MILITARY COMMISSION INSTRUCTIONS
SOURCEBOOK

NATIONAL INSTITUTE OF MILITARY JUSTICE

Washington, D.C.
2003
To the victims of the September 11, 2001 terrorist attacks
and to those killed and wounded in the cause of freedom

Second printing, April 2004

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FOREWORD

On December 7, 2001—the 60th Anniversary of the attack on Pearl Harbor and less than three months after the horror of “9/11”—I spoke to the National League of Cities. I asked whether we can maintain the freedoms that are rooted in our nation’s very soul while ensuring the safety of our citizens. Even as the rescue crews still labored at Ground Zero, I was optimistic that we could. I remain optimistic.

The Administration’s plans to try suspected terrorists by military commissions represented one source of tension between security concerns and what I referred to as “the American way.” When President Bush issued a Military Order dealing with commissions, I raised concerns in my capacity as president of the American Bar Association. Many of those concerns were addressed by the Department of Defense’s later implementing regulations. But just as importantly as raising concerns, I called for dialogue and debate on the use of military commissions and the rules that would govern them. Robust debate is also part of the American way.

This volume—the second by the National Institute of Military Justice addressing the regulations that authorize and govern military commissions—is a key part of that process. NIMJ’s work advances our collective understanding of these controversial tribunals. This volume will certainly help to inform the continued public dialogue concerning the use and fairness of these tribunals.

I suggested to the National League of Cities that “September 11 has forced us to think—about our values and our principles; about the meaning of our democracy; about who we are as a nation. We continue to need that kind of introspection.” I therefore applaud the National Institute of Military Justice and the contributing authors for presenting their further analysis of the rules that will govern the trial of suspected terrorists by military commissions. This work is in keeping with the highest traditions of the bar in a democratic society.

ROBERT E. HIRSHON

Portland, Maine
June 2003
This volume is a companion to the ANNOTATED GUIDE that the National Institute of Military Justice prepared in 2002 in response to two events: President Bush's November 13, 2001 Military Order authorizing military commissions, and Secretary of Defense Donald H. Rumsfeld's March 21, 2002 Military Commission Order No. 1 setting out the basic procedures for trials.

The pace of subsequent developments needed to complete the procedural framework for military commissions has been slow, leading one federal judge to observe, in the course of dismissing a petition for a writ of habeas corpus that was filed on behalf of a Guantánamo Bay detainee, that "[i]t is unclear why it has taken so long for the Executive Branch to implement its stated intention to try these detainees. Putting aside whether these captives have a right to be heard in a federal civilian court—indeed, especially because it appears they have no such right—this lengthy delay is not consistent with some of the most basic values our legal system has long embodied." Gherebi v. Bush, No. CV 03-1267-AHM, 2003 WL 21180433, at *7 (C.D. Cal. May 13, 2003) (Matz, J.), appeal docketed, No. 03-55785 (9th Cir. May 15, 2003).

On February 28, 2003, the Department of Defense released for public comment a draft Military Commission Instruction setting forth the crimes and elements to be prosecuted in cases before military commissions. NIMJ and other organizations had encouraged the Department to use notice-and-comment rulemaking procedures—even though those procedures are not required by law—in the interest of fostering improved public confidence in the resulting rules and affording the Department the benefit of comments from scholars in this arcane field of law. The Department also held a press briefing that day.

Although the drafting process had obviously consumed a good deal of time and no date certain was given for the end of the public comment period, it was clear that the Department wished to move forward promptly. Accordingly, efforts were made to bring the opportunity to comment to the attention of interested parties, and a number of comments were submitted. Thereafter, on April 30, 2003, somewhat later than had been anticipated, the final Crimes and Elements Instruction was promulgated (as Military Commission Instruction No. 2), along with seven others that had not been released in draft form. All eight were released and discussed at a press briefing by Departmental representatives on May 2, 2003. It is unclear why only the Crimes and Elements Instruction was circulated in draft.

The drafting history of the eight Instructions has not been made public. Nor has a detailed response to the comments on the draft of what became Instruction No. 2 been released. For these reasons, and because all of the Instructions will
inevitably be the subject of detailed scrutiny when trials occur, NIMJ concluded that it would be helpful to all concerned—journalists, scholars, public interest organizations, prosecutors and defense counsel, members of the commissions and of the Review Panel, and the federal courts when habeas corpus relief is sought—if source materials related to this non-Administrative Procedure Act rulemaking were available in a convenient format.

A brief unofficial Discussion follows each of the Instructions. Prepared by scholars and practitioners, these are intended to identify issues and implications, rather than necessarily to take sides, although at times this has been unavoidable. With the kind permission of the Institute for International Law of Peace and Armed Conflict, Ruhr-Universität Bochum, we have also included Noëlle Quénivet's thought-provoking comment on the definition of "Military Objective" found in Instruction No. 2. As is the case with the ANNOTATED GUIDE, NIMJ itself takes no position on the wisdom or legality of the commissions.

The Department of Defense has not disclosed how many comments it received from the public or from nongovernmental and international organizations in response to the draft of Instruction No. 2. NIMJ requested copies of all such comments, but has not yet received a response. The handful of comments reproduced here were furnished to us by the originators. It is to be hoped that whatever other comments the Department received will also be made public in time to be put to use by those involved in or seeking to report on commission proceedings. It is also likely that additional Instructions will be issued, concerning such matters as the specific procedures the Review Panel will employ. Because trials may commence at any time, we decided it would be imprudent to wait for either copies of the comments or issuance of further Instructions.

President Bush's Military Order and Secretary Rumsfeld's Military Commission Order, without which the Instructions cannot be fully understood, are not reproduced here because they can be found in full in the ANNOTATED GUIDE, which is available from LexisNexis Matthew Bender.

NIMJ is deeply grateful to the contributors to this sourcebook, who took time from their other professional obligations to analyze the Instructions on short notice. Thanks are also due to Stephen E. Young, Reference Librarian at the Kathryn J. DuFour Library, Columbus School of Law, The Catholic University of America, and to the United Nations Library for generous and timely help.

For further information on military commissions, readers are invited to visit NIMJ's website, www.nimj.org.
Kevin J. Barry, an attorney in private practice in Chantilly, Virginia, is a director and co-founder of the National Institute of Military Justice. He served in the United States Coast Guard from 1966 to 1990, retiring in the grade of Captain. His military duty included service as a trial and appellate judge. [MCI 1]

Mary M. Cheh is the Elyce Zenoff Research Professor of Law at The George Washington University Law School. She is a director of the National Institute of Military Justice and a member of the Rules Advisory Committee of the United States Court of Appeals for the Armed Forces. She has served as a Special Assistant United States Attorney in Washington, D.C., as a member of the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice, and as a consultant to the National Institute of Justice and the President’s Commission on Organized Crime. [MCI 5]

John S. Cooke is Director of Training for the Federal Judicial Center, Washington, D.C. He served in the United States Army Judge Advocate General’s Corps from 1972 to 1998, retiring in the grade of Brigadier General. Among other assignments, he was Deputy Commandant of the Judge Advocate General’s School, Chief Judge of the United States Army Court of Criminal Appeals, and Commander of the United States Army Legal Services Agency. [MCI 8]

Eugene R. Fidell is president of the National Institute of Military Justice and a partner in the Washington, D.C., law firm of Feldesman Tucker Leifer Fidell LLP. He served in the United States Coast Guard from 1969 to 1972 and taught military justice at Yale Law School in 1993 and 1998. He has also served as a public member of the Code Committee on Military Justice. [MCI 2]

Matthew S. Freedus is an associate at the Washington, D.C., law firm of Feldesman Tucker Leifer Fidell LLP. He served as a defense counsel in the United States Navy Judge Advocate General’s Corps from 1998 to 2001. [MCI 4]

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1996, and was Reporter for the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice. [Supplemental Bibliography]

Robert E. Hirshon, a partner at the Portland, Maine, law firm of Drummond Woodsum & MacMahon, was President of the American Bar Association in 2001-02. He has also served as president of the Maine Bar Association and the Maine Bar Foundation, and received the Senator Edmund S. Muskie Access to Justice Award in 2003 for his lifelong commitment to justice for low-income and elderly Americans. He has substantial litigation and legislative experience, and often represents business entities and associations before state legislatures.

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Adele H. Odegard served 24 years as a United States Army judge advocate, retiring in January 2003 in the grade of colonel. She is a graduate of Princeton University and the Rutgers University (Camden) School of Law, and a member of the Pennsylvania and Virginia bars and the National Institute of Military Justice advisory board. [MCI 6]

Noëlle Quénévet is head of publications at the Institute for International Law of Peace and Armed Conflict, Ruhr-Universität Bochum, where she serves as assistant editor of the journal Humanitaires Völkerrecht-Informationsschriften. She is a Ph.D. candidate at the Department of Law, University of Essex.

Gary D. Solis is a retired United States Marine Corps judge advocate and military judge. His doctorate is in the law of war, a subject he teaches at the Georgetown University Law Center. [MCI 3]
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Department of Defense
Military Commission Instruction No. 1

April 30, 2003

SUBJECT: Military Commission Instructions

References:  (a) Military Commission Order No. 1 (Mar. 21, 2002)
           (b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of
                Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16,
                2001)
           (c) Section 113(d) of Title 10 of the United States Code
           (d) Section 140(b) of Title 10 of the United States Code
           (e) Section 898 of Title 10 of the United States Code

1. PURPOSE
This Instruction establishes policies for the issuance and interpretation of Military Commission
Instructions promulgated pursuant to references (a) and (b).

2. AUTHORITY
This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with
references (c) and (d).

3. APPLICABILITY
This Instruction, and, unless stated otherwise, all other Military Commission Instructions apply
throughout the Department of Defense, including to the Office of the Secretary of Defense, the
Military Departments, the Chairman and Vice Chairman of the Joint Chiefs of Staff and the Joint
Staff, the Combatant Commands, the Office of the Inspector General of the Department of
Defense, the Defense Agencies, the Department of Defense Field Activities, and all other
organizational entities within the Department of Defense, to any special trial counsel of the
Department of Justice who may be made available by the Attorney General of the United States
to serve as a prosecutor in trials before military commissions pursuant to Section 4(B)(2) of
reference (a), to any civilian attorney who seeks qualification as a member of the pool of
qualified Civilian Defense Counsel authorized in Section 4(C)(3)(b) of reference (a), and to any
attorney who has been qualified as a member of that pool.

4. POLICIES AND PROCEDURES

A. Promulgation. Military Commission Instructions will be issued by the General Counsel of the Department of Defense (hereinafter General Counsel). Each Instruction will issue over the signature of the General Counsel and, unless otherwise specified therein, shall take effect upon the signature of the General Counsel. Instructions will be numbered in sequence.

B. Professional Responsibility. Compliance with these Instructions shall be deemed a professional responsibility obligation for the practice of law within the Department of Defense.

C. Compliance Breaches. Failure to adhere to these Instructions or any other failure to comply with any rule, regulation, or Instruction applicable to trials by military commission convened pursuant to references (a) and (b) may be subject to appropriate action by the Appointing Authority, the General Counsel of the Department of Defense, or the Presiding Officer of a military commission. Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to references (a) and (b), punitive measures imposed under reference (e), and any other lawful sanction.

5. CONSTRUCTION

Military Commission Instructions shall be construed in a manner consistent with references (a) and (b). Nothing in these Military Commission Instructions applies with respect to the trial of crimes by military commissions convened under other authority. In the event of an inconsistency, the provisions of references (a) and (b) shall govern as provided in Section 7(b) of reference (b). Pronouns referring to the male gender shall be construed as applying to both male and female.

6. NON-CREATION OF RIGHT

Neither this Instruction nor any Military Commission Instruction issued hereafter, is intended to and does not create any right, benefit, privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. Alleged noncompliance with an Instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused or any other person.
7. **RESERVATION OF AUTHORITY**

Neither this Instruction nor any Military Commission Instruction issued hereafter shall be construed to limit, impair, or otherwise affect any authority granted by the Constitution or laws of the United States or Department of Defense regulation or directive.

8. **AMENDMENT**

The General Counsel may issue, supplement, amend, or revoke any Military Commission Instruction at any time.

9. **EFFECTIVE DATE**

This Instruction is effective immediately.

William J. Haynes II
General Counsel of the Department of Defense
DISCUSSION

Kevin J. Barry

Military Commission Instruction No. 1 (MCI 1) is the first of the eight instructions issued by William J. Haynes, II, General Counsel of the Department of Defense, on April 30, 2003. They were issued pursuant to the authority contained in § 7(A) of Military Commission Order No. 1 (MCO 1), issued by the Secretary of Defense on March 21, 2002. That document provided, in pertinent part:

The General Counsel shall issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

MCI 1 is a general instruction, intended to establish "policies for the issuance and interpretation of Military Commission Instructions promulgated pursuant to references (a) [MCO 1] and (b) [the President's Military Order (PMO) of November 13, 2001]." MCI 1 ("current edition") is cited as reference (e) of each of the other seven MCIs issued along with MCI 1.

NIMJ's earlier extensive commentary on military commission regulations to be issued pursuant to § 7 of MCO 1 is contained in NIMJ's ANNOTATED GUIDE—PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (LexisNexis 2002) at 76-84. That commentary discusses, inter alia, the history of military commissions, court-martial practice and procedure, the close relationship that has historically existed between the two, and some of the issues raised by the military commission structure established in the PMO and MCO 1.

References. In addition to the above cited references (a) and (b), the Instruction also cites as authority 10 U.S.C. § 113(d) (reference (c)) and 10 U.S.C. § 140(b) (reference (d)), authorizing, respectively, the Secretary to perform his functions through a designee, and the General Counsel to perform any functions so prescribed by the Secretary. These references fall into the "housekeeping" realm, merely stating the general authority for the Secretary to delegate to and act through the General Counsel.

The final reference (reference (e)) is Art. 98, UCMJ, 10 U.S.C. § 898, one of the "punitive articles." This reference is further discussed below.
Applicability. MCI 1 establishes the applicability for all MCIs that may be issued. They apply "throughout the Department of Defense." The MCI then lists, as included DoD entities, virtually all agencies, departments and other entities within of the Department. Beyond DoD components, the Instructions are also made applicable to any "special trial counsel" made available by the Attorney General to serve as prosecutors at military commissions, and "any civilian attorney who seeks qualification as a member of the pool of qualified Civilian Defense Counsel" as well as "any attorney who has been qualified as a member of that pool."

