003). One lower court has ruled that it has jurisdiction. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), stay granted, 124 S.Ct. 1197 (2004).

³⁹ For detailed analysis see *Jiri Toman*, The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions, 32 *ISRAEL YEARBOOK OF HUMAN RIGHTS* 271 (2003).

⁴⁰ *Id.* at 287-96.

⁴¹ GC IV, note 49 below, art. 5 (persons in the hands of a Party to the conflict who are “definitely suspected of or engaged in activities hostile to the security of the State”). See note 80 below.

⁴² Protocol I, note 50 below, arts. 45.3 and 75.1; ICRC Commentary to Protocol I art. 75, pars. 3031 and 3082.

⁴³ *Id.* at 280-87.

3. Alleged Criminals. Some prisoners at Guantanamo, such as several Algerians arrested in Sarajevo in 2001, were detained outside the Afghan theater of war and accused of conspiring to commit crimes of international terrorism.⁴⁴ They are neither combatants nor civilians interned in armed conflict, and must either be released or given a fair trial with international human rights safeguards.
4. Innocent Civilians. Some prisoners at Guantanamo claim to be innocent civilians mistakenly detained in the war or captured by local forces in Afghanistan and then turned over to the Americans in return for payment of bounties.⁴⁵ Unless the government proves to the contrary in an article 5 status hearing under the Geneva Convention or in a judicial proceeding, they should be repatriated and set free.

D. Applicable Sources of International Law

Both international human rights law and international humanitarian law apply to the proposed military commission trials at Guantanamo. Among applicable treaties to which the U.S. is a State Party are the International Covenant on Civil and Political Rights (“the Covenant”),⁴⁶ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention Against Torture”),⁴⁷ and the 1949 Geneva Conventions on prisoners of war (“GC III”)⁴⁸ and on civilians (“GC IV”).⁴⁹ Other principal sources are customary international law, especially as evidenced by the “fundamental guarantees” (art. 75) of the 1977 Geneva Protocol I (“Protocol I”),⁵⁰ and general principles of humanitarian law, as evidenced by Common Article 3 of the 1949 Geneva Conventions. All these sources bind the U.S. with regard to its conduct of trials at Guantanamo.

1. Applicability of Both Human Rights and Humanitarian Law

⁴⁴ See, e.g., *Boudellaa et al. v. Bosnia and Herzegovina*, Case Nos. CH/02/8679 et al., Decision on Admissibility and Merits, 11 Oct. 2002, Human Rights Chamber of Bosnia and Herzegovina, ANN. REP. 2002, accessible at http://www.hrc.ba/ENGLISH/annual_report/2002/ANNEX/a13.htm (visited 18 May 2004).

⁴⁵ See, e.g., *Al Odah v. United States*, 321 F.3d 1134, 1136-37 (D.C.Cir. 2003) (prisoners allege variously that they were in Afghanistan or Pakistan for purposes of marriage, education, employment or visiting relatives), *cert. granted*, 124 S. Ct. 534 (2003).

⁴⁶ G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force, Jan. 3, 1976.

⁴⁷ G.A. Res. 39/46, annex, 39 U.N. GAOR Supp., (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force, June 26, 1987.

⁴⁸ Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, entered into force, Oct. 21, 1950, entered into force for the U.S., Feb. 2, 1956, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁴⁹ Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, entered into force, Oct. 21, 1950, entered into force for the U.S., Feb. 2, 1956, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁵⁰ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, entered into force, Dec. 7, 1978, reprinted in 16 I.L.M. 1391 (1977).

As confirmed by the Human Rights Committee, the Covenant applies “in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”⁵¹

The International Court of Justice likewise observes that “the protection of the ... Covenant ... does not cease in times of war, except by operation of Article 4 ... whereby certain provisions may be derogated from in a time of national emergency.”⁵² The U.S. has never purported to derogate from its Covenant obligations.

Likewise the Convention Against Torture applies in wartime: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, ... or any other public emergency, may be invoked as a justification of torture.”⁵³

The principle that human rights and humanitarian law are “complementary, not mutually exclusive,” is not limited to the Covenant, but applies to human rights law generally.⁵⁴ The contrary claim of the current U.S. Administration – that rights in war are governed exclusively by international humanitarian law⁵⁵ -- finds no support in the text of the international instruments or in international jurisprudence.

The principle of complementary protection applies specifically at Guantanamo. The United Nations High Commissioner for Human Rights has stated that all prisoners at Guantanamo “are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the [Covenant] and the Geneva Conventions of 1949. ... Any possible trials should be governed by the principles of fair trial, including the presumption of innocence, provided for in the [Covenant] and the Third Geneva Convention.”⁵⁶

⁵¹ *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 (General Comments) (“GC 31”), par. 11.

⁵² I.C.J. Advisory Op. of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, par. 25.

⁵³ Art. 2.2.

⁵⁴ See, e.g., *Las Palmeras Case, Preliminary Objections*, Inter.-Am.Ct.H.Rts., Judgment of Feb. 4, 2000, par. 34 (American Convention on Human Rights to be interpreted in light of international humanitarian law where applicable).

⁵⁵ *Report of the Working Group on Arbitrary Detention*, E/CN.4/2004/3, 15 Dec. 2003, par. 18: The U.S. “stated that the consequences of conflating human rights law and the law of war-international humanitarian law would be dramatic and unprecedented. The two systems were distinct.” Also *compare* Letter of 2 April 2003 from US to secretariat of UN Commission on Human Rights, enclosing response to 16 Dec. 2002 Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2003/G/73, 7 April 2003, *with Opinions adopted by the Working Group on Arbitrary Detention*, E/CN.4/2004/3/Add.1, 26 Nov. 2003, Opinion No. 5/2003 (United States of America), 8 May 2003, par. 13.

⁵⁶ Statement of the High Commissioner for Human Rights on the Detention of Taliban and Al Qaeda Prisoners at U.S. Base in Guantanamo Bay, 16 Jan. 2002, accessible at www.unhchr.ch (visited 18 May 2004).

2. The “Most Favourable Protection” Standard

The complementary nature of international human rights and humanitarian law is especially clear in regard to fair trial rights of persons detained in connection with armed conflict. Not only does international humanitarian law explicitly incorporate human rights standards for fair trials, it directs the application of whichever norms afford the higher standard of protection.

Articles 72-79 of Protocol I provide rules “additional to” the rules on humanitarian protection of civilians,⁵⁷ “as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.” (Art. 72.) The ICRC Commentary specifies that these “other applicable rules” include Covenant norms (and other human rights treaties where applicable).⁵⁸

Among the additional rules in this chapter of Protocol I, article 75 provides “fundamental guarantees” for trial of prisoners, such as unprotected participants in hostilities, who may not qualify for more favorable treatment under the Geneva Conventions.⁵⁹ In addition to specific procedural guarantees, article 75.7(a) provides that trials of such prisoners for war crimes or crimes against humanity should be “in accordance with the applicable rules of international law.” This broad language aims to avoid “questionable trials.”⁶⁰ Especially in view of the express reference to “fundamental human rights” within the “field of application” (art. 72) of this chapter, the fair trial norms of the Covenant and Convention Against Torture must be considered among the “applicable rules of international law.”

Recognition of human rights treaty standards is reinforced by article 75.8, which provides that article 75 may not be construed to limit “any other more favourable provision granting greater protection, under any applicable rules of international law.” This includes greater protection resulting from “another Convention [*e.g.*, the Covenant and the Convention Against Torture] or from customary law.”⁶¹

This principle of the “most favourable protection” applies as well where there is doubt about whether a prisoner qualifies as a prisoner of war, and hence benefits from the fair trial guarantees for POWs, or does not so qualify, in which case he is still entitled to the fair trial rights of protected persons under GC IV and at minimum to the “fundamental guarantees” of article 75. “In case of doubt, the defendant can always invoke the most favourable provision.”⁶²

⁵⁷ Under Protocol I “civilians” are all persons who are not members of armed forces, groups or units eligible for POW status. Protocol I, arts. 50.1, 43.1.

⁵⁸ ICRC Commentary (hereafter “Commentary”) art. 72, par. 2927-28.

⁵⁹ Commentary, art. 75, par. 3031.

⁶⁰ *Id.*, par. 3143.

⁶¹ *Id.*, par. 3142.

⁶² *Id.*, par. 3142.

In short, whatever their status, prisoners tried for war crimes or crimes against humanity are entitled to the most favourable protection afforded by applicable international humanitarian or human rights law, be it the Geneva Conventions, Protocol I or the Covenant and Convention Against Torture. In any event the non-derogable standards of article 75 set “minimum rules of protection.”⁶³

3. Human Rights Treaties

Two human rights treaties are principally relevant to U.S. military commission trials: the Civil and Political Covenant and the Convention Against Torture.

The Covenant guarantees the rights to judicial review of the lawfulness of detentions (art. 9.4), treatment of prisoners with humanity and respect for their inherent dignity (art. 10.1), and a catalogue of fair trial safeguards for “everyone” charged with a criminal offense (art. 14).

Among pertinent article 14 guarantees are the rights to a fair hearing before an independent and impartial tribunal established by law and to equality before the courts (art. 14.1); the presumption of innocence (art. 14.2); and the following “minimum guarantees” (art. 14.3): prompt notice of the charge, adequate time and facilities to prepare a defense and to communicate with counsel of choice, trial without undue delay, trial in the presence of the defendant, defense in person or by assistance of counsel, legal assistance where required by the interests of justice, the right to examine or have examined and to compel attendance of witnesses, free assistance of an interpreter where needed, and the right not to be compelled to testify against oneself or to confess guilt. In addition, everyone convicted of a crime has the right to review of the conviction and sentence “by a higher tribunal according to law.” Art. 14.5.

The U.S. made no reservation to article 14.⁶⁴ Although article 4 permits derogations from certain rights in national emergencies, the U.S. has made no derogation. In any event, Covenant fair trial norms are non-derogable. As the Human Rights Committee explains, derogations may not violate “humanitarian law or peremptory norms of international law, for instance ... by deviating from fundamental principles of fair trial, ...”⁶⁵ There are several reasons for this. First, other explicitly non-derogable rights “must be secured by procedural guarantees, including, often, judicial guarantees.”⁶⁶ Second, “certain elements of the right to a fair trial are explicitly guaranteed under

⁶³ *Id.*, par. 3006.

⁶⁴ The U.S. “understandings” of article 14 are not at issue here. 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992), Understanding II (4). The U.S. understood articles 14.3(b) and (d) not to require counsel of choice where the defendant is provided court-appointed counsel on grounds of indigence, or when he is financially able to retain alternative counsel, or where imprisonment is not imposed. The U.S. also understood that article 14.3(e) permits a State to require a defendant to make a showing that any witness whose attendance he proposes to compel is necessary for his defense, and that article 14.7 does not bar second trials by separate governmental units within the U.S. federal system.

⁶⁵ *General Comment No. 29 on Article 4 of the Covenant: States of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11 (“GC 29”), par. 11.

⁶⁶ *Id.* par. 15.

international humanitarian law during armed conflict, ... ”⁶⁷ Third, “the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected Only a court of law may try and convict a person for a criminal offense.”⁶⁸ And fourth, in death penalty cases, article 6 of the Covenant, which is non-derogable, incorporates article 14 fair trial standards by reference.⁶⁹

Not only article 14 but also the right to judicial recourse under article 9.4 is non-derogable. The Committee explains, “In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished ... ”⁷⁰

The Convention Against Torture requires States Parties to ensure “that any statement which is established to have been made as a result of torture shall not be invoked as evidence” against an accused.⁷¹ Although the U.S. attached reservations and understandings to its ratification of the Convention, none relate to this exclusionary rule.⁷²

4. Geneva Conventions III and IV

The U.S. is a State Party to Geneva Conventions III (prisoners of war) and IV (civilians).⁷³ Under GC III, prisoners of war tried for crimes are guaranteed a series of fair trial rights, including most of those set forth in Covenant article 14.⁷⁴ In addition, GC III guarantees POW’s the right to be tried only by the same courts, under the same procedures, as in cases against military personnel of the detaining power. Art. 102. Since U.S. military personnel are tried by courts-martial subject to civilian judicial review,⁷⁵ this requirement of equal treatment would, by itself, bar any trial by military commission of prisoners of war at Guantanamo.

Fair trial guarantees are considered so essential that “wilfully depriving a prisoner of war of the rights of a fair and regular trial prescribed in this Convention” is deemed a “grave breach” subject to criminal punishment.⁷⁶

⁶⁷ *Id.* par. 16.

⁶⁸ *Id.*

⁶⁹ See part E.17 below.

⁷⁰ *Id.* par. 16.

⁷¹ Art. 15. The only exception allows admission of the statement “against a person accused of torture as evidence that the statement was made.”

⁷² 136 Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

⁷³ The US made only two reservations to the Geneva Conventions, one relating to the death penalty in occupied territories and the other relating to use of Red Cross emblems and insignia, neither of which is relevant here. See CONG. REC. – SENATE, July 6, 1955, at 9963, 9969-70.

⁷⁴ Arts. 99-108. GC III does not explicitly guarantee the rights to a fair and public hearing before an independent and impartial tribunal established by law, to equality before the courts, or to the presumption of innocence. However, it guarantees POW’s the right to trial before the same courts with the same procedures as would hear cases against military personnel of the detaining power (art. 102), it entitles representatives of the Protecting Power to attend the trial except in cases of State security (art. 105), and it does expressly provide for the other fair trial safeguards pertinent here.

⁷⁵ See notes 172 and 173 below.

⁷⁶ GC III, art. 130.