Policies and Procedures. Under the Policies and Procedures paragraph there are three sections. The first notes that the General Counsel is the issuing authority, that Instructions take effect when signed (unless otherwise noted), and that Instructions will be sequentially numbered. These are standard provisions. The second and third sections are perhaps the most important items in the entire instruction, the second making compliance with the Instructions a "professional responsibility obligation for the practice of law" within DoD, and the third establishing sanctions for breaches of compliance in the following attention-getting terms:

Compliance Breaches. Failure to adhere to these Instructions or any other failure to comply with any rule, regulation or Instruction applicable to trials by military commission convened pursuant to references (a) and (b) may be subject to appropriate action by the Appointing Authority, the General Counsel of the Department of Defense, or the Presiding Officer of a military commission. Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to references (a) and (b), punitive measures imposed under reference (e), and any other lawful sanction.

The professional responsibility provision may or may not create any new obligations for attorneys, since attorneys appearing before a military commission are necessarily subject to compliance with applicable rules of the tribunal, raising the potential for disciplinary action by the attorney's licensing authority, the tribunal, or both. Nonetheless, the provisions at least highlights the apparent perception within DoD of the critical importance of the rules applicable to military commissions, and the seriousness with which any failures to comply fully with those rules may be viewed: These provisions also might be viewed as removing any doubt that might arise from differing provisions in various state codes or rules of professional responsibility, but this is not specifically mentioned.

Also unmentioned is the applicability vel non of the various Rules of Professional Responsibility adopted by the Judge Advocates General and made applicable to military and civilian attorneys practicing within the respective service, as well as to civilian attorneys appearing in courts-martial and certain other bodies
(military commissions not listed) convened within that service. With some variations, such rules track the Model Rules of Professional Conduct adopted by the American Bar Association. See, e.g., Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General, JAGInst 5803.1B (1 Feb 2000) (Navy).

The cited provision authorizes "appropriate action" to be taken by the Appointing Authority, the General Counsel, or the Presiding Officer of a military commission. The specific authority for any of these to act is not listed. Clearly, the sanction of being barred from appearing at a military commission seems well within the authority of the General Counsel, and the option to file a report or complaint with the attorney's licensing jurisdiction is available to any of these. Beyond these clear cases, issues arise.

For example, the military commission (though perhaps not the Presiding Officer) could punish an attorney, or any other person, for contempt, under Art. 48, UCMJ, 10 U.S.C. § 848. But this provision (one of the few in the UCMJ that is expressly applicable to military commissions) is not mentioned in MCO 1.

It is not entirely clear whether the MCIs are intended to qualify as "punitive regulations" for purposes of Art. 92(1), UCMJ, 10 U.S.C. § 892(1). See MCM, Pt. IV, ¶ 16c(1)(e); MCM, App. 23, ¶ 16c (collecting cases). The only punitive article specifically mentioned, Art. 98 (reference (e)), is entitled "Noncompliance with procedural rules." It states:

Any person subject to this chapter [Chapter 47, i.e., the UCMJ] who—
(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or
(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;
shall be punished as a court-martial may direct.

By its own terms, this provision applies only to persons subject to court-martial jurisdiction, which would not generally include civilian attorneys. It also does not appear to apply to military tribunals other than courts-martial. Compare Art. 47, UCMJ, 10 U.S.C. § 847, establishing an offense of failing to appear as a witness at a variety of military tribunals including military commissions, and providing for trial in federal district court. It is at least an issue whether Art. 98 is applicable to military commissions.

Non-Creation of Right. By their terms, neither MCI 1 nor any of the other MCIs creates "any right, benefit, privilege, substantive or procedural," and noncompliance "does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused." This raises the question whether the MCIs are in fact either procedural or substantive rules like those applied in other courts and tribunals, where a failure to comply may be examined and tested for
prejudice on review. Presumably, the "of itself" clause simply means that any violation of the MCIs would be tested for prejudice. One would assume that they would be interpreted in light of the "full and fair trial" guaranty found in PMO § 4(c)(2).

Remaining provisions. The remaining provisions dealing with Construction, Reservation of Authority, Amendment and Effective Date are standard provisions and unremarkable.
Military Commission Instruction

SUBJECT: Crimes and Elements for Trials by Military Commission

References: (a) Military Commission Order No. 1 (March 21, 2002)
            (b) Military Order of November 13, 2001, “Detention, Treatment, and Trial of
                Certain Non-Citizens in the War Against Terrorism,” 66 F.R. 57833 (Nov. 16,
                2001)
            (c) Section 113(d) of Title 10 of the United States Code
            (d) Section 140(b) of Title 10 of the United States Code

1. PURPOSE

This instruction provides guidance with respect to crimes that may be tried by military
commissions established pursuant to references (a) and (b) and defines the elements of those
crimes.

2. AUTHORITY

This instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with
references (b), (c) and (d).

3. GENERAL

   A. Background

The following crimes and elements thereof are intended for use by military commissions
established pursuant to references (a) and (b), the jurisdiction of which extends to offenses or
offenders that by statute or the law of armed conflict may be tried by military commission as
limited by reference (b). These crimes and elements derive from the law of armed conflict, a
body of law that is sometimes referred to as the law of war. They constitute violations of the law
of armed conflict or offenses that, consistent with that body of law, are triable by military
commission. This document does not preclude trial for crimes that occurred prior to its effective
date.
B. Effect on Other Laws

No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this instruction as compared to other articulations of law.

C. Non-Exclusivity

This document does not contain a comprehensive list of crimes triable by military commission. It is intended to be illustrative of applicable principles of the common law of war but not to provide an exclusive enumeration of the punishable acts recognized as such by that law. The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense.

4. APPLICABLE PRINCIPLES OF LAW

A. General Intent

All actions taken by the accused that are necessary for completion of a crime must be performed with general intent. This intent is not listed as a separate element. When the mens rea required for culpability to attach involves motive, an intent that a particular consequence occur, or some other specific intent, an intent element is included. Such an intent element is presumed to be related to the conduct constituting the actus reus.

B. The Element of Wrongfulness and Defenses

Conduct must be wrongful to constitute one of the offenses enumerated herein or any other offense triable by military commission. Conduct is wrongful if it is done without lawful justification or excuse. The element of wrongfulness (or the absence of lawful justification or excuse), which may be required under the customary law of armed conflict, is not repeated in the elements of crimes below. Conduct alleged to meet the elements found herein shall be inferred to be wrongful in the absence of evidence to the contrary. Similarly, this instruction does not enunciate defenses that may apply for specific offenses. Defenses potentially available to an accused under the law of armed conflict, such as self-defense, mistake of fact, and duress, may be applicable in certain trials by military commission. In the absence of evidence to the contrary, defenses in individual cases shall be presumed not to apply. The burden of going forward with evidence of lawful justification or excuse, or any applicable defense shall be upon the accused. With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense. Once an applicable defense or an issue of lawful justification or lawful excuse is fairly raised by the evidence presented, except for the defense of lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply. With respect to the defense of lack of mental responsibility, the accused has the burden of proving by clear and convincing evidence, that, as a result of a severe mental disease or defect, the accused was unable to appreciate the nature and quality of the wrongfulness of the accused's acts.
C. Statute of Limitations

Violations of the laws of war and other crimes triable by military commission listed herein are not subject to any statute of limitations.

5. DEFINITIONS

A. Combatant immunity: Under the law of armed conflict, only a lawful combatant in the armed forces of a legitimate party to an armed conflict enjoys “combatant immunity” or “belligerent privilege” for the lawful conduct of hostilities during armed conflict.

B. Enemy: Enemy includes any entity with which the United States or allied forces may be engaged in armed conflict and is not limited to foreign nations, or foreign military organizations or members thereof. Enemy specifically includes any organization of terrorists with global reach.

C. In the context of and was associated with armed conflict: Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (e.g., murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not “in the context of” the armed conflict). This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an “armed attack” or an “act of war” or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

D. Military Objective: Military objectives are those targets which, by their nature, location, purpose, or use, effectively contribute to the enemy’s war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

E. Object of the attack: Object of the attack refers to the person, place, or thing intentionally targeted. In this regard, the term includes neither collateral damage nor incidental injury or death.

F. Protected property: Property specifically protected by the law of armed conflict such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provided they are not military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions.

G. Protected under the law of war: The person or object in question is expressly “protected” under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as
such by the applicable law of armed conflict (e.g., persons who either are hors de combat or medical or religious personnel taking no active part in hostilities).

H. Should have known: The facts and circumstances were such that a reasonable person in the accused’s position would have had the relevant knowledge or awareness.

6. CRIMES AND ELEMENTS

A. Substantive Offenses. The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

1) Willful Killing Of Protected Persons

a. Elements.
   (1) The accused killed one or more persons;
   (2) The accused intended to kill such person or persons;
   (3) Such person or persons were protected under the law of war;
   (4) The accused knew or should have known of the factual circumstances that established that protected status; and
   (5) The killing took place in the context of and was associated with armed conflict.

b. Comments.
   (1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

2) Attacking Civilians

a. Elements.
   (1) The accused engaged in an attack;
   (2) The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities;
   (3) The accused intended the civilian population as such or individual civilians not taking direct part in hostilities to be an object of the attack; and
   (4) The attack took place in the context of and was associated with armed conflict.
3) Attacking Civilian Objects

a. *Elements.*
   
   (1) The accused engaged in an attack;
   
   (2) The object of the attack was civilian property, that is, property that was not a military objective;
   
   (3) The accused intended such civilian property to be an object of the attack; and
   
   (4) The attack took place in the context of and was associated with armed conflict.

4) Attacking Protected Property

a. *Elements.*

   (1) The accused engaged in an attack;
   
   (2) The object of the attack was protected property;
   
   (3) The accused intended such property to be an object of the attack;
   
   (4) The accused knew or should have known of the factual circumstances that established that protected status; and
   
   (5) The attack took place in the context of and was associated with armed conflict.

5) Pillaging

a. *Elements.*

   (1) The accused appropriated or seized certain property;
   
   (2) The accused intended to appropriate or seize such property for private or personal use;
   
   (3) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and
   
   (4) The appropriation or seizure took place in the context of and was associated with armed conflict.

b. *Comments.*

   (1) As indicated by the use of the term "private or personal use," legitimate captures or appropriation or seizures justified by military necessity cannot constitute the crime of pillaging.
6) Denying Quarter

a. *Elements.*
   
   (1) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;
   
   (2) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;
   
   (3) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and
   
   (4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*
   
   (1) The elements presume circumstances in which one or more persons are or will be in a position to surrender unequivocally. They should not be interpreted as limiting the application of lawful force against enemy combatants.

7) Taking Hostages

a. *Elements.*
   
   (1) The accused seized, detained, or otherwise held hostage one or more persons;
   
   (2) The accused threatened to kill, injure, or continue to detain such person or persons;
   
   (3) The accused intended to compel a State, an international organization, a natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; and
   
   (4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*
   
   (1) Consistent with paragraph 4.B., this offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by the law of armed conflict.

8) Employing Poison or Analogous Weapons

a. *Elements.*
   
   (1) The accused employed a substance or a weapon that releases a substance as a result of its employment;
(2) The substance was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties;

(3) The accused employed the substance or weapon with the intent of utilizing such asphyxiating or toxic properties as a method of warfare;

(4) The accused knew or should have known of the nature of the substance or weapon; and

(5) The conduct took place in the context of and was associated with armed conflict.

b. Comments.

(1) “The death or serious damage to health” required by the second element of this offense must be a direct result of the substance’s effect on the human body (e.g., asphyxiation caused by the depletion of atmospheric oxygen secondary to a chemical or other reaction would not give rise to this offense).

(2) The clause “serious damage to health” does not include temporary incapacitation or sensory irritation.

(3) The use of the “substance or weapon” at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.

9) Using Protected Persons as Shields

a. Elements.

(1) The accused positioned, or otherwise took advantage of the location of, one or more civilians or persons protected under the law of war;

(2) The accused thereby intended to shield a military objective from attack or to shield, favor, or impede military operations; and

(3) The conduct took place in the context of and was associated with armed conflict.

10) Using Protected Property as Shields

a. Elements.

(1) The accused positioned or otherwise took advantage of the location of property protected under the law of war;

(2) The accused thereby intended to shield a military objective from attack or to shield, favor, or impede military operations; and

(3) The conduct took place in the context of and was associated with armed conflict.
11) Mutilation or Maiming

a. **Elements.**
   
   (1) The accused subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage;
   
   (2) The accused intended to subject such person or persons to such mutilation;
   
   (3) The conduct caused death or seriously damaged or endangered the physical or mental health of such person or persons;
   
   (4) The conduct was neither justified by the medical treatment of the person or persons concerned nor carried out in the interest of such person or persons;
   
   (5) Such person or persons were in the custody or control of the accused; and
   
   (6) The conduct took place in the context of and was associated with armed conflict.

12) Use of Treachery or Perfidy

a. **Elements.**
   
   (1) The accused invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the law of war;
   
   (2) The accused intended to betray that confidence or belief;
   
   (3) The accused killed, injured, or captured one or more persons;
   
   (4) The accused made use of that confidence or belief in killing, injuring, or capturing such person or persons; and
   
   (5) The conduct took place in the context of and was associated with armed conflict.

13) Improper Use of Flag of Truce

a. **Elements.**
   
   (1) The accused used a flag of truce;
   
   (2) The accused made such use in order to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there was no such intention on the part of the accused;
   
   (3) The conduct resulted in death or serious bodily injury;
   
   (4) The conduct took place in the context of and was associated with armed conflict.
14) Improper Use of Protective Emblems

a. **Elements.**
   (1) The accused used a protective emblem recognized by the law of armed conflict;
   (2) The accused undertook such use for combatant purposes in a manner prohibited by the law of armed conflict;
   (3) The accused knew or should have known of the prohibited nature of such use;
   (4) The conduct resulted in death or serious bodily injury; and
   (5) The conduct took place in the context of and was associated with armed conflict.

b. **Comments.**
   (1) "Combatant purposes," as used in element (2), means purposes directly related to hostilities and does not include medical, religious, or similar activities.

15) Degrading Treatment of a Dead Body

a. **Elements.**
   (1) The accused degraded or otherwise violated the dignity of the body of a dead person;
   (2) The accused intended to degrade or otherwise violate the dignity of such body;
   (3) The severity of the degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and
   (4) The conduct took place in the context of and was associated with armed conflict.

b. **Comments.**
   (1) The second element precludes prosecution for actions justified by military necessity.

16) Rape

a. **Elements.**
   (1) The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
   (2) The invasion was committed by force, threat of force or coercion, or was committed against a person incapable of giving consent; and
(3) The conduct took place in the context of and was associated with armed conflict.

b. Comments.

(1) The second element recognizes that consensual conduct does not give rise to this offense.

(2) It is understood that a person may be incapable of giving consent if affected by natural, induced or age-related incapacity.

(3) The concept of "invasion" is linked to the inherent wrongfulness requirement for all offenses. In this case, for example, a legitimate body cavity search could not give rise to this offense.

17) Hijacking or Hazarding a Vessel or Aircraft

a. Elements.

(1) The accused seized, exercised control over, or endangered the safe navigation of a vessel or aircraft;

(2) The accused intended to so seize, exercise control over, or endanger such vessel or aircraft;

(3) Such vessel or aircraft was neither a military objective nor was the seizure, control, or endangerment thereof required by military necessity; and

(4) The conduct took place in the context of and was associated with armed conflict.

18) Terrorism

a. Elements.

(1) The accused killed or inflicted great bodily harm on one or more persons or destroyed certain property;

(2) The accused:

(a) intended to kill or inflict great bodily harm on such person or persons;

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life or intended to destroy such property;

(3) The killing or destruction was an attack or part of an attack designed to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government;
(4) The accused did not enjoy combatant immunity or an object of the attack was not a military objective; and

(5) The killing or destruction took place in the context of and was associated with armed conflict.

b. Comments.

(1) Even an attack against a military objective that normally would be permitted under the law of armed conflict could serve as the basis for this offense if the attack itself constituted an unlawful belligerency (that is, if the attack was committed by an accused who did not enjoy combatant immunity). This offense can thus be distinguished from “Attacking Civilians” both by requisite intent and because that offense requires an object of the attack to be civilian in character without regard to the nature of the conflict or the authority to conduct hostilities.

19) Murder by an Unprivileged Belligerent

a. Elements.

(1) The accused killed one or more persons;

(2) The accused:

   (a) intended to kill or inflict great bodily harm on such person or persons or

   (b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The accused did not enjoy combatant immunity; and

(4) The killing took place in the context of and was associated with armed conflict.

b. Comments.

(1) The term “kill” includes intentionally causing death, whether directly or indirectly.

(2) Unlike the crimes of willful killing or attacking civilians, in which the victim’s status is a prerequisite to criminality, for this offense the victim’s status is immaterial. Even an attack on a soldier would be a crime if the attacker did not enjoy “belligerent privilege” or “combatant immunity.”
20) Destruction of Property by an Unprivileged Belligerent

a. Elements.
   (1) The accused destroyed certain property;
   (2) The property belonged to another person, and the destruction was without that person’s consent;
   (3) The accused intended to destroy such property;
   (4) The accused did not enjoy combatant immunity; and
   (5) The destruction took place in the context of and was associated with armed conflict.

21) Aiding the Enemy

a. Elements.
   (1) The accused aided the enemy;
   (2) The aid was knowing or intended; and
   (3) The conduct took place in the context of and was associated with armed conflict.

b. Comments.
   (1) Means of accomplishing the first element include, but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.
   (2) The requirement that conduct be wrongful necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.

22) Spying

a. Elements.
   (1) The accused collected or attempted to collect certain information;
   (2) The accused intended to convey such information to the enemy;
   (3) The accused, in collecting or attempting to collect the information, was lurking, acting clandestinely, or acting under false pretenses; and
   (4) The conduct took place in the context of and was associated with armed conflict.
b. *Comments.*

(1) Members of a military organization not wearing a disguise and others who carry out their missions openly are not spies, if, though they may have resorted to concealment, they have not acted under false pretenses.

(2) The requirement that conduct be wrongful in this case necessitates that, consistent with the law of war, a lawful combatant who, after rejoining the armed force to which that combatant belongs, is subsequently captured, incurs no responsibility for previous acts of espionage.

23) **Perjury or False Testimony**

a. *Elements.*

(1) The accused testified at a military commission, in proceedings ancillary to a military commission, or provided information in a writing executed under an oath to tell the truth or a declaration acknowledging the applicability of penalties of perjury in connection with such proceedings;

(2) Such testimony or information was material;

(3) Such testimony or information was false; and

(4) The accused knew such testimony or information to be false.

24) **Obstruction of Justice Related to Military Commissions**

a. *Elements.*

(1) The accused did an act;

(2) The accused intended to influence, impede, or otherwise obstruct the due administration of justice; and

(3) The accused did such act in the case of a certain person against whom the accused had reason to believe:

(a) there were or would be proceedings before a military commission

   or

(b) there was an ongoing investigation of offenses triable by military commission.
B. Other Forms of Liability and Related Offenses. A person is criminally liable for a completed substantive offense if that person commits the offense, aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility. Such a person would be charged as a principal even if another individual more directly perpetrated the offense. In proving culpability, however, the below listed definitions and elements are applicable. Additionally, if a substantive offense was completed, a person may be criminally liable for the separate offense of accessory after the fact. If the substantive offense is not completed, a person may be criminally liable of the lesser-included offense of attempt or the separate offense of solicitation. Finally, regardless of whether the substantive offense was completed, a person may be criminally liable of the separate offense of conspiracy in addition to the substantive offense. Each element need not be specifically charged.

I) Aiding or Abetting

a. Elements.

(1) The accused committed an act that aided or abetted another person or entity in the commission of a substantive offense;

(2) Such other person or entity committed or attempted to commit the substantive offense; and

(3) The accused intended to or knew that the act would aid or abet such other person or entity in the commission of the substantive offense or an associated criminal purpose or enterprise.

b. Comments.

(1) The term “aided or abetted” in element (1) includes: assisting, encouraging, advising, instigating, counseling, commanding, or procuring another to commit a substantive offense; assisting, encouraging, advising, counseling, or commanding another in the commission of a substantive offense; and in any other way facilitating the commission of a substantive offense.

(2) In some circumstances, inaction may render one liable as an aider or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so, that person may be considered to have aided or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) An accused charged with aiding or abetting should be charged with the related substantive offense as a principal.
2) Solicitation

a. Elements.

(1) The accused solicited, ordered, induced, or advised a certain person or persons to commit one or more substantive offenses triable by military commission; and

(2) The accused intended that the offense actually be committed.

b. Comments.

(1) The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to induce another or others to commit any offense triable by military commission. It is not necessary that the person or persons solicited, ordered, induced, advised, or assisted agree to or act upon the solicitation or advice. If the offense solicited is actually committed, however, the accused is liable under the law of armed conflict for the substantive offense. An accused should not be convicted of both solicitation and the substantive offense solicited if criminal liability for the substantive offense is based upon the solicitation.

(2) Solicitation may be by means other than speech or writing. Any act or conduct that reasonably may be construed as a serious request, order, inducement, advice, or offer of assistance to commit any offense triable by military commission may constitute solicitation. It is not necessary that the accused act alone in the solicitation, order, inducement, advising, or assistance. The accused may act through other persons in committing this offense.

(3) An accused charged with solicitation of a completed substantive offense should be charged for the substantive offense as a principal. An accused charged with solicitation of an uncompleted offense should be charged for the separate offense of solicitation. Solicitation is not a lesser-included offense of the related substantive offense.

3) Command/Superior Responsibility – Perpetrating

a. Elements.

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused’s subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding and abetting such offense or offenses; and
(4) The accused failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of the offense or offenses.

b. Comments.

(1) The phrase, “effective authority and control” in element (1) includes the concept of relative authority over the subject matter or activities associated with the perpetrator’s conduct. This may be relevant to a civilian superior who should not be held responsible for the behavior of subordinates involved in activities that have no relationship to such superior’s sphere of authority. Subject matter authority need not be demonstrated for command responsibility as it applies to a military commander.

(2) A commander or superior charged with failing adequately to prevent or repress a substantive offense triable by military commission should be charged for the related substantive offense as a principal.

4) Command/Superior Responsibility – Mispriision

a. Elements.

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused’s subordinates had committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused knew or should have known that the subordinate or subordinates had committed, attempted to commit, conspired to commit, solicited, or aided and abetted such offense or offenses; and

(4) The accused failed to submit the matter to competent authorities for investigation or prosecution as appropriate.

b. Comments.

(1) The phrase, “effective authority and control” in element (1) includes the concept of relative authority over the subject matter or activities associated with the perpetrator’s conduct. This may be relevant to a civilian superior who cannot be held responsible under this offense for the behavior of subordinates involved in activities that have nothing to with such superior’s sphere of authority.

(2) A commander or superior charged with failing to take appropriate punitive or investigative action subsequent to the perpetration of a substantive offense triable by military commission should not be charged for the substantive offense as a principal. Such commander or superior should be charged for the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.
5) **Accessory After the Fact**

a. *Elements.*

(1) The accused received, comforted, or assisted a certain person

(3) Such person had committed an offense triable by military commission;

(4) The accused knew that such person had committed such offense or believed such person had committed a similar or closely related offense; and

(5) The accused intended to hinder or prevent the apprehension, trial, or punishment of such person.

b. *Comments.*

(1) Accessory after the fact should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

6) **Conspiracy**

a. *Elements.*

(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose;

(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(3) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some object or purpose of the agreement or enterprise.

b. *Comments.*

(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.
(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives.

(3) The overt act must be done by one or more of the conspirators, but not necessarily the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and the person remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

7) Attempt

a. Elements.

(1) The accused committed an act;

(2) The accused intended to commit one or more substantive offenses triable by military commission;

(3) The act amounted to more than mere preparation; and

(4) The act apparently tended to effect the commission of the intended offense.
b. Comments.

(1) To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose.

(2) Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) A person who purposely engages in conduct that would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.

(4) It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended offense, solely because of the person's own sense that it was wrong, prior to the completion of the substantive offense. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

(5) Attempt is a lesser-included offense of any substantive offense triable by military commission and need not be charged separately. An accused may be charged with attempt without being charged with the substantive offense.

7. EFFECTIVE DATE

This instruction is effective immediately.
March 7, 2003

By facsimile to (703) 614-4432
Honorable William J. Haynes, Jr.
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20301-1600

Re: Draft Military Commission Instruction

Dear Mr. Haynes:

Please accept the enclosed position of the National Association of Criminal Defense Lawyers on the Draft Military Commission Instruction as part of the public comment process.

We are grateful for the opportunity to provide these comments before you adopt a final version. The intent is to offer constructive suggestions to improve the Instruction, so that it better comports with basic principles of American military and civilian criminal law.

Our concern is founded in part on the prospect that American prisoners of war in future conflicts may be harmed if this Instruction is used as justification for improper treatment of Americans.

The three co-chairs of our Military Law Committee have extensive active-duty and reserve experience as judge advocates.

Please feel free to contact me or any of them.

Sincerely,

Lawrence S. Goldman, President

"Liberity's Last Champion"

Lawrence S. Goldman, President
POSITION OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE DRAFT MILITARY COMMISSION INSTRUCTION

Comments will be made using the headings in the draft Instruction.

I. Authority

The United States Constitution invests the power to define and punish "offenses against the Law of Nations" with the Congress. It also gives the legislative body the authority to make "rules concerning Captures on Land and Water." The United States Supreme Court ruled on this matter two hundred years ago in *Talbot v. Seeman*, 5 U.S. 1, 28 (1801). Further guidance was given in more recent times in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

The bottom line is that the President does not have the authority to unilaterally "legislate" crimes and their elements.

II. General

The overbreadth of the policy statement that "this document does not preclude trial for crimes that occurred prior to its effective date" is alarming because of its *ex post facto* implications. The underlying basis of the draft Instruction is that it is merely illustrating recognized principles of the common law of war or of the law of armed conflict. If that is true, the questioned statement should be rewritten to specifically state "does not preclude trial for crimes then recognized by the common law of war that occurred prior to . . . ."

III. Applicable Principles of Law

While the discussion of the element of wrongfulness acknowledges that conduct must be wrongful to constitute an offense, it then improperly shifts the burden of proof on this element to the accused by stating, "Conduct alleged to meet the elements found herein shall be inferred to be wrongful in the absence of evidence to the contrary." The emphasized language contradicts the requirement that the prosecution has the burden to prove each element beyond a reasonable doubt.

There is a difference between requiring a legal defense to be raised by the accused (after which the burden is on the prosecution) and the inference of wrongfulness in every case in the absence of evidence to the contrary. Placing the burden of going forward on *lawful justification* on the accused is appropriate, but requiring the accused to disprove the wrongful nature of his conduct or risk the inference of wrongfulness turns the American standard of criminal justice on its head. Under this rule, no accused could rest behind the prosecution, and argue that the prosecution had not proved its case.

As to the applicability of recognized legal defenses, the statement that "Defenses potentially available to an accused . . . may be applicable in certain trials by military commission" surely was intended to mean "applicable in certain offenses subject to trials by military
commission.” In other words, the defense of self-defense may not be applicable to a certain offense subject to trial in any court or commission, therefore it would not apply. However, it cannot be intended that the applicability of valid defenses to certain charges can be determined on an ad hoc basis. To do so could create the inequitable situation where one commission could declare a defense applicable while a different commission, trying the exact same fact situation and allegation, could declare the defense not applicable.

The foregoing policy statements should be clarified to state the exact intent of the statements.

Finally, the lack of any statute of limitations, for any offense, is violative of well-established United States military and civilian law, and international law. Those offenses for which no statute of limitations normally exists, such as murder, genocide, etc., are not the subject of this comment.

Conclusion

This position is provided for the sole purpose of aiding the drafters of the Instruction to better make the Instruction comport with the basic fundamental components of American criminal justice systems. To do otherwise will undoubtedly subject American prisoners of war in future conflicts to inhumane and unfair treatment, using the American military commission experience as justification.
ANALYSIS OF DRAFT AND REPORT

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Military Law Committee
March 5, 2003

Department of Defense
MILITARY COMMISSION INSTRUCTION
Crimes and Elements for Trials by Military Commission

* * * * *

I. AUTHORITY - Paragraph 2:

The Military Law Committee [MLC] has grave difficulty in accepting the underlying premise of this “Instruction” that it is the Commander-in-Chief, or his delegate, who has the legal “authority” to define crimes and their elements. That is a quintessential legislative function. Indeed, Article I, § of the U.S. Constitution expressly provides that it is the Congress of the United States that has the enumerated power to:

➢ “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”

➢ Make “Rules concerning Captures on Land and Water;” and

➢ “To make Rules for the government and Regulation of the land and naval Forces;”

1Art. I, § 8, cl. 11-14, U.S. Const. Congress in enacting Article 21, UCMJ, 10 U.S.C. § 821, provided:

“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.”