GC IV guarantees similar fair trial protections to “protected persons,” who may be sentenced only by “competent courts” after a “regular trial.”⁷⁷ Again, willful deprivation is deemed a “grave breach.”⁷⁸

“Protected persons” under GC IV include all those “in the hands of a Party to the conflict” who are not prisoners of war or wounded or sick.⁷⁹ This includes individuals, such as al Qaeda detainees captured in Afghanistan, who may be “definitely suspected of or engaged in activities hostile to the security of the State.”⁸⁰ But even if al Qaeda detainees were not “protected persons” under GC IV, they would be entitled to the even more protective fair trial guarantees of article 75 of Protocol I.⁸¹

5. Customary International Law

The “fundamental guarantees” of article 75 of Protocol I, adopted in 1977, are more protective of fair trials than the 1949 Geneva Conventions, and largely parallel the safeguards of Covenant article 14.⁸²

Although the U.S. has not ratified Protocol I, the fundamental guarantees of article 75 nonetheless bind the U.S. as customary international law. More than 160 States have joined Protocol I.⁸³ The U.S. signed but did not ratify Protocol I. However, its stated reasons for not ratifying did not include objections to the fair trial guarantees of article 75.⁸⁴ On the contrary, U.S. government legal experts and military manuals have identified article 75 as among those provisions of Protocol I that reflect customary international law.⁸⁵ Article 75 is consistent with the fair trial standards of widely ratified

⁷⁷ GC IV, arts. 4, 71-76 and 126.

⁷⁸ Art. 147.

⁷⁹ Art. 4.

⁸⁰ Art. 5. If such persons were captured in occupied territory in Afghanistan, they would not be entitled to “rights of communication” under GC IV “where absolute military security so requires.” *Id.* Rights of communication, however, involve rights of correspondence with the outside world, not rights of fair trial, which art. 5 requires be preserved even for such persons. *Id.*; see also Commentary to art. 5 (2) (p. 57). In any case, under Protocol I, the “fundamental guarantees” of a fair trial would be preserved in any event. (See discussion in section D.5 below.)

⁸¹ This is confirmed by the Commentary to Protocol I, art. 75, par. 3082.

⁸² Whereas Covenant art. 14 guarantees the right to a “fair and public hearing by a competent, independent and impartial tribunal established by law,” art. 75.4 of Protocol I assures the right to trial before an “impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure ...” It then lists essentially the same safeguards as in Covenant arts. 14.2 and 14.3. Right to counsel is implicit in the “necessary rights and means of defence.” Commentary to Protocol I, art. 75.4(a), par. 3096.

⁸³ See ratification table accessible at www.icrc.org (visited May 10, 2004).

⁸⁴ See *Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions*, 26 I.L.M. 561, 562, 564 (1987) (stating objections to Protocol I while “recogniz[ing] that certain provisions of Protocol I reflect customary international law”).

⁸⁵ T. Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64-65 (1989), citing Panel, *Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify*, 81 ASIL PROC. 26, 37 (1987) (Lt. Col. B. Carnahan of the Joint Chiefs of Staff in personal capacity only); *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM.U.J. INT’L.L. & POL’Y 415, 427 (1987) (M. Matheson, Deputy Legal Adviser, U.S. Dept. of State); D. Scheffer, *Remarks*, 96 ASIL

treaties on both human rights (*e.g.*, Covenant art. 14) and humanitarian law (GC III and IV). Leading commentators agree that it reflects customary international law.⁸⁶

6. General Principles of Humanitarian Law

By its terms Common Article 3 of the 1949 Geneva Conventions applies only in conflicts of a non-international character. However, the International Court of Justice long ago ruled that there is “no doubt” that its norms “also constitute a minimum yardstick” and “minimum rules” applicable in international armed conflicts, as “elementary considerations of humanity” which reflect “general principles of humanitarian law.”⁸⁷

Those minimum rules include a prohibition on passing sentences and carrying out executions “without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁸⁸ In view of the inclusion of fundamental fair trial guarantees in widely ratified human rights and humanitarian law treaties, these “indispensable” judicial guarantees of Common Article 3 should be understood to include the fair trial safeguards of the Covenant and the “fundamental guarantees” for fair trials of Protocol I.⁸⁹

7. Territorial Scope of Application

Both international human rights and humanitarian law apply to trials in Guantanamo, which is occupied by the U.S. under a century-old lease from Cuba which

PROC. 404, 406 (2002) (Ambassador Scheffer stated that “we need to understand fully that Article 75 of Protocol I is a very vibrant article that the United States government has actually said represents customary international law (even though we have not ratified Protocol I).”)

The 1997 edition of the U.S. Army, Judge Advocate General's School, International & Operational Law Department, OPERATIONAL LAW HANDBOOK (p. 18-2) stated expressly that the U.S. views article 75 of Protocol I as “customary international law.” (Accessible at at, <http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf>, visited June 4, 2004.) Although more recent editions do not repeat this statement, neither do they qualify or retract it.

⁸⁶ *E.g.*, George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 893 (2002); Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT'L L. 185, 190 (1996); David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 MILITARY L. REV. 40, 81-82 (2002).

⁸⁷ *Military and Paramilitary Activities in and Against Nicaragua*, Merits, Judgment, I.C.J. REPORTS 1986, p. 14, par. 218, 219, 220. This principle is also reflected in U.S. domestic law, which makes violations of Common Article 3 subject to criminal prosecution. 18 U.S.C. 2441 (c)(3)(2004).

⁸⁸ Art. 3 (1)(d).

⁸⁹ The “fundamental guarantees” of Protocol I art. 75 give “valuable indications to help explain the terms of [Common] Article 3 on guarantees.” Commentary to Protocol I 75.4, par. 3084.

grants the U.S. “complete jurisdiction and control” for as long as the U.S. chooses to remain.⁹⁰

The Covenant therefore applies. As the Human Rights Committee recently reaffirmed, States Parties are bound to respect and ensure Covenant rights “to all persons subject to their jurisdiction” and “to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”⁹¹ This is consistent with the Committee’s longstanding jurisprudence, first articulated a decade before the U.S. ratified the Covenant.⁹² The contrary claim lately made by the U.S.,⁹³ which made no reservation on this point when it ratified, is at odds not only with the object and purpose of the Covenant, but also with the consistent case law of other human rights bodies on the territorial application of international human rights instruments.⁹⁴

Similarly the Geneva Conventions and customary international humanitarian law govern U.S. conduct in a territory like Guantanamo over which the U.S. exercises exclusive jurisdiction and effective control.⁹⁵

Finally, the U.S. is responsible under customary international law for the conduct of its organs, including those which carry out judicial functions, and of all persons who in fact act under its direction and control, wherever they may act.⁹⁶ U.S. obligations to comply with international law thus apply wherever it may choose to convene military commission trials.

⁹⁰ See Brief for the Respondents in *Rasul et al. v. Bush et al.*, U.S. Supreme Court Nos. 03-334 and 03-343, March 4, 2004, pp. 9-10 (accessible at www.jenner.com/gitmo, visited June 1, 2004).

⁹¹ *GC 31*, par. 10.

⁹² *Lopez Burgos*, Communication No. R.12/52, Views of 29 July 1981, par. 12.1; *Celiberti*, Communication No. R.13/56, Views of 29 July 1981, par. 10.1.

⁹³ In domestic court litigation challenging the prolonged detentions without due process of law at Guantanamo, the United States has argued that it is not bound by the Covenant at Guantanamo because the lease reserves “ultimate sovereignty” to Cuba and the Covenant binds a State Party only within its own territory. *Rasul v. Bush*, Nos. 03-334 and 343, U.S. Supreme Court, Brief for the Respondents, at 49.

⁹⁴ *E.g.*, *Bankovic et al. v. Belgium et al.*, Eur.Ct.H.Rts. App. No. 00052207/99, Decision of 12 Dec. 2001 (Grand Chamber), par. 71; *Loizidou v. Turkey*, App. No. 000015318/98, Judgment of 23 March 1995 (preliminary objections), par. 62 (State Party responsible under European Convention when it “exercises effective control of an area outside its national territory”); *Coard et al. v. U.S.*, Int.-Am.Comm.H.Rts., Case No. 10.951, Report No. 109/99, 29 Sept. 1999, par. 37.

⁹⁵ Extraterritorial application of the Geneva Conventions is reflected in State practice, including by the U.S. as a member of the Security Council. *E.g.*, Article 7 of the Statute of the International Criminal Tribunal for Rwanda, which has subject matter jurisdiction *inter alia* over violations of Common Article 3 of the Geneva Conventions, provides in relevant part that its “territorial jurisdiction ... shall extend to the territory of Rwanda ... as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens.” (Accessible at www.ictt.org, visited May 26, 2004).

⁹⁶ See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), arts. 4 (state organs exercising judicial functions) and 8 (persons in fact acting under the instructions or under direction and control of the state) (accessible at www.un.org/law/ilc/texts, visited June 16, 2004).

8. Summary

The fundamental guarantees of article 75 of Protocol I, or the comparable provisions of Geneva Conventions III and IV (whichever norms are more favourable in a given case), apply to trials of prisoners at Guantanamo, except where even more favourable fair trial safeguards are provided by the Covenant. This conclusion follows equally from treaty law, customary law, and general principles of humanitarian law.

The next part demonstrates that the establishment, appointment, composition and procedures of the proposed U.S. military commissions at Guantanamo violate these international norms.

E. Violations of International Human Rights and Humanitarian Law

The proposed U.S. military commission trials violate basic fair trial standards of international human rights and humanitarian law in numerous respects. The following is a non-exhaustive list:⁹⁷

1. U.S. Military Commissions Are Not “Established By Law.”

Article 14.1 of the Covenant requires that every tribunal hearing criminal (or civil) cases must be “established by law.” Interpreting an identical phrase of the European Convention on Human Rights, the European Court of Human Rights has recognized that the central purpose of the “established by law” requirement is to guard against excessive executive discretion by requiring that the establishment of any tribunal be by means of a law duly promulgated by the legislative body:

According to the case-law, the object of the term “established by law” in Article 6 of the Convention is to ensure “that the judicial organization in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament” . . .⁹⁸

The legislation establishing a tribunal must be comprehensive in scope. While the legislature need not “regulate each and every detail” of the tribunal, it must set forth “the matters coming within the jurisdiction of [the] certain category of courts,” and “establish[] at least the organizational framework for the judicial organization.”⁹⁹

Consistent with the European case law, the Human Rights Committee directs States Parties, in reporting on their compliance with Article 14, to “specify the relevant constitutional and legislative texts which provide for the establishment of the courts

⁹⁷ This analysis does not address such other issues, for example, as the absence of any provision for *non bis in idem* (see MCO No. 1 section 5), questions regarding proper definitions of substantive crimes (see MCI No. 2), and restrictions on freedom of expression by defense counsel and other trial participants (*e.g.*, MCI No. 4, section 5.C).

⁹⁸ *Coeme and Others v. Belgium*, App. Nos. 00032492/96 et al., Eur.Ct.H.Rts., Judgment of 22 June 2000, par. 98, quoting *Zand v. Austria*, app. no. 7360/76, Eur. Comm’n H.Rts., Commission Report of 12 October 1978, DECISIONS AND REPORTS (DR) 15, pp. 70 and 80.

⁹⁹ *Zand*, note 98 above, pars. 66, 68, 69.

....”¹⁰⁰ This obligation applies not only with respect to ordinary national courts, but equally with regard to any military or other special courts that might be established.¹⁰¹

The President’s Military Order violates this Article 14.1 requirement that all tribunals be “established by law.” No statute duly enacted by the U.S. Congress establishes military commissions.

The President’s Military Order references as the basis of its authority three acts of Congress: the authorization for use of military force following the attacks of September 11, 2001,¹⁰² and sections 821 and 836 of title 10 of the U.S. Code.¹⁰³ None provides the necessary basis for military commissions to be “established by law.” The use of force resolution makes no mention whatsoever of military commissions. Section 821 is merely negative, providing that the jurisdiction of courts-martial does not deprive military commissions of jurisdiction over offenders or offenses that they, “by statute or by the law of war,” may otherwise have.¹⁰⁴ And section 836, rather than establishing requirements for the appointment, composition, jurisdiction or procedure of military commissions, instead delegates to the President virtually complete discretion to define procedures for military commissions, bounded only by his determination of what is “practicable.”¹⁰⁵

Nor does any other U.S. statute “establish by law” the military commissions envisioned in the President’s Military Order. Statutes do provide that two particular offenses – aiding the enemy and spying – may be tried by “court martial or military commission.”¹⁰⁶ These statutes fall far short of “establishing by law” the military commissions contemplated by the President’s Military Order for trial of some 26 specified principal offenses, plus others unspecified.¹⁰⁷

¹⁰⁰ Human Rights Committee, General Comment No. 13, *Equality before the courts and the right to a fair and public hearing by an independent court established by law*, 13 April 1984 (hereafter “GC 13”), par. 3.

¹⁰¹ *Id.* par. 4.

¹⁰² Authorization for the Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224 (2001).

¹⁰³ President’s Military Order, preambular paragraph. The Order also references, without any specification, “the Constitution and laws of the United States.” This general reference is insufficient to satisfy the “established by law” requirement.

¹⁰⁴ 10 U.S.C. section 821 (2004) reads in its entirety: “The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”

¹⁰⁵ 10 U.S.C. section 836 (2004) reads in its entirety: “(a) Pretrial, trial and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (b) All rules and regulations made under this article shall be uniform so far as practicable.”

The requirement that the President’s procedural rules “may not be contrary to or inconsistent with this chapter” does little to confine the President’s discretion, because, with rare exception, the relevant chapter is silent with respect to procedures applicable to military commissions. The procedures that are specified can be fairly characterized as insignificant, especially in comparison to the procedures that are not specified. See note 109 below.