By its plain language this statute does not confer any power or jurisdiction to either the President or “military tribunals.” Congress has provided for only two [2] offenses where military commissions have concurrent jurisdiction: Aiding the Enemy, Art. 104, UCMJ, 10 U.S.C. § 904; and Spies, Art. 106, UCMJ, 10 U.S.C. § 906.
That this is a power of Congress was settled by the Supreme Court early on in our history:

The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.  

Notably, the Draft Instructions - released by the DoD General Counsel's Office but bearing the imprimatur of the Justice Department - do not cite or list Article 21, UCMJ as either a reference or authority for such. While we have no idea as to why they did not invoke that statutory provision, it may have to do with the limitations Congress imposed in Article 36, UCMJ, to wit:

10 U.S.C. § 836. Art. 36, UCMJ. President may prescribe rules:

(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 insofar as practicable.

Obviously by ignoring the UCMJ totally, they can thus ignore basic rights guaranteed by it and within the clear intent of Congress to insure. 

Justice Jackson's seminal concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer 343

2 Talbot v. Seeman, 5 U.S. 1, at 28 (1801)(Marshall, C.J.) [emphasis added].

3While not totally germane to this discussion, we must not forget the impact that this may have on U.S. service members under concepts of reciprocity. The less fair we treat our adversaries, the less likely they are going to treat our brothers and sisters in arms in a fair and humane fashion if they are captured. Indeed, that was a major problem early in the Vietnam war where the North Vietnamese treated our POW's not as POW's, but rather as "common criminals."
U.S. 579 (1952), on the "power" of the President as Commander-in-Chief needs to be kept in mind here:

His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role. What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment. 343 U.S. 643-46.

Justice Jackson's analysis continues:

The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers. 343 U.S. at 650-51 [Emphasis added].

* * *

This contemporary . . . experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that
would be nullified by our adoption of the “inherent powers” formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience. [footnotes omitted; emphasis added] 343 U.S. at 652

Equally as troublesome, in addition to the UCMJ articles referenced above, is the fact that Congress has spoken in this area with some degree of specificity, which from a Constitutional perspective would seem to further weaken any basis for an Executive attempt to create and define “crimes and elements.” A quick computer search in Title 18, shows the following:

- 18 U.S.C. §§ 1091-93, Offense of Genocide;
- 18 U.S.C. § 2331 et seq., Offense of Terrorism,
  - § 2331 contains the “definitions” which would seem to cover those now being held as “detainees;”
  - § 2332a, Use of Certain Weapons of Mass Destruction;
  - § 2332b, Acts of Terrorism Transcending National Boundaries;
  - § 2332f, Bombings of Places of Public Use;
- 18 U.S.C. § 2338, Exclusive Federal Jurisdiction [this is interesting as it states that “The district courts of the United States shall have exclusive jurisdiction . . .” over “terrorism” cases].
  - § 2441(c) defines “war crime” far more narrowly than does the Draft Instruction, viz., § 2441(c), adopts the 1949 Geneva Conventions; the 1907, Hague Convention IV [“Laws and Customs of War on Land”]; Common Article 3, of the 1949 Geneva Conventions dealing with “non-international armed conflict”; and the 1996 Protocol on Mines, Booby-Traps, etc.

In sum, where the Constitution gives express and enumerated powers to Congress and Congress pursuant to that grant of authority has exercised it, such cannot be usurped or changed by Executive fiat which is exactly what this Draft Instruction does.
II. "GENERAL" PROVISIONS - Paragraph 3.

There are some truly frightening provisions here that are the antithesis of our criminal and military jurisprudence. For example, Paragraph 3(A), states inter alia, "This document does not preclude trial for crimes that occurred prior to its effective date." This clearly raises the specter of ex post facto proceedings, since Paragraph 3(C), contains this unusual provision: "The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense." So, we have unknown offenses, and the concomitant "lack of notice" issue under traditional Due Process concepts, that presumably a Military Commission Trial Counsel will dream up, that is not subject to any ex post facto challenge. This raises, rather than resolves, some of the major "objections" that go back to the Nuremberg prosecutions,\(^4\) and at least as to the "notice" provision, may itself violate International Law. In applying the Laws of War, the Supreme Court has observed: "We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution."\(^5\) If however, the Drafters are recognizing and applying traditional ex post facto prohibitions to the creation of crimes prosecuted by such Commissions, then that should be clarified and included within any applicable instruction.

III. "APPLICABLE PRINCIPLES OF LAW" - Paragraph 4.

We do not know the source or origin of the "principles" of law here, but they are not Anglo-American nor are they part of the Law of Armed Conflict - at least that generally accepted up until now. There is a complete burden of proof shifting here that is fundamentally antagonistic to our system of innocent until proven guilty. Here, Paragraph 4(B), states: "Conduct alleged to meet the

\(^4\)The formal Defense objection to the ex post facto nature of some of the Nuremberg war crimes may be read courtesy of Yale Law School's "Avalon Project," at: http://www.yale.edu/lawweb/avalon/imt/proc/v1-30.htm [last accessed on 3 March 2003].

\(^5\)Application of Yamashita, 327 U.S. 1, at 16 (1946) [emphasis added].
elements found therein shall be inferred to be wrongful in the absence of evidence to the contrary.”

Instead of a prosecutor having to prove the “wrongfulness” of an Accused’s conduct, the mere allegation of criminality now rises to an inference of wrongfulness, unless the Defense can bring forth “evidence to the contrary.” I accuse you of being a terrorist, aiding and abetting al Qaeda, and you must prove the negative to be acquitted. That is not our concept of due process jurisprudence.

Another frightening concept is this: “Defenses potentially available to an accused under the law of armed conflict, such as self-defense, mistake of fact, and duress, may be applicable in certain trials by military commission.” First, the clear implication is that the also might NOT be applicable is obvious, and second, who decides when the defenses will or will not be applicable? If there is a valid defense under international law, it must be applicable otherwise the “trial” is nothing but a charade.

Furthermore, the language implies that such “defenses” will be decided on an ad hoc basis - a concept that again flies in the face of established domestic, military and international law principles. Should that interpretation be what is in fact implemented, that then will raise an “equal protection” type of objection where one defendant is allowed to utilize a defense, whereas a similarly situated and charged defendant appearing before another tribunal, is not. That is not “fundamental fairness” as envisioned under international law concepts, nor is it a concept that has any applicability to our own domestic military laws and procedures.

Lastly, Paragraph 4(c)’s provision that there are no statutes of limitation, flies in the face of both domestic and international law, absent traditional offenses involving genocide or homicide. It also ignores the limitations contained in Title 18, U.S.C.

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"The impreciseness of this language may be at fault. Were this phrase to read: “... may be applicable to certain offenses tried by military commission,” then the MLC acknowledges that the utilization of such defenses would be governed by traditional relevance concepts."
IV. DEFINITIONS - Paragraph 5.

There definitions are troublesome for many reasons. For example, the CIA agent killed in Afghanistan would not have “combatant immunity” since he was not a member of our “armed forces,” and thus - especially since he was armed and not wearing a U.S. military uniform, a lawful target under international law. We seriously doubt that this is what the drafter’s intended, but it is one of the unintended results of their efforts to overkill.

The definition of “Combatant Immunity” may be in contradiction to established international law definitions of a lawful combatant if it is improperly limited to those members of the uniformed “armed forces.” This should be clarified because it is clear that under established principles of international law, that “lawful combatants” may include both uniformed members of an armed force and qualifying civilians, such as those recognized under the levée en masse concept.7

The definition of “enemy” goes far beyond what anything in LOAC ever defined. Up until now, “terrorists” from the DoD perspective, were treated as international criminals, like the “pirates” of old. The Columbian drug cartels, the “mafia” and probably the “Hell’s Angels” meet this definition, and theoretically they could be next to be tried before a Military Commission. The LOAC has never included non-governmental instrumentalities [NGI’s] as the “enemy,” and we cannot fathom how the Secretary of Defense can sua sponte and ex parte change customary international law when it certainly is not part of any of the Geneva or other Conventions on War.

The definition of the phrase, “In the context of and was associated with armed conflict” is

a novel application of the traditional concepts of LOAC. It is defined to include “terroristic”
organizations, the very thing Congress legislated in Title 18, U.S.C. Furthermore, under traditional
concepts of international law and the LOAC, an “act of war” is something committed by a State
actor, not an international band of criminals. Thus, this is an unprecedented expansion of both
customary and well settled international law principles.

V. PARAGRAPH 6, “Crimes and Elements.”

The Military Law Committee did not have sufficient time or resources to examine each of the
stated crimes and the elements furnished in view of the short response time. However, our position
is and has been - consistent with our Constitutional objections noted above - that Congress has
properly spoken as to both the crimes and their elements in the Uniform Code of Military Justice,
10 U.S.C. § 801 et seq., and in Title 18, U.S.C., as also noted above. International law and the LOAC
recognize an “equal protection” type of argument that precludes unique or significantly differing
interpretations of the law when dealing with prosecuting “war crimes.” Thus for both consistency
and fundamental fairness purposes, especially for crimes already defined under both domestic and
military law, viz., rape, murder, terrorism, etc., that the existing statutes be utilized.

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March 4, 2003

Honorable William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Re: Draft Military Commission Instruction

Dear Mr. Haynes:

We applaud the Department’s decision to seek public comment on the draft Military Commission Instruction defining crimes and elements triable before military commissions during the ongoing war on terrorism. As you know, The Bar Association of the District of Columbia encouraged the Department to provide such public notice and comment, and we are grateful for this opportunity. We provide the following comments:

1. Page 10 – Paragraph 6.A.18)a(3) – Terrorism: Is this element broad enough? Are other possible purposes excluded? If an attack was not “designed to” intimidate, but has that effect, could that not be a crime under the law of war?

2. Page 16 – Paragraph 6.B.4)b(1) – Misprision: Add the word “do” after “to” in last line.

3. Page 17 – Paragraph 6.B.5)a(2) – Accessory After the Fact: The elements are misnumbered.

4. Page 17 – Paragraph 6.B.6)a(1) – Conspiracy: The language “or otherwise joined an enterprise of persons who shared a common criminal purpose” creates an offense not in violation of the law of war. Without that language, the conspiracy must involve an agreement to commit an offense triable by military commission. With that language, the accused could agree to rob a bank, a crime completely outside of the crimes intended to be tried by military commissions. The explanation contained in comment b(2) does not remedy this problem. This comment contradicts the express language contained in the element. Elimination of this superfluous language will clarify greatly the crime of conspiracy under the law of war.

5. Page 17 – Paragraph 6.B.6)a(3) – Conspiracy: Recommend changing “object” to “objective.”

Please extend our congratulations to those members of your staff who participated in the drafting of this instruction. Overall, it is an outstanding piece of work and in our opinion it will prove over time to be an indispensable tool to define crimes and elements under the law of war, not only during the current war on terrorism, but during future international conflicts throughout the 21st century. Thank you for your consideration of these comments. Please feel free to contact me at 202-639-6676 or Grant Latzin, Chair of BADC’s Military Law Committee, at 703-490-0090.

Sincerely,

[Signature]

William E. Lawler, III
President
cc: Hor. Donald H. Rumsfeld  
Secretary of Defense  
Grant Lattin  
Chair, BADC Military Law Committee
March 12, 2003

Hon. William J. Haynes II  
General Counsel  
Department of Defense  
1600 Defense Pentagon  
Washington, DC 20301-1600

Re: Crimes and Elements for Trials by Military Commission

Dear Mr. Haynes:

This letter is in response to the draft Military Commission Instruction on Crimes and Elements. The National Institute of Military Justice is very pleased that the Department issued that Instruction in proposed form and promptly made available the transcript of the related press briefing. These measures can only foster increased public confidence, both here and abroad, in the final product and in the military commission process at such time as it comes fully into operation.

NIMJ recommends that when the Instruction is issued in final form, the drafter's analysis be issued with it. The Manual for Courts-Martial contains a detailed official, albeit nonbinding, "Analysis" indicating the sources on which various rules were based. MCM Apps. 21-24. These have proven to be invaluable to practitioners, the bench and the scholarly community. Having a comparable document would be of similar help to those involved with military commissions. Indeed, given the diverse and arcane sources from which the crimes and elements were obviously distilled—the briefer referred to "antecedent treaties, judicial opinions from international courts and other courts that have tried things by military commission, tried
law of war violations, ... and international practice"—such a document would be even more critical in the present context.

NIMJ has encouraged scholars and others with an interest to comment on the proposed Instruction, and is aware of several comments that have already been submitted. Because of the importance of the comment process and the value of transparency from the standpoint of public confidence, we recommend that the Department maintain a public docket of all such comments so that current and future scholars will be able to trace as fully as practicable the evolution of the resulting historically-significant document. I would be grateful if you could furnish us copies of whatever comments the Department receives in response to the draft. These will be reviewed for possible use if we generate a second edition of or a supplement to the Annotated Guide LexisNexis published last year with respect to the Procedures for Trials by Military Commission.

We of course recognize that the rulemaking procedures of the Administrative Procedure Act do not apply ex proprio vigore to military commission rules. 5 U.S.C. § 553(a)(1). Nonetheless, the Department may wish to issue something in the nature of a “statement of basis and purpose” when it promulgates the Crimes and Elements in final form, noting any significant comments it has received and indicating what, if any, changes were made, and why. Cf. 5 U.S.C. § 553(c); see generally 3 Jacob A. Stein, Glenn A. Mitchell & Basil J. Mezines, Administrative Law § 15.07, at 15-172 to −175 & nn.6-11 (2002) (collecting cases); Admin. Conf. of the United States, A Guide to Federal Agency Rulemaking 264-72 (2d ed. 1991). “The opportunity to comment is meaningless unless the agency responds to significant points raised by the public.” Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977) (footnote omitted). Once again, taking this step will add to public confidence in the result and will underscore that even in this remarkable era the United States is committed to departing to the least extent practicable from our normal processes for the conduct of public business.