¹⁰⁶ 10 U.S.C. §§ 904 and 906 (2004).

¹⁰⁷ MCI 2, par. 6, lists the following 26 principal offenses as triable by military commission: willful killing of protected persons, attacking civilians, attacking civilian objects, attacking protected property, pillaging, denying quarter, taking hostages, employing poison or analogous weapons, using protected persons as

Even as to the offenses of aiding the enemy and spying, these statutes are insufficient. At most, they confer limited jurisdiction on military tribunals that have yet to be “established by law.”¹⁰⁸ But no statute purports to establish such commissions. None defines their appointment or composition. And with limited exceptions,¹⁰⁹ none establishes their procedures. Hence, no statute meets the minimum international law requirement of “establish[ing] at least the organizational framework for the judicial organization.”¹¹⁰

The U.S. military commissions accordingly are not established by law and hence lack competence under international law to try any offense.

2. The Final Decision of Dispositive Matters by An Executive Official Violates the Right to be Tried by a Tribunal.

Article 14.1 of the Covenant requires that criminal cases be tried by a competent “tribunal.” Yet the U.S. procedures do not give the military commissions – or any judicial body -- final say on certain important dispositions of cases, which are decided instead by an executive official.

Prior to or during the “trial,” the commission’s presiding officer is required to “certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority.”¹¹¹ In other words, the “tribunal” lacks the normal judicial power to determine that a charge pending before it should be dismissed. That power rests instead in the hands of an executive official, appointed and subject to replacement at will by the Secretary of Defense.¹¹²

shields, using protected property as shields, torture, causing serious injury, mutilation or maiming, use of treachery or perfidy, improper use of flag or truce, improper use of protective emblems, degrading treatment of a dead body, rape, hijacking or hazarding a vessel or aircraft, terrorism, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, aiding the enemy, spying, perjury or false testimony, and obstruction of justice related to military commissions.

However, this list is “illustrative,” not “comprehensive” or “exclusive,” and the absence of a particular offense from the list “does not preclude trial for that offense.” *Id.* par. 3.C.

¹⁰⁸ While neither of these statutory provisions uses the term “jurisdiction,” they could be read to confer such jurisdiction, by implication, on any military commissions that may be established.

¹⁰⁹ U.S. statutory provisions on military commissions authorize convening authorities to assign them court reporters and interpreters; require witnesses to appear and prohibit contemptuous acts; permit commissions to receive certain sworn testimony given before courts of inquiry; and direct military lawyers to revise and record their proceedings. 10 U.S.C. 828, 847, 848, 850, 3037, 8037 (2004). Other statutes exclude military commissions from general laws on judicial review of agency action (5 U.S.C. sections 551(1)(F) and 701 (b)(1)(F)) and on pretrial release and speedy trials (18 U.S.C. 3156 and 3172), and provide that extraterritorial jurisdiction of U.S. courts over members or employees of the U.S. armed forces or persons who accompany them outside the U.S. do not deprive military commissions of any jurisdiction they may have “by statute or by the law of war.” 18 U.S.C. 3261(c)(2004).

¹¹⁰ See *Zand*, note 98 above, par. 69.

¹¹¹ MCO No. 1, section 4(A)(5)(d).

¹¹² The Secretary of Defense has already replaced the first Appointing Authority he named. MCO No. 5.

Likewise, a plea agreement between the defense and prosecution is subject to approval, not by the commission, but by the Appointing Authority. Once he approves it, the commission is “bound to adjudge findings and a sentence pursuant to that plea agreement.”¹¹³ The commission lacks the normal judicial power, for example, to ascertain whether the plea was “voluntary and informed.”¹¹⁴ In such cases it is not the commission but an executive official who in reality assesses guilt and approves punishment.

On interlocutory dismissals and plea bargains, then, the accused is deprived of his right to be tried by a tribunal. As the European Court of Human Rights has repeatedly held, “the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of ‘tribunal’.”¹¹⁵

3. U.S. Military Commissions Are Not Independent.

Article 14.1 of the Covenant, incorporated by reference in articles 75.7(a) and 75.8 of Protocol I, guarantees an accused the right to be tried by an “independent and impartial” tribunal. This is “an absolute right that may suffer no exception.”¹¹⁶

The United Nations Special Rapporteur on the Independence of Judges and Lawyers considers judicial independence and impartiality to be “general principles of law recognized by civilized nations” as well as customary international law.¹¹⁷ Violations of these fundamental norms thus also transgress the Common Article 3 ban on sentences by

¹¹³ MCO No. 1, section 6(A)(4).

¹¹⁴ *Id.*, par. 6(A)(4) requires that a plea agreement include a written stipulation by the accused confirming the “voluntary and informed” nature of his plea of guilty. But the ruling on these issues is made not by the commission, but by the Appointing Authority. In contrast, in international courts and U.S. courts-martial, judges perform the judicial function of deciding whether guilty pleas are voluntary and informed. *E.g.*, International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Erdemovic*, No. IT-96-22-A, Judgment of 7 Oct. 1997, pars. 18-20; 10 U.S.C. 845(a) (2004).

¹¹⁵ *Findlay v. U.K.*, App. No. 00022107/93, Judgment of 25 Feb. 1997, par. 77; *Van de Hurk v. The Netherlands*, App.No. 00016034/90, Judgment of 19 April 1994, par. 45; *Morris v. U.K.*, App. No. 00038784/97, Judgment of 26 Feb. 2002, par. 73. Under a recently recognized exception, a non-judicial officer may alter the judgment of a court-martial, but only where the alteration is in turn subject to judicial review, i.e., where the last word remains with the judiciary. *Cooper v. U.K.*, App. No. 00048843/99, Judgment of 16 Dec. 2003 (Grand Chamber), pars. 106, 127-33. That exception does not apply at Guantanamo, where there is no judicial review of the decisions of the military Appointing Authority to approve or modify the rulings of military commissions. See also *Engel and Others v. The Netherlands*, App. Nos. 00005100/71 et al., Judgment of 8 June 1976, pars. 30 and 68 (military members of Dutch Supreme Military Court “enjoy[ed] the independence inherent in the Convention’s notion of a ‘court,’” where they were appointed by and removable by the Crown on joint motion of the ministries of defense and justice and normally only as the last assignment in their military careers); *De Wilde, Ooms and Versyp v. Belgium*, App. Nos. 00002832/66 et al., Judgment of 18 June 1971, par. 78 (“court” or “tribunal” denotes “bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case ..., but also the guarantees of judicial procedure.”)

¹¹⁶ Human Rights Committee, *González del Río v. Peru*, Communication no. 263/1987, Views of 28 Oct. 1992, CCPR/C/46/D/263/1987, par. 5.2.

¹¹⁷ *Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers*, Report of the Special Rapporteur, E/CN.4/1995/39, 6 Feb. 1995, pars. 34, 35.

courts which do not afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹¹⁸

“Independence” refers to the freedom of the members of the tribunal from external interference with their judicial functions, and to the “objectively justified” appearance of such independence.¹¹⁹ “Impartiality” refers to the absence of subjective bias on the part of the members of the tribunal, and to the objectively justified appearance of the absence of bias.¹²⁰ The two concepts are “closely linked” and often treated together by international courts in reviewing the independence and impartiality of military tribunals.¹²¹

In assessing independence and impartiality the Human Rights Committee looks “in particular ... to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition[s] governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch ...”¹²²

By any of these measures, the lack of independence of the U.S. military commissions is patent. Requiring an executive officer rather than the commissions to approve interlocutory dismissals of charges and plea bargains not only deprives the commissions of their character as “tribunals” as noted above, but also illustrates their lack of independence.¹²³ Where the disposition of a case is made not by a judicial officer but by an executive officer, a tribunal lacks judicial independence.¹²⁴

The commissions’ lack of independence is further reflected in the fact that many other powers normally exercised by tribunals or presiding judges are left instead to the broad discretion of the Appointing Authority, who is an executive officer,¹²⁵ and reports

¹¹⁸ Art. 3.1(d).

¹¹⁹ *E.g.*, *Cooper*, note 115 above, par. 104.

¹²⁰ *Id.*

¹²¹ *E.g.*, *id.*; *Findlay*, note 115 above, par. 73; *Alfatli v. Turkey*, Eur.Ct.H.Rts. App.No. 00032984/96, Judgment of 30 Oct. 2003, par. 36.

¹²² GC 13, par. 3; *see also Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Milan, 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, pars. 1-6.

¹²³ *Findlay*, note 115 above, par. 77.

¹²⁴ *Cooper*, note 115 above, pars. 127-33; *see also Inter-Am.Comm’n H.Rts., Salinas v. Peru*, Case 11.084, Report No. 27/94, 30 Nov. 1994, par. 3 (“Report 18/94 on the present case”) (Peru’s Special Military Court was not ‘a competent, independent, and impartial tribunal’ since, under Peru’s Laws of Military Justice ..., it comes under the Ministry of Defense, making it a special court subordinated to an organ of the Executive Branch.”).

¹²⁵ The President as Commander in Chief of the Armed Forces authorized the Secretary of Defense to issue orders for the appointment of military commissions. President’s Military Order, note 1 above, section 4 (b). MCO No. 1, section 2, provided that “the Secretary of Defense or a designee (“Appointing Authority”) may issue orders ... appointing one or more military commissions ...” MCO No. 2 of June 21, 2003, designated the Deputy Secretary of Defense as the Appointing Authority. MCO No. 5 of March 15, 2004, designated a retired Army Major General and former Assistant Judge Advocate General as Appointing Authority, to serve “as a civilian.” U.S. Dept. of Defense News Release No. 187-04, March 17, 2004. However, nothing in the military orders or instructions requires that the Appointing Authority be a civilian, or indeed provides any criteria at all for his or her selection.

to the Secretary of Defense.¹²⁶ The Secretary exercises powers “through, or with the aid” of the Appointing Authority, whose post is within the Department of Defense.¹²⁷

The powers of the Appointing Authority may be grouped in four categories:

Commission Members and Staff: The Authority selects, appoints, removes for cause, fills vacancies, determines the number of members and selects the presiding officers of commissions;¹²⁸ and assigns their administrative personnel.¹²⁹ The only criteria provided for selection are that commission members must be U.S. military officers and “competent to perform the duties involved,”¹³⁰ and at least one must be a U.S. military lawyer.¹³¹

The “manner of appointment” of commission members is an important indication of their lack of independence.¹³² The lack of criteria and transparency in their selection process raises troublesome questions of potential, unseen interference in the independence of the commissions. Nothing precludes the Appointing Authority from selecting members with a view to favoring the prosecution over the defense, or provides any means by which the defense might be made aware of any such “hand picking” of the “judges.” This risk is aggravated by the entirely *ad hoc* nature of the appointments. A military officer may be appointed to sit on one commission, and then never be appointed to another, or the officer may be appointed repeatedly. The Appointing Authority’s discretion to control the composition of commissions is wide and unchecked.

Trial Procedures: The Authority is empowered to decide many questions of trial procedure normally ruled on by courts, including all interlocutory questions the presiding officer may choose to refer.¹³³ In addition, he or she may close the proceedings to the public and may even exclude the accused and his civilian defense counsel.¹³⁴ Even when proceedings are open, the Authority decides at his “discretion” on the attendance of the public and press, and also decides on public release of transcripts “at the appropriate time.”¹³⁵ The Authority directs the time and place of each commission session;¹³⁶ conducts an “administrative review” of the record of trial and may return the case for further proceedings if necessary;¹³⁷ approves or disapproves any communications by prosecutors, military and civilian defense counsel “and associated personnel” to the news

¹²⁶ MCI No. 6, April 15, 2004, *Reporting Relationships for Military Commission Personnel*, section 3(A)(1).

¹²⁷ *Id.*, citing 10 United States Code section 113(d), which authorizes the Secretary to “perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate.”

¹²⁸ MCO No. 1, sections 2, 4(A)(1), 4(A)(2), 4(A)(3), and 4(A)(4).

¹²⁹ *Id.* 4(D).

¹³⁰ *Id.* 4(A)(3).

¹³¹ *Id.* 4(A)(4).

¹³² See *Findlay*, note 115 above, par. 73.

¹³³ MCO No. 1, section 4(A)(5)(d).

¹³⁴ *Id.* 6(B)(3).

¹³⁵ *Id.*

¹³⁶ *Id.* 6(B)(4).

¹³⁷ *Id.* 6(H)(3).

media “regarding cases and other matters related to military commissions”;¹³⁸ and may limit the time between the trial on the merits and the sentencing hearing.¹³⁹ Exercise of these normally judicial powers by an executive officer constitutes direct interference with the independence of the commissions.

Decisions on Charges and Dispositions: The Authority acts, on the one hand, as chief prosecutor, by approving and referring all charges to commissions.¹⁴⁰ On the other hand, as noted above, he or she is directed to perform judicial functions by deciding all interlocutory questions whose disposition would terminate the proceedings on any charge.¹⁴¹ Likewise the Appointing Authority intrudes on judicial independence by approving and effectively directing the commission to accept and follow any plea agreements.¹⁴²

Regulation of the Defense: The Authority also has strong powers that may limit or chill the defense. Most significantly, the Authority may revoke the right of an attorney to appear before any military commission,¹⁴³ bar permanently any individual from commissions, and otherwise impose sanctions for violations of military commission instructions and rules.¹⁴⁴ When an accused selects a particular military defense counsel, but requests that his initially assigned military counsel continue, the Authority decides whether to grant the request.¹⁴⁵ The Authority also assigns interpreters to the defense “as necessary”;¹⁴⁶ approves requests for additional members of the “defense team”;¹⁴⁷ approves requests for exceptions from restrictions on travel and communications by civilian defense counsel, including requests for travel away from Guantanamo after proceedings begin;¹⁴⁸ may impose “reasonable restriction on the time and duration of contact” between civilian defense counsel and the accused;¹⁴⁹ and may direct the chief military defense counsel to carry out such defense-related functions as the Appointing Authority may choose.¹⁵⁰

¹³⁸ MCI No. 3, April 15, 2004, *Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors*, section 5(c); MCI No. 4, April 15, 2004, *Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel*, April 30, 2003, section 5 (c).

¹³⁹ MCI No. 7, April 30, 2003, *Sentencing*, section 4(A).

¹⁴⁰ MCO No. 1, sections 3(A), 6(A)(1) and (2). In contrast, the revised British system for air force courts-martial, which the European Court of Human Rights found to be independent and impartial, permits the Authority only to refer charges to the prosecutor. It is then the prosecutor’s office “which decides whether a prosecution by court-martial should be pursued or not.” *Cooper*, note 115 above, par. 112. Moreover, unlike U.S. military prosecutors, the chief prosecutor in British air force courts-martial is not a military officer but a civilian “answerable to the Attorney General only.” *Id.* par. 113.

¹⁴¹ MCO No. 1, section 4(A)(5)(d).

¹⁴² *Id.* 6(A)(4).

¹⁴³ *Id.* 4(A)(5)(b).

¹⁴⁴ MCI No. 1, April 30, 2003, *Military Commission Instructions*, section 4.

¹⁴⁵ MCO No. 1, section 4(C)(3)(a).

¹⁴⁶ *Id.* 5(J).

¹⁴⁷ MCI No. 5, Annex B, Feb. 5, 2004, section II.C.

¹⁴⁸ *Id.* II.E.

¹⁴⁹ *Id.* II.H.

¹⁵⁰ MCI No. 4, April 15, 2004, section 4(B).

In addition, the Appointing Authority may issue further regulations for the conduct of commission proceedings.¹⁵¹

The lodging of such extensive powers, many ordinarily exercised by courts – including the final say on judgments -- in a single executive officer violates judicial independence and impartiality. Even though the comparable powers of British army court-martial “convening officers” were less sweeping, discretionary and judicial in character,¹⁵² the European Court of Human Rights ruled that they objectively justified doubt as to the independence and impartiality of British courts-martial.¹⁵³ Yet the U.S. Appointing Authority has even greater power to interfere with the judicial independence of military commissions.

In addition, all members of the military commissions are serving military officers,¹⁵⁴ a factor justifying doubt as to their independence.¹⁵⁵ They are subject to military performance evaluations,¹⁵⁶ a further reason to doubt their independence.¹⁵⁷

¹⁵¹ MCO No. 1, section 7(A).

¹⁵² Like a U.S. Appointing Authority, the British “convening officer” decided on the charges, convened the court-martial and appointed its members. His “agreement,” too, was necessary before the prosecutor could accept a plea agreement. However, his agreement – unlike that of a U.S. Appointing Authority – did not bind the court-martial. Similarly, his agreement was “usually” sought before charges could be withdrawn – unlike the U.S. Appointing Authority, whose approval must be obtained to withdraw charges. *Findlay*, note 115 above, pars. 38, 74. Further, the “convening officer” did not exercise the powers over trial procedure, including scheduling and closing hearings, of the U.S. Appointing Authority. *Id.* pars. 36-41.

The “convening officer” also acted as the “confirming officer.” In this capacity, he was like the U.S. President or Secretary of Defense insofar as his ratification was required before a sentence could become final. *Id.* par. 77.

¹⁵³ *Id.* pars. 74, 80. See also *DeCubber v. Belgium*, App. No. 00009186/80, Eur.Ct.H.Rts., Judgment of 26 Oct. 1984, pars. 29-30 (impartiality of judge open to doubt where he also served as investigating judge, and distinctions between judicial and prosecutorial roles not “clear-cut”).

¹⁵⁴ MCO No. 1, section 4(A)(3).

¹⁵⁵ The European Court of Human Rights found the participation of civilians in key positions on British air force courts-martial to be “one of the most significant guarantees of the independence of the court-martial proceedings.” *Cooper*, note 115 above, par. 117. Among the factors the European Court found negating the independence and impartiality of Turkish National Security Courts was that one of the three members of these courts was a military judge, and such officers are “servicemen who still belong to the army, which in turn takes its orders from the executive.” *Incal v. Turkey*, App. No. 00022678/93, Judgment of 9 June 1998, par. 68. The accused, a civilian, “could legitimately fear that because one of the judges ... was a military judge [the court] might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case.” *Id.* par. 72. *Accord, Alfatli*, note 121 above, par. 40.

¹⁵⁶ MCI No. 6, section 3(A)(8). Commission members “continue to report to their parent commands.” *Id.* 3(B)(10).

¹⁵⁷ The performance of members on the commission may not be considered in preparing their military performance evaluations. *Id.* This does not, however, dispel legitimate doubt. In *Grievances*, note 159 below, par. 84, the British government similarly argued that a naval Judge Advocate was “not reported on as regards his performance” in courts-martial. The European Court was unimpressed. It noted that the Judge Advocate – like the members of U.S. military commissions – “is a serving naval officer in a post which may or may not be a legal one and who, ..., sits in courts-martial only from time to time.” *Id.* par. 85.

Most have career aspirations within the military,¹⁵⁸ yet another factor objectively justifying doubt.¹⁵⁹

These pervasive structural defects are aggravated by the public statements by the Commander in Chief (the President) characterizing the prisoners at Guantanamo as “bad men,”¹⁶⁰ and by the Secretary of Defense that “the people in U.S. custody are ... enemy combatants and terrorists who are being detained for acts of war against our country.”¹⁶¹ To counter these widely publicized statements would require strong structural guarantees of independence.¹⁶² Yet the commissions are burdened by the opposite: strong structural interferences with their independence.

In addition, the executive establishment of military commissions to try offenses that could otherwise be heard by civil courts with full guarantees violates the widely accepted principle of judicial independence that, “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”¹⁶³

¹⁵⁸ MCO No. 1, section 4(A)(3) requires that commission members be military officers, although they may include retired officers recalled to active duty.

¹⁵⁹ In *Grievés v. U.K.*, App. No. 00057067/00, Judgment of 16 Dec. 2003, pars. 88, 91, a Grand Chamber of the European Court of Human Rights found that career aspirations of British navy court-martial members were among the factors objectively justifying doubts about their independence and impartiality. In contrast, in *Cooper*, note 115 above, pars. 104-34, the Grand Chamber found British air force courts-martial to be independent and impartial. Among the differences that led the European Court to condemn navy courts-martial were “the absence of a full-time [presiding officer], with no hope of promotion and no effective fear of removal and who was not subject to report on his judicial decision-making ...” This “deprives naval courts-martial of what was considered, in the air-force context, to be an important contribution to the independence of an otherwise *ad hoc* tribunal. ... [A]nd most importantly, the Judge Advocate in a naval court-martial is a serving naval officer who, when not sitting in a court-martial, carries out regular naval duties. In contrast, the Judge Advocate in the air-force is a civilian working full-time on the staff of the Judge Advocate General, himself a civilian.” *Grievés*, pars. 81-82.

U.S. military commissions are much closer to British navy than to air-force courts-martial. The U.S. presiding officer is not permanent but *ad hoc*. MCO No. 1, section 4(A)(4). He has the same hope for promotion as any other military officer. He is not a civilian but a “Military Officer who is a judge advocate of any United States armed force.” *Id.*

¹⁶⁰ E.g., N. Watt, *Bush Aids Blair By Halting Trial of Britons in Guantanamo Bay*, THE GUARDIAN (London), July 19, 2003, p. 8.

¹⁶¹ Remarks by Secretary of Defense Donald Rumsfeld to Greater Miami Chamber of Commerce re: Prisoners being held at Guantanamo Bay, Miami, Fla., Feb. 13, 2004 (accessible at www.defenselink.gov).

¹⁶² Members of commissions are all subordinate in the military chain of command to the President and Secretary of Defense. Where “a tribunal’s members include persons who are in a subordinate position, in terms of their duties and the organization of their service, *vis-à-vis* one of the parties, accused persons may entertain a legitimate doubt about those persons’ independence.” *Alfatli*, note 121 above, par. 44.

¹⁶³ *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985 and endorsed by UN G.A. Res. 40/32 of 29 November 1985 and 40/146 of 13 December 1985, par. 5. *Accord*, Int.-Am.Ct.H.Rts., *Castillo Petruzzi v. Peru*, Judgment of 30 May 1999, par. 129 (“A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create “[t]ribunals that do not use the duly

For all of these reasons, doubts about the independence of the military commissions are objectively justified. The commissions fail to meet minimum international standards of judicial independence.¹⁶⁴ For this additional reason, they lack competence under international law to try any offense.

4. U.S. Military Commissions Are Not Impartial.

The commissions are instructed to act “impartially.”¹⁶⁵ This formal undertaking, however, does not suffice to assure impartiality in fact or in appearance.¹⁶⁶ Doubts about their impartiality are “objectively justified” by the same factors that negate their appearance of independence.

In addition, their impartiality is open to doubt because they empower members of one armed force to sit in judgment on their presumed enemies. In *Ocalan v. Turkey* the European Court of Human Rights found that even a single military judge on a three-judge tribunal, even for only a portion of the proceedings, tainted its impartiality (and independence).¹⁶⁷ Among other factors, doubts were objectively justified by “the exceptional nature of the trial itself concerning a high-profile accused who had been engaged in a lengthy armed conflict with the Turkish military authorities ...”¹⁶⁸

The impartiality of U.S. military commissions in judging their presumed adversaries, like that of the Peruvian anti-terrorism courts condemned by the Human Rights Committee, is in doubt because they consist of “serving members of the armed forces.” This violates the “cardinal aspect of a fair trial ... that the tribunal must be, and

established procedures of the legal process [...] to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”)

Likewise the Human Rights Committee “notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.” GC 13, par. 4.

¹⁶⁴ The UN Special Rapporteur on the Independence of Judges and Lawyers “expressed his deep concern” over the U.S. Military Order authorizing trials by military commission. The Rapporteur was “especially concerned about the impact of such measures on the rule of law and due process and the wrong signals such action ... could have on other member States, particularly the developing States.” Reports that the U.S. was considering “setting up parallel courts to deal with terrorist-related offences are matters of grave concern.” Report of the Special Rapporteur, E/CN.4/2003/65, 10 January 2003, pars. 37, 39.

¹⁶⁵ MCO No. 1, section 6 (B)(2).

¹⁶⁶ The European Court of Human Rights has found doubts about impartiality objectively justified even though British court-martial members were sworn to act “without partiality,” *Findlay*, note 115 above, pars. 35, 75 and 80, and even though Turkish military judges on National Security Courts were constitutionally guaranteed to be independent and to judge “according to their personal conviction, in accordance” with the law, *Incal*, note 155 above, pars. 27, 67, 73.

¹⁶⁷ App.No. 00046221/99, Judgment of 12 March 2003, pars. 111-21.

¹⁶⁸ *Id.* at 120.

be seen to be, independent and impartial.”¹⁶⁹ U.S. military commissions accordingly lack competence under international law to try any offense.

5. U.S. Military Commissions Impermissibly Discriminate Against And Among Non-U.S. Nationals.

(a) Discrimination Against Non-U.S. Nationals

The President’s Military Order authorizes trial by military commission of members of al Qaeda and other alleged international terrorists only if they are non-citizens of the U.S.¹⁷⁰

Thus, if a foreign national and an American both join al Qaeda, and both commit the same terrorist bombing, the foreign national can be tried by military commission, but the American cannot. The American would be entitled to trial either by a civil court with full judicial guarantees,¹⁷¹ or by court-martial presided over by a certified military judge,¹⁷² and subject to judicial review by independent civil courts of appeal, including the U.S. Supreme Court.¹⁷³

This discrimination contravenes both international human rights and humanitarian law. Covenant article 2.1 requires States Parties to recognize Covenant rights “without distinction of any kind.” Article 26 adds, “All person are equal before the law and are entitled without any discrimination to the equal protection of the law.” Although a few

¹⁶⁹ Human Rights Committee, *Polay Campos v. Peru*, Comm.No.577/1994, Views of 9 Jan. 1998, par. 8.8. Peruvian anti-terrorism tribunal judges, unlike the members of U.S. military commissions, were anonymous. But that distinction makes the U.S. commissions even more suspect by comparison. The Human Rights Committee’s concern was precisely that behind the anonymity of the Peruvian judges, a member of the military might sit as a judge. *Id.* In contrast, it is a certainty that all members of U.S. military commissions will be members of the military.

¹⁷⁰ President’s Military Order, section 2(a). The title of the Order is “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.”

¹⁷¹ *See, e.g., Reid v. Covert*, 354 U.S. 1, 35-41 (1957). This difference in treatment is not mandated by the U.S. Constitution, at least as interpreted during World War II, when the Supreme Court upheld a trial by military commission of a presumed U.S. citizen. *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942).

¹⁷² The presiding officer of a military commission need merely be a military lawyer, i.e., “a Military Officer who is a judge advocate.” MCO No. 1 section 4(A)(4). This officer deliberates and votes in closed session with other commission members. *Id.* section 6 (F). In contrast, the law requires that the presiding officer of a special or general court-martial be a military judge, i.e., a judge advocate who is also “certified to be qualified for duty as a military judge by the Judge Advocate General,” and who “may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.” 10 U.S.C. 826 (a), (b) and (e) (2004).