On the substance, NIMJ’s ability to comment is hampered by the absence of formal explanatory materials. Nonetheless, based on our own review and that of scholars here and abroad with whom NIMJ has consulted, the draft Instruction is an impressive and worthwhile distillation of the contemporary law of armed conflict, and will likely be a pivotal document for
many years. Perhaps attention could be paid to the following questions as the
document is put into final form:

1. Section 1(e) of the President's Military Order of November 13, 2001
provides for trials "for violations of the laws of war and other applicable laws
by military tribunals." Section 3(B) confers jurisdiction "over violations of the
laws of war and all other offenses triable by military commission." Article 21,
UCMJ, refers to "concurrent jurisdiction with respect to . . . offenses that by
statute or by the law of war may be tried by military commissions . . . ." We
recommend that the Instruction indicate which of the listed crimes are a
reflection of the law of war and which are in the "by statute," "other
applicable laws," or "other offenses" category. See generally NIMJ Annotated
Guide 9-11 (2002). We also recommend that the Instruction be a dynamic
document, to be amended as additional crimes are identified, so that to the
greatest extent possible the Instruction will be complete.

2. Should the caption of § 3(B) read "of" instead of "on"? The purpose of
the provision seems to be to caution the reader against drawing inferences
from other arguably related areas of law. If so, one would think the caption
should refer to the "effects of other" rather than possible "effect on other"
fields of law.

3. Section 3(C) takes the position that the list of crimes set forth in the
Instruction is not exhaustive. Presumably this reflects the dynamic nature of
international law, particularly customary international law, but it must be
admitted that this dynamism is in tension with conventional text-based
norms of American criminal law. At the same time, a measure of elasticity
has been tolerated in military law in the context of the so-called General
To this extent, military law (the rules governing internal discipline of the
forces) and the law of armed conflict can be viewed as cognate bodies of
jurisprudence.

4. The second sentence of § 5(B) states: "Enemy specifically includes
any organization of terrorists with global reach." Should "international" be
substituted for "global" in order to avoid any implication that the
organization must be able to act literally anywhere in the world, as opposed
to merely across or without regard to nation-state boundaries?
Hon. William J. Haynes II
March 12, 2003

5. It may be useful to add a comment on "war booty" or "battlefield souvenirs" in connection with the crime of pillaging. See 10 U.S.C. § 2579.

6. Under what circumstances might military necessity come into play in connection with the crime of degrading treatment of a dead body (No. 15)?

7. The term "lurking," used in connection with spying (No. 22), may reflect its use in article 106, UCMJ. It is vague and archaic, and brings to mind the loitering and vagrancy statutes that have been judicially invalidated. E.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

8. Article 48, UCMJ, dealing with contempts, expressly applies to military commissions (and prescribes a very modest maximum punishment). Should contempt be added as a 25th crime?

9. Do the provisions on command/superior responsibility in § 6B rest on conventional notions of military hierarchical structure that are inapposite to relations between (a) tribal chiefs and their allies or (b) voluntary suppliers of aid and those who recruit them?

10. With respect to § 6B(6), it was pointed out in the press briefing that the Instruction does not seek to penalize "mere membership" in al Qaeda or other covered organizations. This is an important point that presumably reflects both consideration of the treatment of SS membership after World War II as well as the suspicion with which American law has viewed "mere membership" as a basis for adverse action in a broad range of contexts for many years. E.g., United States v. Robel, 389 U.S. 258 (1967). The point is sufficiently important that it merits specific mention in the comments.

Twenty-five years ago, Judge William H. Cook of the United States Court of Military Appeals (as it was then called) wrote an informative law review article with a (to some) startling title: Courts-Martial: The Third System of American Criminal Law, 1978 So. Ill. U. L. Rev. 1. He overlooked a fourth system: military commissions. NIMJ applauds the care the Department has taken in seeking to breathe new life into this long disused and little-understood institution. If circumstances dictate the retrieval of military commissions from desuetude, we will continue to monitor the process and work to facilitate public understanding here and abroad.
Hon. William J. Haynes II
March 12, 2003
Page 5

Very truly yours,

Eugene R. Fidell

Eugene R. Fidell

Advance copy by fax to (703) 614-4432
March 14, 2003

William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Dear Mr. Haynes,

We are writing in response to the issuance on February 28, 2003 of the Draft Military Commission Instruction on “Crimes and Elements for Trials by Military Commission” (the “Draft Instruction”). Human Rights Watch appreciates the opportunity to comment on the Draft Instruction and hopes that comments from the public will be incorporated into the final Military Commission Instruction.

The Draft Instruction generally conforms to the laws of armed conflict as set out in the 1907 Hague Conventions and the 1949 Geneva Conventions, as well as various sources of customary international humanitarian law. However, Human Rights Watch is very concerned that the Draft Instruction includes ambiguous language and outright departures from the law of armed conflict in numerous areas. Our specific concerns are detailed below.

Prosecution of Persons Entitled to POW Status

At the outset, we wish to note that the Draft Instruction cannot be read outside the context of the rules of procedure for the proposed commissions. The Military Order of November 13, 2001 and Military Commission Order No. 1 of March 21, 2002 are inconsistent with provisions of the 1949 Geneva Conventions relating to the prosecution of prisoners-of-war (POWs). Under the Third Geneva Convention, a POW “shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power” (Geneva III, art. 82). A POW can be validly sentenced only if tried by “the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power” (Geneva III, art. 102) and “shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him” (Geneva III, art. 106).

Because U.S. service members are tried under courts-martial with a right of appeal to an independent civilian court, any POW held by the United States must be tried in these same courts and not before the military commissions. Human Rights Watch maintains that the Taliban soldiers detained by the United States — members of the regular armed forces of the then-government of Afghanistan — should have been designated POWs under the Third Geneva Convention and therefore may be tried only in courts-martial. The failure of the United States to properly determine whether any of the persons held in the context of anti-terrorism operations are POWs (or...
protected persons under the Fourth Geneva Convention) does not obviate its legal obligation to ensure that any trials of persons who should have been ruled POWs are conducted in courts-martial with a right of appeal to an independent civilian court.

Inclusion of Sources of Law

Human Rights Watch urges the Department of Defense to cite the sources of law upon which it relies in describing each offense or legal principle included in the Draft Instruction. For each offense, the Instruction should clarify whether the source of law is the law of armed conflict or U.S. federal criminal law, or both, and set out the specific provision or provisions. Including the sources of law will facilitate accurate descriptions of offenses and convey clearly the basis for the statements made in this document.

Prosecution of Unprivileged Combatants

Under the laws of armed conflict, criminal acts by so-called unprivileged belligerents may be prosecuted under the national laws of the detaining power. The Draft Instruction specifies three crimes by unprivileged belligerents: Terrorism (6-18), Murder by an Unprivileged Belligerent (6-19) and Destruction of Property by an Unprivileged Belligerent (6-20).

Appropriately, Draft Instruction part 4.B on “The Element of Wrongfulness and Defenses” states that: “With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense.” Thus, where an element of a crime requires the absence of combatant immunity, the prosecution will have the burden of showing that the defendant was an unprivileged belligerent.

Human Rights Watch is very concerned, however, that the definition of who enjoys combatant immunity (5.A) is far too restrictive: it only recognizes the combatant immunity of “lawful combatant[s] in the armed forces of a legitimate party to an armed conflict.” This is much narrower than that under article 4 of the Third Geneva Convention, which also includes militia members forming part of the armed forces of a party to the conflict, other militias meeting certain requirements, persons accompanying armed forces, and civilians who take up arms to resist invading forces in a levée en masse. Also, there is no requirement under the Geneva Conventions that a party to an armed conflict be “legitimate” for the laws of war to apply. By defining a privileged combatant more narrowly for the war in Afghanistan and presumably future armed conflicts, soldiers could be prosecuted for permissible wartime acts, which would be in violation of the laws of armed conflict. The notion of legitimacy should not be used to deny combatant protections to those who are entitled to them under the Geneva Conventions.

Deciding which defendants are entitled to combatant immunity is a critical threshold question in any prosecution before the military commissions. The issue must be decided in each individual case based on a fair and independent assessment of the facts before the commission. To date, however, the determination of combatant immunity has not been handled through established U.S. military procedures that comply with the Geneva Conventions. The U.S. government’s high-level, public assertions that none of the persons held in connection with the “war on terror,” including those
captured during the international armed conflict in Afghanistan, are entitled to POW status make it very unlikely that a court under the authority of the executive branch could reach an independent and impartial finding on this issue.

If combatant immunity is improperly decided, it will compound the past misapplication of the Geneva Conventions with respect to determination of detainee status by permitting prosecutions for acts, such as shooting at enemy soldiers or destroying enemy military property, that are permissible on the battlefield. For instance, a Taliban soldier involved in a battle could be found criminally liable for shooting and killing a member of the attacking forces. The comments to 6-19 state: "Unlike the crimes of willful killing or attacking civilians, in which the victim’s status is a prerequisite to criminality, for this offense the victim’s status is immaterial" (emphasis added). Thus, the fact that the victim was a member of the opponent’s armed forces, such as a U.S. soldier who took part in the conflict between the United States and Afghanistan, will be legally irrelevant. In this manner, the military commissions will undermine the concept of combatant immunity, a fundamental element of the laws of armed conflict.

Unclear Nexus between Illegal Acts and Armed Conflict

The Draft Instruction appropriately seeks to define criminal acts subject to military commission jurisdiction as those committed "in the context of and ... associated with armed conflict" (5.C). However, it does not differentiate between international and non-international armed conflicts, a fundamental distinction of the Geneva Conventions. This distinction is necessary, for instance, to determine whether a captured belligerent is entitled to POW status and hence combatant immunity.

Human Rights Watch is concerned that the definition of the "necessary nexus" between the illegal acts and armed conflict has no clear limits. This would allow for the prosecution of offenses that have no meaningful relationship to an armed conflict. It would also allow for the prosecution of persons whose cases normally and appropriately would be tried by U.S. civilian courts. Because of the danger to basic due process guarantees of allowing criminal acts away from a classic battlefield to be characterized as acts of war, we maintain that there should be a presumption that cases within the jurisdiction of U.S. courts be tried before them.

Overbroad and Inaccurate Descriptions of Specific Offenses

The descriptions of a number of offenses are vague and, in some cases, misstate the laws of war or the scope of an offense under U.S. criminal law. For instance, the Draft Instruction suggests that the offense of Aiding the Enemy (6-21), which under U.S. law applies to American soldiers helping the opposing side (10 USC § 904), could be applied to persons assisting their own forces against the United States. At a minimum, this provision should clearly distinguish between providing aid to a terrorist organization, which is a separate offense under U.S. law, and assisting the regular armed forces of one’s own country against the United States, which is not a crime and therefore cannot be prosecuted in the military commissions.

The Draft Instruction states that the offense of terrorism (6-18) includes attacks "designed" to "influence the policy of a government by intimidation or coercion" or to "affect the conduct of a government." This provision appears to be derived largely from 18 USC § 2331. If that is indeed
the source of law, it should be clearly referenced and the scope of these definitions explained in the commentary. The need for clarity in this provision is especially necessary in light of the inappropriately narrow definition of combatant immunity, discussed above, and the assertion in the comments to section 6-18 that "[e]ven an attack against a military objective that normally would be permitted under the law of armed conflict could serve as the basis for this offense." The definition of terrorism could therefore be used to criminalize conduct, such as armed violence against military targets, that is permissible under the laws of war.

The prohibition on Spying (6-22) includes the ambiguous notion of "lurking." This expansion of the definition of spying has no clear basis in international law. For instance, the definition of spying in the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land defines spying as "acting clandestinely, or on false pretenses" to obtain information about the enemy (Art. 29). It does not include the term "lurking," which is so vague as to not give proper notice of the conduct proscribed.

The offense of Perjury or False Testimony (6-23) does not specify, as it should, that false statements made under torture or other forms of ill treatment are not actionable. The Draft Instruction lists duress as a possible defense that "may" be applicable "in certain trials" by military commissions (4.B). The duress provision is wholly insufficient given the conduct of interrogations outside the scope of U.S. constitutional protections against self-incrimination and coercive interrogation and in circumstances in which serious, unanswered allegations of torture have been credibly presented. If U.S. forces are indeed torturing or otherwise mistreating detainees, it is both unlawful and grossly unjust to prosecute them for making false statements to stop or avoid ill-treatment. If U.S. officials are not engaged in torture, then the Department of Defense should have no concern about the inclusion of such a provision, while its existence will ensure that any claims of torture or ill-treatment can be evaluated fairly in the context of prosecution for perjury or false testimony. The section on defenses (4.B) should state clearly that the affirmative defenses are available in all trials by military commission.

We understand that the Draft Instruction is not a criminal code, but rather is intended to summarize the existing law of armed conflict and related offenses. For offenses prosecuted by military commissions to have any credibility, the crimes set forth in the final Instruction must be clearly, tightly, and accurately delineated, particularly for those offenses where there is little international or domestic statutory or case law. Overbroad and vague provisions encourage wrongful prosecutions and convictions. Beyond the individual injustice done, they ultimately call into question the entire judicial process, tainting appropriately prosecuted cases along with the questionable ones.

**Omissions of Certain War Crimes**

The Draft Instruction lists twenty-four separate offenses, most of which are derived from the Geneva Conventions and others sources of international law, including the Rome Statute of the International Criminal Court. A number of important violations are inexplicably omitted. These include certain grave breaches of the Geneva Conventions, including: torture or inhuman treatment of prisoners of war or protected persons; willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Geneva Conventions; and the unlawful deportation or transfer or unlawful confinement of a protected person. Moreover, the description of the offense of rape is overly
narrow. The International Criminal Tribunal for the former Yugoslavia has held that rape occurs
where sexual penetration occurs without the consent of the victim, rather than on the basis of force
or coercion. We urge the Instruction to adopt this standard. Consent for this purpose must be
consent given voluntarily, as a result of the victim's free will, assessed in the context of the
surrounding circumstances. We also note that while the crime of rape is listed, the Draft Instruction
fails to include sexual slavery, enforced prostitution and forced pregnancy.

It is not clear to Human Rights Watch why these important provisions have been omitted. We do
not understand the rationale for there being a provision on "Degrading Treatment of a Dead Body"
(6-15) but not one specifically prohibiting the torture of detainees.

In addition, while the Draft Instruction includes attacks on civilians as a war crime, it does not
include knowingly making disproportionate or indiscriminate attacks on the civilian population or
civilian objects, as spelled out in Protocol I of 1977 to the 1949 Geneva Conventions. Protocol I
also prohibits unjustifiable delay in the repatriation of prisoners of war and civilians. While the
United States has not ratified Protocol I, it has accepted most of its provisions as reflective of
customary humanitarian law.

The selective inclusion of only some war crimes, while excluding others of obvious importance and
severity, threatens to undermine the legitimacy of the military commissions. The exclusion of the
offenses noted above, such as torture, will only raise suspicions that the U.S. government is pursuing
a justice of double standards - prosecuting crimes that only al-Qaeda and opposing forces are likely
to commit, but omitting crimes that U.S. forces are alleged already to have committed or
conceivably might commit. This appearance of a double standard holds true even though the
military commissions, by law, cannot prosecute crimes by U.S. citizens.

Statute of Limitations

The Draft Instruction states that the violations of the laws of war and other listed offenses are "not
subject to any statute of limitations" (4.C). While there are no statutes of limitations for war crimes,
there are statutory limitations on offenses, other than capital offenses and certain terrorism offenses,
derived from U.S. federal criminal law. Because the Draft Instruction does not have the force of law
necessary to alter or lift any statute of limitations set forth in federal criminal statues, this provision
is inaccurate and should be rewritten to conform to the law.

Clarification of Ex Post Facto Applicability

The Draft Instruction states that it does not preclude trial for crimes that occurred prior to its
effective date (3.A) and that defendants can be tried for offenses not specifically enumerated in the
draft instruction (3.C). While Human Rights Watch understands that this document does not
purport to create new offenses - and indeed the Department of Defense lacks the legal authority to
do so - these two provisions have created confusion regarding the possibility of ex post facto
prosecution. They therefore should be revised to remove any question regarding this issue. The
Instruction should make clear that even though offenses not listed therein are prosecutable, as are
crimes committed before the effective date of the Instruction, any prosecution before the military
commissions will be conducted in full compliance with constitutional and international prohibitions
on ex post facto proceedings. The military commissions can only conduct trials for offenses that were criminalized under the law of armed conflict or U.S. federal law at the time the offense was committed.

Again, Human Rights Watch appreciates having the opportunity to comment on the Draft Instruction. Please contact us should you wish to discuss this matter further.

Sincerely,

Kenneth Roth
Executive Director
March 14, 2003

Hon. William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20301-1600

Re: Draft Instruction: Crimes and Elements for Trials by Military Commission

Dear Mr. Haynes:

Attached to this letter are comments of the Lawyers Committee for Human Rights on the Draft Military Commission Instruction respecting Crimes and Elements for Trials by Military Commission, issued for comment by the Department of Defense on February 28, 2003. We welcome the Department’s decision to allow a period for public comment before finalizing the draft Instruction. As a general matter, an open and candid dialogue with the concerned public is important to ensure not only the quality of proposed rules and regulations, but also the indispensable public legitimacy of the process.

The attached comments address specific provisions of the draft Instruction. As a preliminary matter, however, we wish to highlight two legal defects respecting the plans for military commissions overall, that we believe cannot be corrected in a document defining Crimes and Elements.

First, we have serious concerns regarding the legality of the Department’s issuance of these draft Crimes and Elements to be punished by military commissions, as well as the issuance of the earlier orders creating and regulating the military commissions, in the absence of any authorizing legislation from Congress. Under Article I, § 8 of the Constitution, only Congress is empowered to authorize establishment of military commissions under its power to “define and punish...Offences against the Law of Nations,” an authorization that was present, for example, in Ex parte Quirin, 317 U.S. 1 (1942), but is absent in the current circumstances. See Neal K. Katyal & Laurence H. Tribe, “Waging War, Deciding Guilt: Trying the Military Tribunals,” 111 Yale L.J. 1259, 1287-88 (2002).
We also reiterate our concern regarding the legality, under U.S. and international norms, of the contemplated procedures for military commissions, as set forth in Military Commission Order No. 1 (March 21, 2002) (the "Order"). Particularly troubling is the failure to provide an independent judicial appeal from what is now an entirely closed system within the military chain of command. This directly contravenes Article 106 of the Third Geneva Convention, which mandates a right of appeal "in the same manner as the members of the armed forces of the Detaining Power." By reason of Article 129 of the Third Geneva Convention, and Article 146 of the Fourth Geneva Convention, Article 106 (and Article 105, referred to below) applies "[i]n all circumstances" to all "persons" accused of "grave breaches"; and so even to individuals the United States determines ineligible for "prisoner of war" status.

In addition, the Order permits extremely broad discretion to deny a defendant and his chosen civilian counsel access to unclassified and even unclassifiable "Protected Information." Indeed, Section 6(B)(3) of the Order authorizes the court, for unspecified "national security" reasons, to conduct the entire trial in secret, without the presence of the accused or civilian counsel. Moreover, while "Protected Information" would be excluded from consideration by the tribunal unless made available to the defendant's assigned military counsel, potentially exculpatory evidence could be withheld even from the military lawyer under Section 6(D)(5)(b). These powers violate a defendant's rights under Article 105 of the Third Geneva Convention to "defence by ...counsel of his own choice"; the "calling of witnesses"; and access to the "[p]articulars of the...charges...as well as the documents which are generally communicated to the accused by virtue of the laws in force of the armed forces of the Detaining Power." While Article 105 does permit a trial to be "held in camera," as an exceptional measure "in the interest of State security," no mention is made of excluding the defendant or his lawyer.

Should you or others in the Department have an interest in further discussing any of the matters raised in the attached comments or in this letter, we would be pleased to meet with you at a time and place convenient to you.

Sincerely,

Kenneth D. Hurwitz
Lawyers Committee for Human Rights

Comments on Draft Military Commission Instruction: Crimes and Elements for Trials by Military Commission

The Lawyers Committee for Human Rights (LCHR) commends the Department of Defense (DoD) for providing the public with an opportunity to comment on the draft “Military Commission Instruction: Crimes and Elements for Trials by Military Commission.” The LCHR hopes that the DoD will carefully consider and respond to the comments received, since there are serious flaws with the current draft.

As a general matter regarding the draft as a whole, the LCHR is concerned that some of the definitions in the current draft impermissibly expand the jurisdiction of the military commissions. As discussed in more detail below, many of the definitions in this document go beyond the established customary law of war, and as such encompass crimes that fall within the jurisdiction of civilian courts. The current draft attempts to expand the definitions of armed conflict, enemy combatants, and unlawful belligerency to include acts that have traditionally been viewed as criminal acts, not acts of war, and to persons traditionally categorized as criminals, not as belligerents. The LCHR believes that the executive branch does not have the constitutional authority to unilaterally expand the definitions of war crimes. See U.S. Const. Art. I, § 8 (granting Congress the authority to “define and punish .... Offences against the Law of Nations”). Moreover, the LCHR believes that the retroactive application of these expanded definitions would pose serious ex post facto and due process problems. The LCHR strongly urges the DoD to limit the jurisdiction of the military commissions to crimes recognized under the international law of war.

Detailed comments on individual definitions are provided below. The LCHR notes, however, that its failure to discuss any portion of the draft in these comments does not constitute an endorsement of that portion, but rather reflects space and time constraints.

Section 3: General

The Lawyer’s Committee is concerned that this section, insofar as it “does not preclude trial for crimes that occurred prior to its effective date” and states that “the absence of a particular offense from the corpus of those enumerated herein does not preclude trial for the offense,” may lead to violations of the U.S. Constitution’s Due Process and Ex Post Facto clauses and the corresponding customary international law principle of nullum crimen sine lege (no crime without prior law). Customary or common law definitions of crimes may satisfy the requirement of preexisting law, provided that the customary definition is precise and definite. See, e.g., Ex parte Quirin, 317 U.S. 1, 29 (1942). Accordingly, we recommend inserting language to the effect that:
"The Commissions will respect the prohibition on *ex post facto* laws and will apply only those rules which were beyond doubt part of the customary international law of war at the time the offense occurred."

*Cf.* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 ¶ 34 (1993), reprinted at 32 I.L.M. 1159 ("[T]he application of the principle *nullum crimen sine lege* requires that the [International Criminal Tribunal for the Former Yugoslavia] should apply rules of international humanitarian law which are beyond any doubt part of customary law . . . ").

Section 4: Applicable Principles of Law

Section 4(B): The Element of Wrongfulness and Defenses

Some of the language in this paragraph is unnecessarily confusing. For example, the sentence "[c]onduct alleged to meet the elements herein shall be inferred to be wrongful in the absence of evidence to the contrary" might be read to impermissibly shift the burden of proof to the defendant. This sentence is, moreover, unnecessary in light of the subsequent description of the burden of production and burden of proof as to affirmative defenses, and we therefore recommend deleting it. In addition, the sentence "Defenses potentially available to an accused under the law of armed conflict, such as self-defense, mistake of fact, and duress, *may* be applicable in certain trials by military commissions" (emphasis added) could be read to suggest that defendants would not necessarily be guaranteed the right to raise defenses to which they are entitled under international law. We therefore suggest that this sentence be replaced with:

"The accused shall be entitled to raise any defense available under the customary law of war, including but not limited to those related to justification or excuse such as self-defense, mistake of fact, and duress."

We also recommend that language from Section 4.02(1) of the American Law Institute's Model Penal Code (MPC) be inserted following the language about the defense of lack of mental responsibility to indicate that evidence of mental infirmity may be relevant not only to the affirmative defense of insanity, but also on the issue of whether the prosecution has met its burden of proof with respect to an element of intent:

"Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense."

Finally, we suggest that some mention be made of an accused's competency at the time of trial (as opposed to at the time of the offense), and note that the Supreme Court has held that it violates due process to require an accused to prove he is incompetent to stand trial by clear and convincing rather than a preponderance of the evidence. *See Cooper v. Oklahoma*, 517 U.S. 348 (1996).
Section 5: Definitions

Section 5(A): Combatant immunity

The LCHR is gravely concerned that the definition of combatant immunity is inconsistent with customary international law. The draft states that “[u]nder the law of armed conflict, only a lawful combatant in the armed forces of a legitimate party to an armed conflict enjoys 'combatant immunity' or 'belligerent privilege' for lawful conduct of hostilities during armed conflict.” It is not clear that this definition includes all those persons entitled to combatant immunity under the established international law of war. For example, article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 134. [hereinafter “Third Geneva Convention”], expressly privileges, inter alia, not only members of a party’s armed forces proper but also “members of militias or volunteer corps” which are part of a party’s armed forces; “[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements” provided that they are commanded by a person responsible for his subordinates; have a fixed distinctive sign recognizable at a distance; carry arms openly; and conduct their operations in accordance with the laws and customs of war; “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power”; and “[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist...without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.” All of these arguably fall outside the definition in the government’s draft.

Since the draft Instruction is ostensibly meant to restate, and not alter, the customary law of armed conflict (and any attempt to do otherwise by this mechanism would raise serious constitutional problems), we recommend that “combatant immunity” or “belligerent privilege” be defined by reference to customary law:

“The terms ‘combatant immunity’ and ‘belligerent privilege’ have the meaning attributed to them by the customary international law of war and relevant treaties, including but not limited to The Hague Convention No. IV of 18 October 1907, Respecting the laws and Customs of War on Land, 36 Stat. 2227, T.S. 539, and the Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 134.”

Section 5(B): Enemy

The Instruction defines an “enemy” as including “any entity with which the United States or allied forces may be engaged in armed conflict and is not limited to foreign nations, or foreign military organizations or members thereof. Enemy specifically includes any organization of terrorists with global reach.” Particularly when coupled with the expansive definition of armed conflict, see infra, this definition appears to enlarge, rather than summarize, the definition of “enemy” under the customary international law of war. Cf. Third Geneva Convention, art. 2; (Fourth) Geneva
Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287 (describing rules to be applied in armed conflict "between two or more of the High Contracting Parties," i.e., states). It is, moreover, inconsistent with the customary usage of the term "enemy" in U.S. law. Cf. Alien Enemy Act, 50 U.S.C. § 21 (2002) (applies "[w]henever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event."); United States v. Greathouse, 26 F. Cas. 18,22 (C.C.N.D. Cal. 1863) (No. 15,254) ("The term 'enemies' as used in the [Treason] [C]lause, according to its settled meaning at the time the Constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us.").

We recommend that this section be deleted and that the term "enemy" be interpreted as necessary in accordance with the law of armed conflict.

Section 5(C): In the context of and was associated with armed conflict

The Instruction states that:

A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war' or the number, power, stated intent, or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force.

Under this definition, almost any act (or even mere attempted act) of violence or terrorism could give rise to an "armed conflict." This is inconsistent with customary international law, which does not define armed conflict so broadly. Use of force by private persons rather than organs of a state has not traditionally been considered an act of war. See The Handbook of Humanitarian Law in Armed Conflict 42 (Dieter Fleck, ed. 1995). Moreover, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has stated that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, IT-94-1-AR72 ¶ 70 (ICTY App. Ch.) (emphasis added). See also Rome Statute of the International Criminal Court Art. 8(2)(f) (defining armed conflict not between two nations to include "protracted armed conflict between governmental authorities and organized armed groups or between such groups" but to exclude "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978.
The LCHR recommends that the DoD replace the questionable language with the ICTY definition, which more accurately reflects the customary understanding of armed conflict.

Section 6(A): Crimes and Elements — Substantive Offenses

Section 6(A)(1): Willful Killing of Protected Persons

The comment for this offense, which states that "[t]he intent requirement for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack," creates ambiguity since it could be read to suggest that all collateral damage will be excused regardless of disproportionality or lack of military necessity (though it is possible that the "lawful" attack language might have been meant to incorporate such notions). The comment is unnecessary since a defense of military necessity/collateral damage is implicit in the grave breaches regime of the Geneva Conventions from which this offense is derived.

Moreover, the inclusion of this comment here combined with the omission of similar comments from the next three offenses (attacking civilians, civilian objects, and protected property) might be read to suggest that the defense based on the claim that the damage was collateral and justified by military necessity could not be raised with respect to those other three crimes. While the LCHR supports the broadest possible protection for civilians, it believes that the U.S. would raise a defense based on proportionality and lawfulness of collateral damage if U.S. forces were charged with attacking civilians, civilian objects, or protected property. The LCHR is concerned that the U.S. should apply the same standards to others that it applies to itself. The LCHR believes the best way to remove the ambiguity is simply to delete the comment from the offense of "willful killing of protected persons."