¹⁷³ The U.S. Congress has established a Court of Appeals for the Armed Forces, consisting of five judges “appointed from civilian life” by the President, subject to advice and consent of the Senate, for 15 year terms, who can be removed only for neglect of duty, misconduct or mental or physical disability. 10 U.S.C. 941, 942 (a), (b) and (c) (2004). All courts-martial death sentences are subject to mandatory review by that Court, and all persons whose court-martial convictions have been upheld by a military appeals court are entitled to petition for review by that Court. 10 U.S.C. 867 (a)(1) and (3) (2004). Discretionary review of its decisions is available from the U.S. Supreme Court. 10 U.S.C. 867a (a). In addition, court-martial convictions may be reviewed by *habeas corpus*. *E.g., Parker v. Levy*, 417 U.S. 733 (1974).

Covenant rights may be denied to non-citizens,¹⁷⁴ “[t]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”¹⁷⁵ Geneva Conventions III and IV, as well as Protocol I, are in accord.¹⁷⁶

Not all differences in treatment are discriminatory. Distinctions may be upheld “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”¹⁷⁷

The President’s Military Order, however, articulates no justification, let alone a “reasonable and objective” basis, to discriminate against foreign nationals. It justifies trial by military commission in order to “protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks,” and because of the “danger to the safety of the United States and the nature of international terrorism.”¹⁷⁸ But it makes no effort to explain why these rationale apply to foreign but not to American international terrorists, and none is apparent. On the contrary, where the subject matter jurisdiction of special courts for alleged terrorists “is not based on objective criteria but on the nationality of the suspected terrorists,” the result is “discrimination based on nationality.”¹⁷⁹

In failing to articulate a “reasonable and objective” basis for relegating certain accused to a separate and inferior trial system, the President’s Military Order is similar to the Irish special court legislation found by the Human Rights Committee to violate Covenant article 26 rights to equality before the law and to equal protection of the law.¹⁸⁰ Like the President’s Military Order here, which gives him unfettered discretion to refer

¹⁷⁴ Non-citizens may be denied the rights to freedom of movement and residence within a country, art. 12.1; the rights to enter and not to be expelled from a country, arts. 12.4 and 13; and the rights to vote and take part in public affairs and public service, art. 25.

¹⁷⁵ General Comment No. 15, *The position of aliens under the Covenant*, 11 April 1986 (“GC 15”), par. 2.

¹⁷⁶ “[A]ll prisoners of war shall be treated alike ..., without any adverse distinction based on ... nationality ...” GC III art. 16. Protected persons under GC IV shall be treated “without any adverse distinction.” Art. 27. Protocol I “fundamental guarantees” must be provided “without any adverse distinction based upon ... national ... origin ...” Art. 75.1.

¹⁷⁷ General Comment No. 18, *Non-discrimination*, 10 Nov. 1989 (“GC 18”), par. 13. The United States interprets articles 2.1 and 26 to permit distinctions “when such distinctions are, at minimum, rationally related to a legitimate governmental objective.” 138 CONG.REC. S4781-01 (daily ed., April 2, 1992), Understanding II(1). It is not clear that this test differs from the “reasonable and objective” language used by the Committee. In any event neither the President’s Military Order nor logic explains why trying foreign but not American members of al Qaeda by military commission is “rationally related” to the legitimate objective of countering international terrorism.

¹⁷⁸ Sections 1 (e) and (f).

¹⁷⁹ Report of the Working Group on Arbitrary Detention, note 55 above, E/CN.4/2004/3, 15 Dec. 2003, par. 67.

¹⁸⁰ *Kavanagh v. Ireland*, Communication No. 819/1998, Views of 26 April 2001, CCPR/C/71/D/819/1998, par. 10.3. A majority of the Committee found it unnecessary to consider whether the Irish law also violated the article 14.1 requirement of equality before the courts, *id.*, but five members found a violation of that provision as well. Individual Opinion of Committee members Henkin, Lallah, Medina, Khalil and Vella. The Committee also relied on the fact that judicial review was “effectively restricted,” *id.* par. 10.2, whereas in the case of U.S. military commission judicial review is expressly prohibited. President’s Military Order, note 1 above, section 7(b).

certain cases to military commissions,¹⁸¹ the Irish law authorized referral of certain cases to special courts in the “unfettered discretion” of prosecutors.¹⁸² In addition, like the Order here, which requires no explanation of why cases are referred to trial by military commission, the Irish law allowed prosecutors to refer cases to special courts with no explanation of why ordinary courts were “inadequate” for some cases but not others.¹⁸³

Trials before civil courts with full judicial safeguards are not among those few Covenant rights afforded only to citizens. Under article 14.1, “All persons shall be equal before the courts and tribunals.” The minimum guarantees of article 14.3 must be provided “in full equality.” The Human Rights Committee elaborates: “Aliens shall be equal before the courts and tribunals, Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights.”¹⁸⁴

While the general right to equality is not expressly listed among those Covenant rights which are non-derogable,¹⁸⁵ the U.S. has not derogated from the Covenant. Even if it had, derogations may not be “inconsistent with ... other obligations under international law, ...”¹⁸⁶ As the Human Rights Committee notes, this includes “particularly the rules of international humanitarian law.”¹⁸⁷

Far from justifying discrimination in trials of non-citizens, international humanitarian law guarantees equal or better treatment of foreign citizens. Geneva Convention III grants foreign prisoners of war the right to trial before the “same courts” using the “same procedures” as apply to soldiers of the Detaining Power.¹⁸⁸ Geneva Convention IV grants fair trial rights to civilians,¹⁸⁹ only if they are “not nationals” of the Detaining Power.¹⁹⁰ And Protocol I provides “fundamental guarantees” for persons not already protected by GC III or IV, “without any adverse distinction” based upon, among other grounds, “other status, or on any other similar criteria.”¹⁹¹ The prohibition of discrimination based on “other status” includes discrimination based on nationality.¹⁹²

¹⁸¹ President’s Military Order, section 2(a)(2), authorizing military commission trials only in cases which the President deems “in the interest of the United States.” The Order provides no criteria for this determination, much less any means of judicial review of the determination.

¹⁸² *Kavanagh*, par. 10.2.

¹⁸³ *Id.*

¹⁸⁴ GC 15, par. 7.

¹⁸⁵ Article 4 prohibits derogations that involve discrimination “solely on the basis of race, colour, sex, language, religion or social origin.”

¹⁸⁶ Art. 4.1.

¹⁸⁷ GC 29, par. 9.

¹⁸⁸ Art. 102.

¹⁸⁹ GC IV, arts. 71-78 and 126.

¹⁹⁰ Art. 4.

¹⁹¹ Art. 75.1.

¹⁹² See Views of the Human Rights Committee in *Gueye v. France*, Communication no. 196/1985, Decision of the Human Rights Committee, 6 April 1989, CCPR/C/35/D/196/1985, par. 9.4 (nationality discrimination constitutes discrimination based on “other status” under art. 26 of the Covenant). See also Int.-Am.Ct.H.Rts, Adv.Op. OC-18, *Legal Status and Rights of Undocumented Migrants* (2003), pars. 110 (principle of non-discrimination is *ius cogens*) and 121 (due process must be guaranteed to all without discrimination based on migratory status).

In brief, the U.S. relegation of foreign citizens to trial by military commission, while American citizens accused of the same crimes are entitled to trial by civil courts or (if members of the military) by courts-martial with greater fair trial protections, constitutes discrimination contrary to international human rights and humanitarian law.

(b) Discrimination Among Non-U.S. Nationals

U.S. military commission procedures also discriminate among foreign citizens of different nationalities. After the British Prime Minister reportedly pressed the matter with the U.S. President, the British Attorney General announced in July 2003 that the Americans had agreed to a series of concessions for the trials of two British citizens who are among the first six prisoners designated as eligible for trial by military commission. Unlike citizens of other nations, British citizens will not face the death penalty and will be able to “choose their own U.S. civilian lawyers, use British lawyers as consultants and speak confidentially with their attorneys. More contacts with their families and immediate visits by British officials were also promised, as were public trials,”¹⁹³

Similar concessions for Australian prisoners were announced in November 2003.¹⁹⁴

U.S. officials contend that these concessions were based on a case-by-case analysis of the evidence and security issues involving the British and Australian prisoners.¹⁹⁵ Yet they were announced only after significant, prolonged, high-level diplomatic pressure from two of America’s closest allies. No other nation’s prisoners have been offered comparable concessions.

Discrimination in favor of foreign nationals of some countries and against foreign nationals of other countries denies equal protection of the laws in violation of article 26 of the Covenant,¹⁹⁶ and hence articles 75.7 and 75.8 of Protocol I as well.

¹⁹³ B. Graham and T. Branigan, *Two Britons at Guantanamo Will Not Face the Death Penalty; Official Denies U.S. Is Dealing Out Separate Justice to Favorites*, WASHINGTON POST, July 23, 2003, A18. Even so, months of negotiations have yet to produce complete agreement; as of February 2004 negotiations reportedly broke down over British insistence on a right of judicial appeal from the military commissions. G. Jones, *Blunkett calls for ‘fair deal,’* THE DAILY TELEGRAPH (London), Mar. 8, 2004, p. 4.

¹⁹⁴ U.S. Dept. of Defense News Release No. 892-03, Nov. 25, 2003, *U.S. and Australia Announce Agreements on Guantanamo Detainees*. Australian prisoners will not face the death penalty; will not have their attorney-client conversations monitored; will not face prosecution evidence that would require closed proceedings from which the accused would be excluded; can have appropriately cleared foreign attorneys as consultants to the defense team with access to case material on a case-by-case basis; will have increased family contacts; and may be able to serve any sentence in an Australian prison. See also U.S. Dept. of Defense, News Release No. 564-04, June 10, 2004, *Guantanamo Detainee Charged*.

¹⁹⁵ The U.S. claimed that its concessions to the Australians were “case specific” and made “[a]fter examining the specific facts and circumstances surrounding each Australian detainee case ...” *Id.* Similarly its concessions to the British were “based on the evidence” and the “circumstances of their cases.” U.S. Dept. of Defense News Release No. 541-03, July 23, 2003, *DOD Statement on British Detainee Meetings*.

¹⁹⁶ *Karakurt v. Austria*, No. 965/2000, Human Rights Committee, Views of 29 April 2002, pars. 8.3-8.4 (finding violation of art. 26 by Austria in differing treatment of Turkish and other European nationals in private employment councils); *Van Oord v. The Netherlands*, No. 658/1995, Human Rights Committee,

The U.S. military commissions, then, discriminate both against and among foreign nationals. Both forms of discrimination violate international human rights and humanitarian law.

6. U.S. Commissions Do Not Prosecute Prisoners of War Before the Same Courts Using the Same Procedures as Would Be Used to Prosecute U.S. Soldiers for Such Crimes.

Prisoners at Guantanamo who were members of the Taliban armed forces (as opposed to members of al Qaeda or civilians) likely qualify as prisoners of war eligible for the protections of the Third Geneva Convention.¹⁹⁷ The Third Convention (art. 102) grants POW's the right to be tried by the "same courts" using the "same procedures" as would be used against members of the armed forces of the detaining power. Yet U.S. soldiers accused of similar offenses are tried by courts-martial, presided over by certified military judges and subject to review by civil courts.¹⁹⁸ Independently of the discrimination against all foreign nationals, trials by military commission violate the GC III rights of those who qualify as POW's.

7. Prolonged Pretrial Detention Without Charge Violates the Rights to Prompt Notice, Appearance Before a Judge, Judicial Recourse, Judicial Investigation and Trial, and to Limited Pretrial Detention of Prisoners of War.

Prisoners were held at Guantanamo for over two years before the first criminal charges were filed in two cases in February 2004.¹⁹⁹ As of mid-June 2004, prisoners have been held for over two and a half years since their initial capture, without any trials having begun. The first trial is now reportedly expected to begin in August 2004.²⁰⁰ This prolonged detention without notice of charge, appearance before a judge, judicial recourse or trial violates international human rights and humanitarian law.

The Covenant requires promptness at all procedural stages leading to criminal convictions. Persons arrested must be informed "promptly" of any charges (arts. 9.2 and 14.3(a)). They must be brought "promptly" before a judge or judicial officer (art. 9.3).

Views of 14 August 1997, pars. 8.4-8.6 (reviewing under Covenant art. 26, but not finding discrimination, in preferential treatment of foreign nationals of certain countries in regard to social security and taxes).

¹⁹⁷ *Jiri Toman, The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions*, 32 *ISRAEL YEARBOOK OF HUMAN RIGHTS* 271, 280-87 (2003).

¹⁹⁸ See notes 172 and 173 above.

¹⁹⁹ On February 24, 2004, two Guantanamo detainees were charged with being members of a joint criminal enterprise and conspiracy to commit various war crimes and terrorism. U.S. Dept. of Defense News Release No. 122-04, Feb. 24, 2004. An earlier action was taken with regard to another detainee who, although not yet charged, was assigned a military defense counsel on December 3, 2003, U.S. Dept. of Defense News Release No. 912-03, Dec. 3, 2003 -- three weeks after the U.S. Supreme Court agreed to review whether U.S. courts have jurisdiction to hear his claims that he is being unlawfully detained. *Rasul v. Bush*, 124 S.Ct. 534 (2003).

²⁰⁰ N. Lewis, *Australian May Face U.S. Tribunal*, *NEW YORK TIMES*, June 2, 2004, p. A16.

Everyone deprived of liberty – not only those arrested on criminal charges -- is entitled to bring proceedings before a court, so that the court may decide “without delay” on the lawfulness of the detention (art. 9.4). Everyone charged with crimes is entitled to trial “within a reasonable time” (art. 9.3) and “without undue delay” (art. 14.3(c)).

The Geneva Conventions also require prompt processing. In the case of prisoners of war, judicial investigations must be conducted “as rapidly as circumstances permit” and the trial “as soon as possible.” Pretrial confinement of POW’s cannot lawfully exceed three months.²⁰¹ Likewise civilians and protected persons must be “promptly informed” of the charges and brought to trial “as rapidly as possible.”²⁰² Similarly the “fundamental guarantees” of Protocol I require that the accused be “informed without delay” of the particulars of charges,²⁰³ and incorporate the other Covenant temporal guarantees set forth above.

The Human Rights Committee interprets these temporal guarantees strictly:

Charges: The right to be informed “promptly” of the charges arises during an investigation as soon as a court or prosecutor “decides to take procedural steps against a person suspected of a crime or publicly names him as such.”²⁰⁴ The Committee has found violations of article 9.2 where the accused was not informed at the time of arrest,²⁰⁵ or when the accused was held for ten days before being informed.²⁰⁶

In contrast, defendants before U.S. military commission are not entitled to be notified of the charges “promptly,” but only “sufficiently in advance of trial to prepare a defense.”²⁰⁷ As noted above, only three Guantanamo prisoners have been notified of charges. The first two were not notified until February 2004, and charges against the third were not brought until June 2004.

Judge: Delays in bringing an arrested person before a judge or judicial officer “must not exceed a few days.”²⁰⁸ The Committee has found violations of article 9.3 in cases of delays as short as four or five days.²⁰⁹ No Guantanamo detainee has yet been brought before a judge or judicial officer.

Judicial Proceedings: The Committee has found violations of article 9.4 in cases where the accused was prevented for a period of as little as one week from bringing

²⁰¹ GC III art. 103.

²⁰² GC IV art. 71.

²⁰³ Protocol I art. 75.4(a).

²⁰⁴ GC 13, par. 8.

²⁰⁵ *Drescher Caldas v. Uruguay*, Comm. No. 43/1979, Views of 21 July 1983, par. 14; *Bithashwiwa v. Zaire*, Comm. No. 241/1987, Views of 29 Nov. 1989, par. 13 (b).

²⁰⁶ *Fillastre and Bizouarn v. Bolivia*, Comm. No. 336/1988, Views of 6 Nov. 1991, par. 6.4.

²⁰⁷ MCO No. 1, section 5 (A); see also section 6(A)(3). This complies with the right of a prisoner of war to be notified of the particulars of charges “in good time before the opening of the trial.” GC III art. 105. That right, however, is in addition to the separate right to be notified of charges “promptly.” Both rights must be respected.

²⁰⁸ General Comment 8 (“GC 8”), *Right to Liberty and Security of Persons*, 30 June 1982, par. 2.

²⁰⁹ *Freemantle v. Jamaica*, Comm. No. 625/1995, Views of 28 April 2000, pars. 7.4 and 7.5; *Terán Jijón v. Ecuador*, Comm. No. 277/1988, Views of 8 April 1992, par. 5.3.

judicial proceedings to challenge his detention.²¹⁰ No Guantanamo detainee has yet been permitted to bring such proceedings. On the contrary, some U.S. courts have ruled that they lack jurisdiction over such claims, although the matter is currently under review by the U.S. Supreme Court.²¹¹

Pretrial Detention: In addition to the GC III rule (art. 103) that pretrial detention of POW's not exceed three months, the Covenant rule for other prisoners is that any pretrial detention must be "as short as possible."²¹² Prisoners at Guantanamo have been detained for up to two and a half years.

Trial: The article 14.3 (c) requirement of trial "without undue delay" applies to "all stages" of proceedings, both in first instance and on appeal.²¹³ Since no trials have yet begun at Guantanamo and no appeals are permitted, at this stage one can consider only the delay in the first phase, namely the delay in initiating trial proceedings. Some two and a half years after the initial detentions, no trials have begun at Guantanamo.

In short, the procedural delays at Guantanamo do not come close to meeting the standards for prompt procedures set by the jurisprudence of the Committee.

This conclusion is not disturbed by the U.S. argument that initially it held prisoners only for purposes of protection (denying their services to the enemy) and intelligence interrogations, and not for purposes of criminal investigation.²¹⁴ The U.S. may argue, therefore, that the time clock for purposes of criminal procedures did not begin to run until the point in time when criminal prosecution became a purpose of detention.

Any such argument would be both unfounded in fact and unsound in law. High level U.S. documents reveal that potential criminal prosecution was, from at least January 2002, one purpose of detention at Guantanamo.²¹⁵ And in cases where prisoners were originally detained for security or intelligence purposes, outside the criminal justice

²¹⁰ *Torres v. Finland*, Comm. No. 291/1988, Views of 5 April 1990, par. 5.3.

²¹¹ *Al Odah v. U.S.*, 321 F.3d 1134 (D.C.Cir), *cert granted sub nom. Rasul v. Bush*, 124 S.Ct. 534 (2003).

²¹² GC 8, par. 3.

²¹³ GC 13, par. 10.

²¹⁴ See Brief for the Respondents in *Rasul et al. v. Bush et al.*, U.S. Supreme Court Nos. 03-334 and 03-343, March 4, 2004, pp. 5, 53-54 (accessible at www.jenner.com/gitmo, visited June 1, 2004).

²¹⁵ On January 26, 2002, Secretary of State Colin Powell sent a memorandum to the Counsel to the President on the applicability of the Geneva Convention to the conflict in Afghanistan. (Accessible at http://watchingjustice.org/pub/doc_250/powell_memo.pdf, visited May 24, 2004) Option 1 was that the Geneva Convention on Prisoners of War did "not apply" to the conflict; option 2 was that it did apply, but that al Qaeda as a group and Taliban individually or as a group were not entitled to POW status. Either option, wrote Powell, would "provide flexibility to provide conditions of detention and trial ... " However, Option 1 – which was not chosen by the President -- had the disadvantage that, "It undermines the President's Military Order by removing an important legal basis for trying the detainees before Military Commissions." In contrast, Option 2 – which was selected – "provides the strongest legal foundation for what we actually intend to do."

system, the Human Rights Committee has repeatedly found violations of criminal procedure temporal guarantees, noting the entire period of detention.²¹⁶

The rule could not be otherwise. If governments were permitted to delay “starting the clock” until a point in time within their discretion, they could easily evade all requirements of prompt notice and trial.

However, even if the procedural clock did not start at the initial detention, the Guantanamo cases would still be unduly delayed. On July 3, 2003 the President formally designated the first six prisoners as eligible for trial by military commission²¹⁷ – an essential prerequisite for their trial.²¹⁸ This was the very latest point in time at which it can be said that the government decided “to take procedural steps against a person suspected of a crime ...,” thereby starting the procedural clock for notice of charges.²¹⁹ Yet no charges were brought until February 24, 2004 – more than six and a half months later – and even then only against two prisoners. A third prisoner was charged in June 2004, more than eleven months after the original designations. As of mid-June 2004, the other three designated prisoners have yet to be charged, no trials have begun, and none are expected before August 2004.

Even taking into account the difficulty of prosecuting cases against alleged members of a secretive and clandestine international terrorist organization, the delays since July 2003 far exceed the time periods in the Covenant and Geneva Conventions. Especially when measured in the context of the prior year and a half of detention and interrogation, delays of more than six months (and in one case eleven months) prior to notice of charges and at least eleven months prior to any judicial appearance or judicial

²¹⁶ E.g., *Lopez Burgos v. Uruguay*, Comm. No. 52/1979, Views of 29 July 1981, pars. 2.2, 2.4, 13 (violation of art. 9.3 right to trial within a reasonable time where victim detained for two weeks in Argentina by Uruguayan “security and intelligence forces,” then held in Uruguay “incommunicado by the special security forces at a secret prison for three months,” before being held “at the disposition of military justice” for several months, and eventually tried by military court); *Pietraroia v. Uruguay*, Comm.No. 44/1979, Views of 9 April 1981, pars. 2.1, 2.2, 13.2, 17 (violation of art. 9.3 rights to be brought promptly before a judge or judicial officer and to trial within a reasonable time where victim held six months in “administrative detention” before being charged by a military court); and *Campora Schweizer v. Uruguay*, Comm.No. 66/1980, Views of 12 Oct. 1982, pars. 2.3, 3.5, 7, 18.1, 19 (violation of rights under art. 9.3 to be brought promptly before a judge and under art. 14.3 (c) to trial without undue delay, where victim “kept imprisoned without charges at the disposal of the Executive authorities under the ‘prompt security measures’” with “no legal remedies available,” before eventual military trial). To similar effect see *Celiberti v. Uruguay*, Comm.No. 56/1979, Views of 29 July 1981, pars. 2.2, 9, 11 (violation of art. 14.3(c) right to be tried without undue delay); *Sala de Touren v. Uruguay*, Comm. No. 32/1978, Views of 31 March 1981, pars. 2.1, 2.2, 8, 12 (violation of art. 9.3 right to be brought promptly before judge or judicial officer); *Soriana de Bouton v. Uruguay*, Comm.No. 37/1978, Views of 27 March 1981, pars. 2.1, 7, 10, 13 (same); *Vasilskis v. Uruguay*, Comm.No. 80/1980, Views of 31 March 1983, pars. 2.1, 2.2, 10.4, 11 (violation of art. 14.3(c) right to trial without undue delay); *Weinberger v. Uruguay*, Comm.No. 28/1978, Views of 29 Oct. 1980, pars. 2, 12, 16 (violation of art. 9.3 rights to be brought promptly before judge or judicial officer and to be tried within reasonable time); and *Conteris v. Uruguay*, Comm.No. 139/1983, Views of 17 July 1985, pars. 1.3, 1.4, 1.5, 7.3, 9.2, 10 (same).

²¹⁷ J. Mintz, *6 Could Be Facing Military Tribunals, U.S. Says Detainees Tied to Al Qaeda*, WASHINGTON POST, July 4, 2003, p. A1.

²¹⁸ President’s Military Order, section 2(a)(1).

²¹⁹ GC 13, par. 8.

recourse, while the prisoners remain in pretrial detention, violate both international human rights and humanitarian law.

Thus, regardless of whether one starts the procedural clock at the time of capture in late 2001, or of transfer to Guantanamo in early 2002, or of the first designations of eligibility for trial by military commission in mid-2003, the procedural delays violate international norms. If it is determined in individual cases that the violations were repeated and egregious, the appropriate remedy would be dismissal of all charges.²²⁰

8. In the Circumstances of Guantanamo, Prolonged Pretrial Detention Without Charge Violates the Right Not to Be Subjected to Cruel, Inhuman or Degrading Treatment.

As the ICRC has noted, many prisoners at Guantanamo have now been held more than two years in “seemingly indefinite detention beyond the reach of the law. ... [T]he ICRC believes that knowledge of their fate could play a large part in addressing mental and emotional health problems among the detainees...”²²¹ These health problems are serious: by October 2003 some 21 prisoners had made 32 suicide attempts at Guantanamo, and a large number were being treated for clinical depression.²²²

Prisoners in prolonged detention at Guantanamo suffer psychological anxiety due to the uncertainty of their potential legal futures. Their fates may range from indefinite detention without trial (until the end of the “war on terrorism”), to trial before a military commission which may impose the death penalty.

The reported physical conditions of detention add to the psychological stress. The majority of prisoners are held in solitary confinement (which, if prolonged, may by itself amount to cruel, inhuman or degrading treatment).²²³ They are restricted to small cells seven days per week, 24 hours per day, except for interrogations and for three 30-minute exercise periods each week on a small concrete slab. Lights are kept on 24 hours per day. They are shackled while outside their cells.²²⁴

Depending on the mental state of an individual prisoner, these conditions alone can engender sufficient stress and anxiety to amount to cruel, inhuman or degrading treatment.²²⁵

²²⁰ International Criminal Tribunal for Rwanda, Appeals Chamber, *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision of 31 March 2000, par. 71.

²²¹ ICRC, note 23 above.

²²² N. Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, NEW YORK TIMES, Oct. 10, 2003, p. A1.

²²³ Human Rights Committee, General Comment 20, *Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment*, 10 March 1992, par. 6 (“... prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7.”)

²²⁴ C. Savage, *Inside Guantanamo*, MIAMI HERALD, Aug. 24, 2003, p. L1.

²²⁵ See *Soering v. U.K.*, Eur.Ct.H.Rts., App. No. 00014030/88, Judgment of 7 July 1989, pars. 100-09, 111. The U.S. accepts treaty prohibitions of cruel, inhuman or degrading treatment or punishment “only insofar” as such treatment or punishment is banned by U.S. constitutional provisions against “cruel, unusual and

In addition, there have been numerous allegations of physical and psychological mistreatment of prisoners (even though access to Guantanamo is tightly restricted and details of ICRC reports remain confidential). One former British prisoner, for example, “accused his American captors of subjecting him and other inmates to a catalog of brutality: beatings, forced injections, sleep deprivation and shackling in painful positions. ... [He] said he witnessed dozens of beatings inflicted by a team of guards ... Inmates suffered broken arms and legs, and bloodied and swollen faces, [He] said inmates told him about interrogations during which women in civilian clothes subjected them to sexual humiliation ...”²²⁶

If these allegations are true (the Pentagon denies them²²⁷) such treatment violates not only human rights law but also customary international humanitarian law norms embodied in Common Article 3, requiring that prisoners be treated humanely and prohibiting cruel treatment and outrages upon personal dignity, and in particular, humiliating and degrading treatment.²²⁸ It also violates comparable norms relating to POW’s under GC III, protected persons under GC IV, and all other persons under the “fundamental guarantees” of Protocol I.²²⁹

9. Coercive Conditions at Guantanamo Violate the Right Not to Be Compelled to Testify Against Oneself or to Confess Guilt.