Section 6(A)(16): Rape

The definition of rape requires that the invasion have been "committed by force, threat of force, or coercion, or was committed against a person incapable of giving consent." The International Criminal Tribunal for the Former Yugoslavia has rejected the requirement of force or coercion in favor of a standard that turns on a "lack of consent," out of concern that the coercion in many cases may be implicit rather than explicit (for example, in the context of a prison camp or town occupied by hostile forces). See Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, Feb. 22, 2001, paras. 438-42. Similarly, the definition of rape to be employed by the International Criminal Court (ICC) requires that the invasion have been "committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent." Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes,
Section 6(A)(17): Hijacking
Section 6(A)(18): Terrorism

The LCHR is concerned that while terrorism and hijacking are undoubtedly crimes, they are not clearly established as war crimes with fixed definitions under the customary international law of armed conflict. This is important, because it goes to the proper jurisdiction of military commissions. See Ex Parte Quirin, 317 U.S. 1, 29 (1942) (distinguishing offenses that may be tried before military tribunal as those which are violations of the "law of war"); Duncan v. Kahanamoku, 327 U.S. 304, 313-14 (1946) (same). See also 18 U.S.C. §§ 2331-2339B (section of criminal code defining crime of terrorism to be tried in civilian courts). This is not to question whether acts that might be popularly characterized as terrorism might not in some circumstances also fall within one or more traditional categories of war crime (e.g., willful killing of civilians), but rather to note that terrorism per se has not previously been defined as a war crime and that the definition given here therefore expands, rather than simply restates, the customary international law of armed conflict. As stated in our introductory comments, there are serious constitutional problems with prosecuting offenses that are not clearly war crimes and persons who are not clearly combatants under the customary law of war in front of military commissions, rather than civilian courts.

The LCHR also notes that traditional war crimes (such as willful killing of protected persons or attacking civilians or civilian property) adequately address the conduct at issue. The LCHR therefore recommends that the separate offenses of "hijacking" and "terrorism" be deleted entirely.

That having been said, should the DoD retain these offenses there are also several problems with the definitions themselves. For example, under the draft Instruction liability for terrorism could be based on the fact that "the accused . . . destroyed certain property," § 6(A)(18)(a)(1). The definition places no limit on what that "certain property" might include, and the use of disjunctive language in § 6(A)(18)(a)(2)(b) suggests that the destruction of property need not be accompanied by any danger to human life. The section is therefore vague and overbroad enough to apply to a wide range of conduct designed to "affect the conduct of a government," including protected First Amendment activities such as burning a flag. Requiring that the destruction of property be inherently dangerous to human life or evince a wanton disregard for human life might partially alleviate this problem. Cf. 18 U.S.C. § 2331(5)(A) (defining terrorism to include "acts dangerous to human life that are a violation of the criminal laws of the United States or of any State").

To the extent that there is an emerging definition of terrorism in the international customary law of war, moreover, § 6(A)(18)(a)(4) appears inconsistent with this emerging definition. This section states that an element of the offense is that "[t]he accused did not enjoy combatant immunity or an object of the attack was not a military
objective.” Neither is supported by the law of war. The first part is not supported because not even a lawful combatant may engage in “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population.” The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Art. 51(2), 1125 U.N.T.S. 3. The second part (along with the comment in § 6(A)(18)(b), which states that “[e]ven an attack against a military objective that normally would be permitted under the law of armed conflict could serve as the basis for this offense if the attack itself constituted unlawful belligerency”) is also not based on the customary law of war, because while such an attack may well be a violation of the laws of war, it is not clearly established as a war crime called “terrorism.”

Section 6(A)(19): Murder by an Unprivileged Belligerent

Section 6(A)(20): Destruction of Property by an Unprivileged Belligerent

These two offenses are problematic insofar as “unprivileged belligerency” and “armed conflict” are defined too broadly, as discussed supra.

Section 6(A)(21): Aiding the Enemy

This definition is problematic insofar as “enemy” and “armed conflict” are defined too broadly, as discussed supra. While the LCHR recognizes that “aiding the enemy” is a crime under the UCMJ, 10 U.S.C. § 904, the overly expansive definitions of enemy and armed conflict make it possible that this could apply to persons who would not have fallen within military jurisdiction under § 904 previously and who ought properly to be tried in civilian courts. Moreover, the most culpable acts of aid (those where the accused knew that he was aiding the commission of a substantive offense within the jurisdiction of the commission) would fall within the category of aiding and abetting. Accordingly, the LCHR recommends deleting this offense.

If the offense is nevertheless retained, we note that comment (1) includes broad range of conduct, some of which may be relatively innocent, and we therefore recommend adding a materiality threshold as well as a comment to indicate that the mens rea for this offense includes knowledge that the person being aided is an enemy, cf. United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).

Section 6(A)(22): Spying

This definition is undesirably vague. The Instruction applies where “[t]he accused collected or attempted to collect certain information,” § 6(A)(22)(a)(1), yet does not limit in any way what that “certain information” might include, leaving open the possibly that the collection of perfectly innocent information (which might even be protected by the First Amendment) could give rise to liability. In addition, the term “lurking” is archaic and vague.

This crime is also problematic insofar as “enemy” and “armed conflict” are defined too broadly, as discussed supra. While the LCHR recognizes that spying is a
crime under the UCMJ, 10 U.S.C. § 906, the overly expansive definitions of enemy and armed conflict make it possible that this could apply to persons who would not have fallen within military jurisdiction under § 906 previously and who ought properly to be tried in civilian courts.

Section 6(A)(24): Obstruction of Justice Related to Military Commissions

There are significant differences between the Instruction’s definition of obstruction of justice and the definition in the U.S. criminal code. Obstruction of justice is defined extensively and exclusively in 18 U.S.C. §§ 1501-1518. Seventeen different forms of obstruction are highlighted in the Code, setting up a dynamic where acts are either easily characterized as obstruction under one of the seventeen provisions, or they are not, and are therefore not prosecutable as obstruction. The general obstruction provision, 18 U.S.C. § 1503, includes as obstruction actions by an individual which, “corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.” 18 U.S.C. § 1503 (2002). The Instruction borrows from this language, but removes “corruptly or by threats of force” such that obstruction of justice, as defined by the Instruction, is when “[t]he accused did an act; . . . [and] intended to influence, impede, or otherwise obstruct the due administration of justice.” Instruction, § 6(A)(24)(a)(1), (2). Thus, benign acts, under the Instruction, can be characterized as obstruction of justice so long as the accused had intent to obstruct justice. This attaches liability to actions which would fall short of being characterized even as an attempt under the civilian system, and criminalizes conduct that has never been held to be criminal before. As such, this provision raises significant concerns. The LCHR recommends adopting the definition from 18 U.S.C. § 1503.

This offense is also troubling insofar as it might apply to civilians or non-combatants, who ought properly to be tried in civilian courts.

Section 6(B): Other Forms of Liability and Related Offenses

Section 6(B)(1): Aiding and Abetting

The other provisions in § 6(B) refer to the commission of substantive offenses “triable by military commission,” but aiding and abetting simply refers to the commission of a “substantive offense.” The omission is likely unintentional, but the definition should simply be corrected to make clear that the substantive offense committed was “triable by a military commission.”

Section 6(B)(4): Command/Superior Responsibility – Mispriision

Comment 1 is confusing and should be clarified. The comment states that “[t]he phrase ‘effective authority and control’ in element (1) includes the concept of relative authority over the subject matter or activities associated with the perpetrator’s conduct.” It is not clear what is meant by “relative authority”: does it mean the superior’s authority
relative to that of other superiors? The superior’s authority over that subject matter relative to his authority over other subject matter? To the extent that the DoD is attempting to distinguish between civilian and military superiors, it may wish to simply use the language employed by the Rome Statute of the International Criminal Court, Art. 28(b)(ii), which addresses this problem by requiring with respect to non-military superiors that “the crimes concerned activities that were within the effective responsibility and control of the superior.”

Section 6(B)(6): Conspiracy

The inclusion of language about “criminal enterprises” is problematic. The Instruction states that applies where “[t]he accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose,” § 6(B)(6)(a)(1). Since the requirement that the substantive offenses plotted by the conspirators be “triable by military commission” only attaches to the first clause, the second clause would seemingly impose liability on persons who joined an enterprise with a criminal purpose even where that purpose was outside the jurisdiction of the military commissions. Although comment (b)(2) goes some way towards alleviating this problem, insofar as it states that “the agreement or enterprise must, at least in part, involve the commission or intended commission of one or more of the substantive offenses triable by military commission,” it leaves open the possibility of a sort of pendent jurisdiction for all crimes outside military commission’s jurisdiction if the enterprise or conspiracy intended to commit at least one crime within that jurisdiction. This would be particularly troubling in the case of persons who had no intent to support the commission of a crime within the jurisdiction of a military tribunal. At a minimum, the definition should be modified to clarify that the person charged must have intended the commission of at least one crime within the jurisdiction of the commission.

Also problematic is the fact that the Instruction makes joining a criminal enterprise a separate offense. See § 6(B)(6)(b)(8). It is well established that conspiracy is an independent offense; that joining a criminal enterprise that does not meet the definition of conspiracy is also an offense is less well-established. The definition of “criminal enterprise” here is significantly differently from that in domestic law. See 21 U.S.C. § 848 (narrowly defining continuing criminal enterprise based on pattern of certain offenses). To the extent that the notion of a “criminal enterprise” as a legal concept distinct from a conspiracy has been imported from international criminal proceedings, the notion of a criminal enterprise has been applied by the International Criminal Tribunal only as a mode of principal liability for offenses not as a separate and distinct offense like conspiracy. See, e.g., Judgement, Prosecutor v. Kvocka, Case No. IT-98-30/1 ¶ 244 (ICTY Tr. Ch. I, Nov. 2, 2001).

The LCHR recommends deleting entirely the language about criminal enterprises from this section. The LCHR believes that the time-tested definition of conspiracy should be sufficient to reach all of the conduct that may properly be brought before the military commissions. If the government believes that traditional conspiracy law is
insufficient, the proper avenue for expanding the pool of persons who may be held liable for the acts (or intended acts) of others is through legislation, not a unilateral declaration by the executive. The need for congressional involvement is particularly heightened here because this section as currently drafted comes close to punishing mere membership in a group, which skirts the limits of constitutionality.

March 14, 2003
March 19, 2003

William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600


Dear Mr. Haynes:

On behalf of the American Civil Liberties Union and its 330,000 members, we appreciate this opportunity to share our views and recommendations with you regarding the draft Military Commission Instruction on “Crimes and Elements for Trials by Military Commission” (Draft Instruction).

As a preliminary matter, the ACLU would like to reiterate our view that military commissions are unnecessary because the regular criminal courts are an appropriate forum for prosecuting suspected terrorists. The United States must respect basic notions of fairness and due process as a matter of democratic principle and international law. Any perceived abandonment of the right to fair trials would undermine America's longstanding commitment to human rights and civil liberties.

The United States can avoid these problems by honoring its historical commitment to fair trials. The best way to do this is to try suspected terrorists in federal courts with all the attendant due process protections that would entail. This approach has led to successful prosecutions of Al Qaeda and other terrorists in the past and there is no reason why such trials could not be successful in the future.

As we explained in our earlier letters, the Military Order of November 13, 2001 and the Military Commission Order No. 1 of March 21, 2002 contain numerous deficiencies and do not respect fundamental norms of civil liberties and due process. On March 20, 2002, President Bush promised that the military tribunal system would show the world a "fair system that will enable us to bring people to justice [but] at the same time protect citizenry." Two days later Secretary Rumsfeld announced that the "commissions will conduct trials that are fair and impartial." So far, these promises have not been fulfilled, and the legitimacy of any proceedings involving military commissions will be questioned in our eyes and the eyes of the world.

We also fear that by endorsing the use of military commissions without sufficient due process to try suspected terrorists or others accused of violating the laws of war, we may thereby undermine the principles of military justice that would apply to American soldiers subject to trial by an enemy force or nation or in an international tribunal.

We remain particularly concerned about the constitutionality of using such tribunals against terrorism suspects apprehended in the United States. We are also disappointed that the Draft Instruction continues to ignore the distinction between the armed forces of enemy nations and suspected terrorists who are – particularly if apprehended outside of a battlefield situation – more appropriately viewed as criminal suspects than unlawful enemy combatants.
In addition to these overall concerns, we have a number of specific concerns about a number of deficiencies in the Draft Instruction which, we believe, could add new elements of unfairness to trials conducted by military commissions. Our specific concerns, and recommendations, are detailed below.

Enumerated Crimes

_Nullem crimen sine lege_ ("there is no crime without a law") is one of the most fundamental principles of national and international law. An individual may only be found criminally liable for conduct that was specifically prohibited by law at the time of its commission. Thus, the law must spell out the proscribed conduct with certainty so that the individual who commits the crime is aware of the wrongfulness of his or her conduct.

The Draft Instruction appears to overlook the existence of this principle of due process. For example, Section 3(C) provides that "[t]his document does not contain a comprehensive list of crimes triable by military commission." Moreover, the Draft Instruction indicates that "[t]he absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense." As a result, individuals could be prosecuted for crimes that are not set forth in the Draft Instruction or otherwise clearly established by international law.

Section 3(A) also raises due process concerns. It provides that "[t]his document does not preclude trial for crimes that occurred prior to its effective date." Since the Draft Instruction does not set forth a comprehensive list of crimes triable by military commissions and does not limit the trial of unenumerated crimes to crimes that were clearly established under international law at the time they were committed, individuals could be prosecuted for crimes that did not even exist when they were committed.

By providing implicit authority for a military commission to find new criminal offenses not listed in the Instruction, the Instruction loses its utility as a guide to the prosecution and defense counsel of what elements must be established to convict an accused. It also seriously undermines the fairness of a military commission trial. Without providing a definitive corpus of crimes, the prosecution could be tempted to avoid an embarrassing acquittal by urging a commission to invent a new criminal offense, not listed in the Instruction, that effectively relieves the prosecution of the burden of establishing the elements of one of the crimes that is listed in the Instruction. This concern is aggravated by the procedural deficiencies in earlier orders that permit substantial command influence over the military commissions.