Where prisoners make statements to interrogators under the coercive conditions at Guantanamo, three kinds of violations of international human rights and humanitarian law may result.

First is a violation of the U.S. obligation not to admit statements made under torture as evidence. Military commissions are not only authorized, but required to admit statements made by prisoners at Guantanamo -- even statements made under torture. The U.S. military orders provide that evidence “shall” be admitted if the presiding officer or a

inhumane” treatment or punishment. (U.S. reservations to the Convention Against Torture, Cong.Rec. S17486-01, daily ed., Oct. 27, 1990, Reservation I(1)); U.S. reservations to the Covenant, 138 Cong.Rec. S4781-01, daily ed., April 2, 1999, Reservation I(3).) To the extent, if any, these reservations afford less protection than the treaty norms, they are invalid. A State “may not reserve the right ... to subject persons to cruel, inhuman or degrading treatment or punishment ...,” because the ban is established not only by treaty but also by customary international law. Human Rights Committee, General Comment No. 24 , *Issues Relating to Reservations*, 4 Nov. 1994, CCPR/C/21/Rev.1/Add.6 (“GC 24”), par. 8. Moreover, the U.S. made no reservations to the equally stringent norms of the Geneva Conventions. See notes 228 and 229 below.

²²⁶ S. Rotella, *Ex-Inmate Alleges U.S. Abuse at Guantanamo; A Briton Held for Two Years says Prisoners Were Brutally Beaten and Sexually Humiliated*, LOS ANGELES TIMES, May 25, 2004, p. A1.

²²⁷ *Id.*

²²⁸ Arts 3.a (1), 3.a (1)(a) and 3.a (1)(c).

²²⁹ POW’s must be treated humanely at all times (GC III art. 13), with respect for their persons and honor (art. 14), and without torture or inhuman treatment, which is a grave breach (art. 130). Civilians and protected persons must be treated with humanity (GC IV arts. 5 and 27), and protected against all violence and threats (art. 27), as well as against torture, corporal punishment, measures of brutality, intimidation and terrorism (arts. 32 and 33). Torture and inhuman treatment are grave breaches of GC IV. Art. 147. All other persons must be treated humanely in all circumstances (Protocol I art. 75.1), and protected against outrages upon personal dignity, in particular, humiliating and degrading treatment (art. 75.2(b)), and threats thereof (art. 75.2(e)).

majority of the commission considers that it “would have probative value to a reasonable person.”²³⁰ Thus, if a statement made under torture nonetheless has some “probative value,” it “shall” be admitted as evidence.

This violates U.S. obligations under the Convention Against Torture. Article 15 of the Convention requires each State Party “to 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, ...”²³¹

Second, even in the absence of torture, where statements were made in coercive conditions such as those pervasive at Guantanamo, their admission in evidence violates the right under international human rights and humanitarian law “[n]ot to be compelled to testify against [one]self or to confess guilt.”²³² The Human Rights Committee advises that where statements result from cruel, inhuman or degrading treatment, or where prisoners are not treated humanely and with respect for their dignity, “The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.”²³³

Yet U.S. military commission procedures provide that the right of the accused not to testify at trial “shall not preclude admission of evidence of prior statements ... of the Accused.”²³⁴ Thus, prior statements made during imprisonment in the coercive conditions at Guantanamo, and before the accused had assistance of counsel,²³⁵ “shall” be admitted into evidence, whenever the commission believes they have probative value.

Third, conditions at Guantanamo may coerce prisoners into plea bargain agreements, by which they plead guilty in return for a specified term of imprisonment.²³⁶ The pressure to enter into such agreements is made especially strong by the U.S. claim that even if a prisoner wins his case before a military commission, and is found not guilty on all charges, the military can continue to imprison him as an “unlawful enemy combatant” until the end of the “war” on terrorism.²³⁷ An agreement to plead guilty may thus be the only way a prisoner can be assured of release from Guantanamo by a definite date.

²³⁰ MCO No. 1 par. 6(D)(1).

²³¹ Art. 15 allows only one exception: statements made under torture may be used “against a person accused of torture as evidence that the statement was made.”

²³² Covenant art. 14.3(g). Humanitarian law similarly provides: “No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.” GC III, art. 99. For all other persons the “fundamental guarantees” of Protocol I provide, “No one shall be compelled to testify against himself or to confess guilt.” Art. 75.4(f).

²³³ GC 13 par. 14.

²³⁴ MCO No. 1 par. 5.F.

²³⁵ At Guantanamo the accused has no right to counsel until “sufficiently in advance of trial to prepare a defense.” *Id.* par. 5.D.

²³⁶ Prospective plea bargains at Guantanamo have been reported in the press. E.g., J. Mintz, *Deals Reported Afoot for Detainees; But Lawyers Question Pacts for Clients Without Access to Counsel*, WASHINGTON POST, Dec. 6, 2003, p. A6; M. Dunn, *Hicks considers pleading guilty*, HERALD SUN (Melbourne, Australia), 27 May 2004.

²³⁷ See note 25 above.

Yet whether such a plea of guilty was effectively coerced is not subject to judicial review, or even to meaningful review by the military commission. Rather, once a plea bargain is approved by the Appointing Authority, the commission has no choice but to accept it.²³⁸

10. Restrictions on Legal Assistance Violate the Rights to Counsel and to Counsel of Choice.

U.S. military commission procedures authorize assignment of military defense counsel to the accused only “sufficiently in advance of trial to prepare a defense.”²³⁹ As a result, the accused may be – and they in fact have been -- imprisoned for years with no legal assistance. The first defense counsel did not meet with any prisoner at Guantanamo until December 2003;²⁴⁰ the vast majority of prisoners have still not been permitted to meet with counsel. Meanwhile, throughout all these years of detention, the government interrogates the prisoners. Military commissions are then authorized to admit into evidence the statements taken from prisoners, without advice of counsel, during these interrogations.²⁴¹

This prolonged denial of access to counsel, while taking statements that may be used in evidence, violates the right to counsel.²⁴²

Even once counsel are finally made available, commission procedures continue to violate the right to counsel. Covenant article 14 guarantees not only the right to counsel, but specifically the right to counsel of one’s own choice. This encompasses both the right of an accused “to communicate with counsel of his own choosing” and the right “to defend himself . . . through legal assistance of his own choosing.”²⁴³ Detainees who are prisoners of war are also expressly guaranteed the right “to defence by a qualified advocate or counsel of his own choice.”²⁴⁴

This fundamental right to choose one’s own counsel is violated by U.S. military commission procedures. Instead of allowing free choice of counsel, they require an accused to accept as counsel a military officer who is a judge advocate of the United

²³⁸ MCO No. 1, section 6(A)(4). The plea agreement must include a written stipulation by the accused that confirms the “voluntary and informed” nature of his plea of guilty. *Id.* However, the same coercion that induces him to plead guilty could equally induce him to sign this stipulation.

²³⁹ MCO No. 1 section 5(D).

²⁴⁰ See note 30 above.

²⁴¹ MCO No. 1 sections 5(F) and 6(D)(1).

²⁴² The Human Rights Committee has found violations of the right to counsel where access was denied for as few as five days after a person was taken into custody. *Kelly v. Jamaica*, Comm. No. 537/1993, Views of 29 July 1996, par. 9.2. In *Imbrioscia v. Austria*, App. No. 00013972/88, Judgment of 24 Nov. 1993, Eur.Ct.H.Rts., par. 33, the accused contended that “in order to be effective, the right to defend oneself must cover not only the trial, but also the preceding interrogations . . .” The government argued that there was no right to counsel during interrogations. *Id.* par. 34. But the Court disagreed, explaining that denial of counsel during interrogation “may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply” with the right to counsel. *Id.* par. 36.

²⁴³ Arts. 14.3 (b) and (d).

²⁴⁴ GC III, art. 105.

States Armed Forces.²⁴⁵ While an accused may ask that the assigned military lawyer be replaced by another military lawyer, the accused has no right to the appointment at government expense of a civilian lawyer.²⁴⁶

In the event that an accused retains civilian counsel at his own expense, the military lawyer nonetheless remains a member of the defense team, regardless of the wishes of the accused.²⁴⁷ Forcing the accused to accept a lawyer who is a member of the detaining military force violates the right to defense counsel of one's own choosing.²⁴⁸

Additional restrictions negate even this limited access to representation by a civilian lawyer. An accused may not choose a lawyer who is a citizen of his or her home country; any civilian counsel must be a U.S. citizen.²⁴⁹ This may impair the effectiveness of the defense.²⁵⁰ Moreover, only those civilian lawyers who can receive a security clearance from the U.S. military are allowed to represent an accused.²⁵¹ In addition, the exclusion of civilian defense counsel from secret hearings (part 13 below) and denial of access of civilian (and in some cases military) defense counsel to secret documents (part 14 below) further violate the right to effective assistance of counsel.

11. Monitoring Attorney-Client Communications Violates the Right to Be Interviewed by Counsel in Private.

U.S. military commission procedures expressly authorize the military to engage in "monitoring of communications"²⁵² between the accused and defense counsel (both military and civilian) "for security or intelligence purposes."²⁵³ Monitoring may be

²⁴⁵ MCO No. 1, pars. 4(C)(3) and (4).

²⁴⁶ *Id.* at par. 4(C)(3).

²⁴⁷ *Id.* at par. 4(C)(4); MCI 5, Annex B, par. II.D.

²⁴⁸ See *Lopez Burgos v. Uruguay*, Human Rights Committee, Comm. No. 52/1979, Views of 29 July 1981, pars. 7.4, 8.1 and 11.5, 13 (violation of art. 14(3)(d) where person accused of subversive activities was denied access to a civilian lawyer and required instead to choose an attorney from a government list of military lawyers).

²⁴⁹ MCO No. 1, par. 4(C)(3)(b). A partial exception to this rule has been carved out for the exclusive benefit of detainees who are citizens of Great Britain or Australia. See part E.5 (b) above.

²⁵⁰ An accused may for many reasons be most comfortable with counsel from his or her home country, who can communicate with the accused without recourse to an interpreter, and who the accused may trust and confide in more than he would an attorney from the detaining power. A prisoner of war, for example, is guaranteed "assistance by one of his prisoner comrades," in addition to representation by "a qualified advocate or counsel of his own choice . . ." GCIII Art. 105.

²⁵¹ MCO No. 1, par. 4(C)(3)(b).

²⁵² "Communications" is broadly construed to include communications by "oral, electronic, written, or any other means." MCO No. 3, par. 3.

²⁵³ MCO No. 3, par. 3. Although par. 4(F) provides that information obtained from monitoring will not be used against the accused or shared with persons responsible for the prosecution, these limitations do not remedy the breach of confidentiality. Neither the accused nor his counsel are likely to speak with the candor essential to an effective defense if they know their communications are being monitored by the military, for whatever purpose.

conducted whenever a designated military officer determines, for example, that it is “likely to produce information for security or intelligence purposes.”²⁵⁴

This violates the right of all accused to communicate with defense counsel in confidence, which is intrinsic to the Covenant rights to “communicate with counsel”²⁵⁵ and to “legal assistance.”²⁵⁶ Prisoners of war are also expressly entitled to be interviewed by their defense counsel or advocate “in private.”²⁵⁷

The right of confidential attorney-client communications in criminal cases, widely recognized by international law,²⁵⁸ must be respected even in cases of accused who are “extraordinarily dangerous” and whose “methods had features in common with terrorists.”²⁵⁹ As the European Court has explained, “If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.”²⁶⁰

²⁵⁴ *Id.* par. 4 (A).

²⁵⁵ Article 14.3 (b) of the Covenant guarantees the right of the accused to “communicate with counsel.” The Human Rights Committee comments that this “requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications.” GC13, par. 9.

Even in States which, unlike the U.S., are not Parties to the Covenant, widely endorsed UN guidelines have repeatedly required confidentiality of attorney-client communications. *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First UN Cong. on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955, and approved by Economic and Social Council resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, par. 93: (“Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.”); *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, U.N. G.A. Res. 43/173 of 9 Dec. 1988, Principle 18.4 (“Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.”); *Basic Principles on the Role of Lawyers*, adopted by the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 Sept. 1990, Principle 22 (“Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.”)

²⁵⁶ Art. 14.3 (d) guarantees the right to “legal assistance.” Interpreting the identical right in the European Convention, the European Court of Human Rights concluded “that an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) ... of the [European] Convention.” *S. v. Switzerland*, App. Nos. 00012629/87 and 00013965/88, Judgment of 28 Nov. 1991, par. 48.

²⁵⁷ Counsel for a POW may “freely visit the accused and interview him in private.” GC III Art. 105.

²⁵⁸ *E.g.*, American Convention on Human Rights, O.A.S. Treaty Series No. 36, entered into force, July 18, 1978, art. 8.2 (d) (right of accused “to communicate freely and privately with his counsel . . .”); Council of Europe Standard Minimum Rules for the Treatment of Prisoners, art. 93 (“Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.”); and European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights, ETS No. 161, entered into force, Jan. 1, 1999, art. 3(2) (c) (Detainees “shall have the right to correspond, and consult out of hearing of other persons, with a lawyer . . .”).

²⁵⁹ *S. v. Switzerland*, note 256 above, pars. 9 and 47.

²⁶⁰ *Id.* par. 48.

This rationale applies equally to the Covenant, which requires States Parties to ensure “effective protection of Covenant rights.”²⁶¹ Likewise privacy of communications between an accused prisoner of war and his defense counsel or advocate is an “essential prerogative.”²⁶² The U.S. military commission procedures violate this basic right of all accused.

12. U.S. Military Commission Procedures Violate the Right of an Accused to Defend Himself in Person.

The Covenant guarantees the right of an accused “to defend himself in person” rather than through counsel.²⁶³ This right has been judicially enforced in cases of serious international crimes.²⁶⁴

U.S. military commission procedures violate this right in two respects. First, they mandate that an accused be “represented at all relevant times” by military defense counsel,²⁶⁵ “notwithstanding any intention expressed by the Accused to represent himself.”²⁶⁶ The accused is thus not permitted to defend himself without the assistance of an unwanted military lawyer.

Second, as discussed below, commission procedures permit only military defense counsel, and not the accused, to participate in secret proceedings and to have access to secret documents.²⁶⁷ Thus, even if the accused were somehow unburdened of his mandatory military counsel, he would still be precluded from effectively defending himself in person. His article 14 rights are thereby violated.

13. Exclusions from Secret Hearings Violate the Rights of the Accused to be Tried in His Presence and to Assistance of Counsel.

Prisoners tried by military commission may be excluded from portions of their trials. While generally the accused “may” be present at every stage of the trial, his presence must be “consistent with Section 6(B)(3).”²⁶⁸ That section authorizes the commission’s presiding officer -- or the Appointing Authority -- to close proceedings. Closure may be for such purposes as protecting classified information or intelligence sources, methods or activities, or “other national security interests.” And it “may include a decision to exclude the Accused, [and] Civilian Defense Counsel...”

²⁶¹ GC 31, par. 6.

²⁶² ICRC Commentary to GC III, art. 105, par. 3 (b).

²⁶³ Art. 14.3 (d). As the Human Rights Committee notes, the right to a defense lawyer applies “[w]hen the accused does not want to defend himself in person ...” GC 13, par. 9.

²⁶⁴ *E.g.*, International Criminal Tribunal for Yugoslavia, *Prosecutor v. Milosevic*, Case No. IT-02-54, Status Conference, 30 August 2001, Case No. IT-99-37-PT, T. 6-7; *see further* Order Inviting Designation of *Amicus Curiae*, 30 August 2001; and Order concerning *Amici Curiae*, 11 January 2002.

²⁶⁵ MCI No. 4, section 3.B (11).

²⁶⁶ *Id.*, section 3 (D)(2).

²⁶⁷ See parts E.13 and 14 below.

²⁶⁸ MCO No. 1 par. 5.K.

This violates the right of an accused under international human rights and humanitarian law “[t]o be tried in his presence, ...”²⁶⁹ The ICRC Commentary explains that “the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts, to ask questions himself and to make his objections or propose corrections.”²⁷⁰

By allowing prosecutors to present and argue secret evidence in the absence of the accused and civilian defense counsel, U.S. military commission procedures breach not only this “important” element of the right to be tried in one’s presence, but also the right to assistance of counsel. Even though military defense counsel may be present at all sessions of the trial, this fails to cure the violation, because military defense counsel “may not disclose any information presented during a closed session to individuals [such as the accused and civilian defense counsel] excluded from such proceeding.”²⁷¹

14. Denials of Secret Documents Violate the Right to Adequate Facilities for the Defense.

The presiding officer may also deny documents or portions thereof to the defense if they contain broadly defined “protected information.”²⁷² The officer may substitute instead a portion or a summary, or a statement of the relevant facts the withheld documents would prove.²⁷³ But this does not cure the problem, for three reasons.

First, there is no requirement to make any substitution; even though protected information is admitted into evidence, it may simply be withheld from the accused and defense counsel.²⁷⁴ Second, neither the accused nor his counsel has any way to know whether the substitute, if any, fairly and adequately compensates for their denial of access to the original. Since that original is known to the prosecution, the result is a denial of “equality of arms.”²⁷⁵

And third, if the prosecution chooses not to offer protected information into evidence, it may be withheld from the accused and defense counsel, both civilian and

²⁶⁹ Covenant art. 14.3 (d). Accord, Protocol I art. 75.4 (e): “Anyone charged with an offense shall have the right to be tried in his presence.” This includes, at minimum, all hearings in which the prosecutor participates. *E.g.*, Eur.Ct.H.Rts., *Belziuk v. Poland*, App. No. 00023103/93, Judgment of 25 March 1998, par. 39.

²⁷⁰ ICRC Commentary to Protocol I art. 75, par. 3110.

²⁷¹ MCO No. 1 par. 6(B)(3).

²⁷² This includes information which is “classified or classifiable”; or which is protected from disclosure by “law or rule”; or whose disclosure “may” endanger witnesses or participants in commission trials; or which concerns “intelligence and law enforcement sources, methods, or activities”; or which concerns “other national security interests. *Id.* section 6(D)(5)(a). See also *id.* section 9 (no unauthorized disclosure of “state secrets”).

²⁷³ *Id.* section 6(D)(5)(b).

²⁷⁴ The presiding officer is authorized to direct the deletion of protected information “or” a substitution. *Id.*

²⁷⁵ *E.g.*, Human Rights Committee views in *Aarela and Nakkalajarvi v. Finland*, Comm. No. 779/1997, Views of 7 Nov. 2001, par. 7.4; *Jansen-Gielen v. Netherlands*, Comm. No. 846/1999, Views of 14 May 2001, par. 8.2; *Robinson v. Jamaica*, Comm.No. 223/1987, Views of 4 April 1989, par. 10.4; *Fei v. Colombia*, Comm. No. 514/1992, Views of 26 April 1995, par. 8.4.

military.²⁷⁶ This is especially troubling in regard to information that may tend to exculpate the accused. Generally the prosecution must turn over such exculpatory information to the defense.²⁷⁷ However, if the exculpatory information is “protected,” the prosecution is not permitted to disclose it. The defense thus may never learn of the existence of critical exculpatory information.

For all three reasons, denial of “protected” information to the defense violates the right of the accused under both international human rights and humanitarian law to “adequate ... facilities for the preparation of his defense.”²⁷⁸

15. Denial of Judicial Appeal Violates the Right to Review By a Higher Tribunal.

No judicial appeal is permitted from the decisions of military commissions.²⁷⁹ Commission decisions are subject to review by a “review panel.”²⁸⁰ If that panel finds a material error of law requiring dismissal of the charges, the Appointing Authority must dismiss the charges.²⁸¹

The review panel members must be, and those initially named appear to be, “well qualified by virtue of their experience, impartiality, and judicial temperament.”²⁸² However, they are designated by the Secretary of Defense, and must be either military officers or (like the initial members) civilians temporarily commissioned as military officers.²⁸³ Both their manner of designation and their military identity thus contrast unfavorably with those of the judges of the Court of Appeals for the Armed Forces, who review judgments of courts-martial. Unlike members of the review panels for military commissions, those judges must be nominated by the President and confirmed by the Senate, and are civilians.²⁸⁴

In addition, judges of the Court of Appeals for the Armed Forces may be removed only by the President, upon notice and hearing, and only for neglect of duty, misconduct or disability.²⁸⁵ In contrast, review panel members may be removed by the Secretary of

²⁷⁶ MCO No. 1 section 6(D)(5)(b).

²⁷⁷ *Id.* section 5.E.

²⁷⁸ Covenant art. 14.3(b). The Human Rights Committee explains that the “facilities must include access to documents and other evidence which the accused requires to prepare his case, ...” GC 13, par. 9. See also GC III art. 105 (right to “necessary facilities to prepare the defence”); GC IV art. 72 (right to “the necessary facilities for preparing the defence”); and Protocol I art. 75.4(a) (right to “all necessary rights and means of defence”).

²⁷⁹ President’s Military Order, section 7(b)(2).

²⁸⁰ MCO No. 1 section 6(H)(4).

²⁸¹ MCI 9, section 4 (C)(1)(a)(1).

²⁸² *Id.* section 4(B)(1)(a). The first four members named are prominent civilians temporarily commissioned as Army Major Generals. They include a former U.S. Attorney General, a distinguished lawyer and former Secretary of Transportation, the chief judge of the Rhode Island Supreme Court, and a trial judge and former Attorney General of Pennsylvania. U.S. Dept. of Defense News Release No. 990-03, Dec. 30, 2003.

²⁸³ MCO No. 1 section 6(H)(4).

²⁸⁴ See note 173 above.

²⁸⁵ 10 U.S.C. 942 (c) (2004).

Defense, without notice or hearing, for “military exigency.”²⁸⁶ The review panel thus lacks the structural independence essential to judicial review.²⁸⁷

The lack of judicial appeal violates the right of “everyone” convicted of a crime to have his conviction and sentence “reviewed by a higher tribunal according to law.”²⁸⁸ In the case of prisoners of war, it also violates their right of appeal “in the same manner as members of the armed forces of the Detaining Power.”²⁸⁹

16. Denial of Judicial Recourse Violates the Rights to Judicial Review of the Lawfulness of Detention and to an Effective Remedy.

An accused tried by military commission “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”²⁹⁰

Because persons tried by military commission are deprived of liberty pending trial, during trial, and after trial (if found guilty, and potentially even if found not guilty), the blanket ban on judicial review violates the Covenant. Article 9.4 provides: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that [the] court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

In addition, because U.S. military commission and review proceedings are not independent and impartial and otherwise violate fundamental fair trial rights, they are not “effective” remedies.²⁹¹ The ban on judicial review thus also violates the U.S. obligations under article 2.3(a) to ensure an “effective remedy” for violations of Covenant rights, and to ensure that the remedy is “accessible.”²⁹²

17. U.S. Military Commission Procedures Fail to Meet Minimum International Standards for Imposition of the Death Penalty.

U.S. military commissions are authorized to impose the death penalty.²⁹³ This violates U.S. obligations under the Covenant. Article 6.2 permits the death penalty only when imposed by a “competent court” in a proceeding “not contrary to the provisions of the present Covenant” – which include fair trial rights under articles 9 and 14.²⁹⁴ U.S.

²⁸⁶ MCI 9, section 4(B)(2) (Secretary may remove a panel member for “good cause,” which includes “military exigency”).

²⁸⁷ See part E.3 above.

²⁸⁸ Covenant art. 14.5.

²⁸⁹ GC III art. 106. U.S. military personnel convicted in courts-martial have the right to appeal to courts. See note 173 above.

²⁹⁰ President’s Military Order, section 7(b)(2).

²⁹¹ See Human Rights Committee, GC 31, par. 15.

²⁹² *Id.*

²⁹³ President’s Military Order, section 4 (A); MCO No. 1, sections 6 (F) and (G); MCI No. 7, section 3 (A).

²⁹⁴ The Human Rights Committee observes that it follows “from the express terms of article 6 that it [the death penalty] can only be imposed ... [in a manner] not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent

military commissions meet neither test: they are not courts and their proceedings are contrary to articles 9 and 14. Since the right to life is non-derogable, “any trial leading to the imposition of the death penalty during a state of emergency must conform to ... the Covenant, including all the requirements of [article] 14 ...”²⁹⁵ Hence U.S. military commissions may not impose the death penalty. Although the U.S. made a reservation to Covenant article 6, its reservation neither does nor could authorize capital punishment in trials conducted in violation of fundamental fair trial norms.²⁹⁶

tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal.” General Comment 6, *The Right to Life*, 30 April 1982, par. 7.

See also *United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty*, adopted by Economic and Social Council resolution 1984/50 of 25 May 1984, par. 5: “Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, ...”

Likewise the Geneva Convention on prisoners of war recognizes that it is “essential to preclude any arbitrary action in such an important matter [the death penalty].” Commentary to GC III art. 100.

²⁹⁵ GC 29, par. 15.

²⁹⁶ The U.S. reserved the right to impose capital punishment, “subject to its Constitutional constraints,” on any person (other than a pregnant woman) “duly convicted under existing or future laws permitting the imposition of capital punishment.” 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992), Reservation I(2). This reservation does not authorize death penalties in trials that fail to meet fundamental fair trial standards, because fair trials in death penalty cases are required by the U.S. Constitution. *E.g., Gregg v. Georgia*, 428 U.S. 153, 188-95 (1976). If the reservation were interpreted otherwise, so as to authorize arbitrary deprivation of life, it would offend a peremptory norm and would not be compatible with the object and purpose of the Covenant, and hence would be invalid. GC 24, par. 8.

18. U.S. Military Commission Procedures as a Whole Deprive an Accused of the Right to a Fair and Regular Trial and Fail to Respect Generally Recognized Principles of Regular Judicial Procedure.

The cumulative impact of the multiple violations of international fair trial norms denies all persons tried by U.S. military commissions their rights to a “fair” hearing,²⁹⁷ to “judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,”²⁹⁸ and to a trial meeting “generally recognized principles of regular judicial procedure.”²⁹⁹

In addition, prisoners of war, civilians and other protected persons are denied their right to a “fair and regular trial.”³⁰⁰ This safeguard “is absolutely general. It applies to all accused persons, even those who are charged with having contravened the Geneva Conventions themselves.”³⁰¹

F. Conclusion

For all the foregoing reasons, trials conducted by U.S. military commissions violate fundamental norms of international human rights and humanitarian law. U.S. military commissions are not established by law, they are not courts, they are not independent and impartial, they are discriminatory, and they violate fundamental fair trial norms in numerous respects. No trial of any person for any crime by such commissions would be lawful.

²⁹⁷ Covenant art. 14.1.

²⁹⁸ Common Article 3(1)(d). The “fundamental guarantees” of Protocol I art. 75 give “valuable indications to help explain the terms of [Common] Article 3 on guarantees.” Commentary to Protocol I art. 75.4, par. 3084.

²⁹⁹ Protocol I art. 75.4.

³⁰⁰ GC III arts. 129, 130; GC IV art. 147.

³⁰¹ ICRC Commentary to GC IV art. 71, par. 1.