We recognize that the Draft Instruction does not list all offenses that are criminal violations of the law of armed conflict and that are clearly established under international law. For example, it does not define the crimes of genocide or crimes against humanity.

However, rather than provide implicit authority for a commission to define these crimes on its own, the Department of Defense should issue a supplemental instruction that defines any offense not listed in the Instruction for which the prosecution may wish to charge a detainee prior to any decision to list charges against a detainee.

**Recommendation #1:** At the end of paragraph 3.A of the Draft Instruction, after the word "effective date," add "provided that the status of such conduct as a criminal violation of the law of armed conflict in international law was clearly established at the time the offense was committed."

**Recommendation #2:** Delete paragraph 3.C ("Non-Exclusivity") and replace with "An offense may only be tried by a military commission pursuant to this order if the status of such conduct as a criminal violation of the law of armed conflict in international law was clearly established at the time the offense was committed, and if the crime for which the detainee is charged was defined by this Instruction or a supplemental Instruction prior to the time charges were instituted."

Enumerated Elements

The Draft Instruction set forth 24 separate offenses and 7 other forms of liability. However, the proposed elements for each of these crimes do not act with the restrictive force of law that is required for any legitimate court. Rather, they appear to act only as guidelines that may be added to, subtracted from or completely ignored—thereby granting unfettered discretion to the military commissions.

In addition, the enumerated elements often fail to track the elements of similar offenses already set forth in the United States Code or international law. For example, the offense of "Aiding the Enemy" is defined even more broadly than an identically titled provision in 10 U.S.C. § 904, which itself could not be applied to non-members of the U.S. military. Read literally, the Draft Instruction could apply to a lawful enemy soldier who provides assistance to his own side, which, as Human Rights Watch points out in its comments to the Instruction, is not prohibited by the international law of armed
The more logically applicable law of aiding terrorism, criminalized under 18 USC § 2339, contains safeguards that the Draft Instruction do not, including the important requirement that the defendant have the specific intent to aid a terrorist act, or that the defendant be on notice because the target of the aid has been designated as terrorist organization by the United States government. Consequently, the Draft Instruction could allow the punishment of an individual who unwittingly aids a terrorist organization whereas the United States Code would not. Such inconsistency between existing federal law and the Draft Instruction only adds to the apparent arbitrary and inconsistent nature of these provisions.

Recommendation #3: A new paragraph should be added to section 3 which reads – “As provided in paragraph 5.C of Military Commission Order No. 1, issued March 21, 2002, the prosecution bears the burden of establishing guilt in all cases tried by a military commission beyond a reasonable doubt. As a result, each element of a criminal offense as described in this Instruction must be proven beyond a reasonable doubt. The commission has no authority to relieve the prosecution of this burden with respect to any offense.”

Recommendation #4: The offense of “aiding the enemy” should be deleted. It has no logical application with respect to aiding one’s own lawful enemy force. The offense of providing material support to terrorists should be tried in federal criminal courts. In the alternative, the offense should be revised to track the offenses of providing material support to terrorists contained in 18 U.S.C. § 2339A.

Presumption of Guilt

The Draft Instruction requires that any conduct proscribed must be wrongful. Section 4(B) adds, however, that “[c]onduct alleged to meet the elements found herein shall be inferred to be wrongful in the absence of evidence to the contrary.” Thus, the presumption of guilt shifts to the defendant before proceedings have even commenced. The placement of this burden of proof on the defendant constitutes a violation of the presumption of innocence.

The presumption of innocence is a core concept of due process and fundamental fairness, long recognized in United States law and international law. The International Covenant on Civil and Political Rights, a treaty signed and ratified by the United States, provides that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” The presumption of innocence is also set forth in the Rome Statute of the International Criminal Court (Rome Statute), which provides that “[e]veryone shall be presumed innocent until proved guilty [beyond reasonable doubt] before the Court.” Perhaps most pertinent for the Department of Defense, Military Commission Order No. 1 of March 21, 2002, also provides plainly, at section 5(B), that “[t]he Accused shall be presumed innocent until proven guilty.”

Recommendation #5: The third and fourth sentences of paragraph 4.B (from “The element of wrongfulness” through “evidence to the contrary”), which provide for a general presumption of wrongfulness, should be deleted.

Presumption Against Applicability of Defenses

The unfettered discretion that the Draft Instruction provides to the military commissions may also be seen in the treatment of available defenses. For example, Section 4(B) declines to enunciate defenses that may be raised by a defendant in proceedings before the military commissions. While it acknowledges the existence of defenses, the Draft Instruction provide that “[i]n the absence of evidence to the contrary, defenses in individual cases shall be presumed not to apply.” This provision not only places the ordinary burden on the accused to going forward with evidence that establishes an affirmative defense, but it also appears to place an unprecedented burden on the accused to overcome the presumption that the defenses do not apply. This apparently requires both a factual and legal showing.

Defenses to criminal liability have long been recognized in domestic and international law. Thus, they should be recognized in the Draft Instruction. For example, the Rome Statute provides for numerous defenses, including the defenses of self-defense, duress, mistake of fact, mistake of law and age. The International Criminal Tribunal for the former Yugoslavia recognizes similar defenses.

Recommendation #6: The seventh sentence of paragraph 4.B, reading “In the absence of evidence to the contrary, defenses in individual cases shall be presumed not to apply,” should be deleted.

Statute of Limitations
The Draft Instruction explicitly excludes a statute of limitations for any crimes. Section 4(C) provides that "[v]iolations of the laws of war and other crimes triable by military commissions listed herein are not subject to any statute of limitations." While international law recognizes that the statute of limitations should not apply for certain offenses, it does not provide a blanket exception for all offenses. Indeed, only a small set of heinous crimes are relieved of a statute of limitations under international law. For example, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity precludes application of the statute of limitations to only certain war crimes and crimes against humanity.

In contrast, such crimes as unwitting aid (Section 5(B)(21)), spying (Section 5(B)(22)), perjury (Section 5(B)(23)), and obstruction of justice (Section 5(B)(24)) were not included in that waiver. These offenses are also defined by the federal criminal code and do provide for a limitations period except in capital cases. In general, the federal criminal code provides for a limitations period of five years, and eight years for some non-capital terrorism offenses. See 18 U.S.C. § 3282.

The explicit exclusion of a statute of limitations is also troubling given the open-ended nature of the crimes set forth in the Draft Instruction. Since the Draft Instruction does not set forth a comprehensive list of crimes triable by military commissions, individuals could be punished decades from now for crimes that did not even exist when they were committed.

Recommendation #7: Paragraph 3.C should be amended to read as follows: "Capital offenses or other offenses described herein that are covered by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity shall not be subject to any statute of limitations. The limitations period for all other offenses is five years." In the alternative, the Instruction could list a limitations period for each specific offense, providing for no limitation for covered war crimes offenses while providing a specific limitation of either five years for a general offense, such as perjury, or eight years for a terrorism offense.

Additional Concerns

The aforementioned concerns are not exclusive. Significant problems also exist with respect to combatant immunity, the definition of armed conflict, and other provisions pertaining to the laws of war.

Conclusion

We appreciate the enormous task facing the United States in reconciling the need for national security with the demands of the Constitution and international law. We are also convinced that liberty and security need not be at odds.

Fair trials protect the rights of the accused, the interests of the public, and our nation's longstanding commitment to civil liberties and human rights. Our most basic values - and everything we are fighting to protect - demand that we uphold and affirm fundamental rights to all.

Sincerely,

Laura W. Murphy
Director
ACLU Washington National Office

Timothy Edgar
Legislative Counsel
ACLU Washington National Office

Paul Hoffman
National Task Force Coordinator
ACLU International Human Rights Task Force

Prof. William Aceves
Board Member, ACLU of San Diego and Imperial Counties
March 13, 2003

The Honorable William J. Haynes, II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

RE: CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION

Dear Mr. Haynes:

I would like to comment on Section 11, concerning Maiming and Mutilation.

It is my belief that this section should be expanded to specifically forbid torture and make that crime prosecutable. As you know, various international conventions have defined and outlawed torture, so I won't draft my own definition.

Nevertheless, I feel torture is a very serious potential problem which should fall within the crimes and elements for trial by military commissions.

Thank you very much for the opportunity to comment.

Very truly yours,

John E. Tuthill

JET/kl
Subj ect: Crimes and Elements for Trials by Military Commission

References:
(a) Military Commission Order No. 1 (Mar. 21, 2002)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Section 821 of Title 10 of the United States Code
(f) Military Commission Instruction No. 1, current edition

1. Purpose
This Instruction provides guidance with respect to crimes that may be tried by military commissions established pursuant to references (a) and (b) and enumerates the elements of those crimes.

2. Authority
This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (b) through (e). The provisions of reference (f) are applicable to this Instruction.

3. General
A. Background. The following crimes and elements thereof are intended for use by military commissions established pursuant to references (a) and (b), the jurisdiction of which extends to offenses or offenders that by statute or the law of armed conflict may be tried by military commission as limited by reference (b). No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that
body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

B. **Effect of Other Laws.** No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this Instruction as compared to other articulations of law.

C. **Non-Exclusivity.** This Instruction does not contain a comprehensive list of crimes triable by military commission. It is intended to be illustrative of applicable principles of the common law of war but not to provide an exclusive enumeration of the punishable acts recognized as such by that law. The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense.

4. **APPLICABLE PRINCIPLES OF LAW**

A. **General Intent.** All actions taken by the Accused that are necessary for completion of a crime must be performed with general intent. This intent is not listed as a separate element. When the mens rea required for culpability to attach involves an intent that a particular consequence occur, or some other specific intent, an intent element is included. The necessary relationship between such intent element and the conduct constituting the actus reus is not articulated for each set of elements, but is presumed; a nexus between the two is necessary.

B. **The Element of Wrongfulness and Defenses.** Conduct must be wrongful to constitute one of the offenses enumerated herein or any other offense triable by military commission. Conduct is wrongful if it is done without justification or excuse cognizable under applicable law. The element of wrongfulness (or the absence of lawful justification or excuse), which may be required under the customary law of armed conflict, is not repeated in the elements of crimes below. Conduct satisfying the elements found herein shall be inferred to be wrongful in the absence of evidence to the contrary. Similarly, this Instruction does not enunciate defenses that may apply for specific offenses, though an Accused is entitled to raise any defense available under the law of armed conflict. Defenses potentially available to an Accused under the law of armed conflict, such as self-defense, mistake of fact, and duress, may be applicable to certain offenses subject to trial by military commission. In the absence of evidence to the contrary, defenses in individual cases shall be presumed not to apply. The burden of going forward with evidence of lawful justification or excuse or any applicable defense shall be upon the Accused. With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense. Once an applicable defense or an issue of lawful justification or lawful excuse is fairly raised by the evidence presented, except for the defense of lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply. With respect to the defense of lack of mental responsibility, the
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Accused has the burden of proving by clear and convincing evidence that, as a result of a severe mental disease or defect, the Accused was unable to appreciate the nature and quality of the wrongfulness of the Accused's acts. As provided in Section 5(C) of reference (a), the prosecution bears the burden of establishing the Accused's guilt beyond a reasonable doubt in all cases tried by a military commission. Each element of an offense enumerated herein must be proven beyond a reasonable doubt.

C. Statute of Limitations. Violations of the laws of war listed herein are not subject to any statute of limitations.

5. DEFINITIONS

A. Combatant immunity. Under the law of armed conflict, only a lawful combatant enjoys "combatant immunity" or "belligerent privilege" for the lawful conduct of hostilities during armed conflict.

B. Enemy. "Enemy" includes any entity with which the United States or allied forces may be engaged in armed conflict, or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof. "Enemy" specifically includes any organization of terrorists with international reach.

C. In the context of and was associated with armed conflict. Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (e.g., murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not "in the context of" the armed conflict). The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war," or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

D. Military Objective. "Military objectives" are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

E. Object of the attack. "Object of the attack" refers to the person, place, or thing intentionally targeted. In this regard, the term includes neither collateral damage nor incidental injury or death.
F. Protected property. "Protected property" refers to property specifically protected by the law of armed conflict such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provided they are not being used for military purposes or are not otherwise military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions but does not include all civilian property.

G. Protected under the law of war. The person or object in question is expressly "protected" under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as such by the applicable law of armed conflict. For example, persons who either are hors de combat or medical or religious personnel taking no active part in hostilities are expressly protected, but other civilians may not be.

H. Should have known. The facts and circumstances were such that a reasonable person in the Accused's position would have had the relevant knowledge or awareness.

6. CRIMES AND ELEMENTS

A. Substantive Offenses—War Crimes. The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

1) Willful Killing Of Protected Persons

a. Elements.

(1) The accused killed one or more persons;
(2) The accused intended to kill such person or persons;
(3) Such person or persons were protected under the law of war;
(4) The accused knew or should have known of the factual circumstances that established that protected status; and
(5) The killing took place in the context of and was associated with armed conflict.

b. Comments.

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.
2) Attacking Civilians
   a. **Elements.**
      (1) The accused engaged in an attack;
      (2) The object of the attack was a civilian population as such or individual civilians not taking direct or active part in hostilities;
      (3) The accused intended the civilian population as such or individual civilians not taking direct or active part in hostilities to be an object of the attack; and
      (4) The attack took place in the context of and was associated with armed conflict.
   b. **Comments.**
      (1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

3) Attacking Civilian Objects
   a. **Elements.**
      (1) The accused engaged in an attack;
      (2) The object of the attack was civilian property, that is, property that was not a military objective;
      (3) The accused intended such property to be an object of the attack;
      (4) The accused knew or should have known that such property was not a military objective; and
      (5) The attack took place in the context of and was associated with armed conflict.
   b. **Comments.**
      (1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

4) Attacking Protected Property
   a. **Elements.**
      (1) The accused engaged in an attack;
      (2) The object of the attack was protected property;
      (3) The accused intended such property to be an object of the attack;
      (4) The accused knew or should have known of the factual circumstances that established that protected status; and
(5) The attack took place in the context of and was associated with armed conflict.

b. Comments.
(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

5) Pillaging
a. Elements.
(1) The accused appropriated or seized certain property;
(2) The accused intended to appropriate or seize such property for private or personal use;
(3) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and
(4) The appropriation or seizure took place in the context of and was associated with armed conflict.

b. Comments.
(1) As indicated by the use of the term “private or personal use,” legitimate captures or appropriations, or seizures justified by military necessity, cannot constitute the crime of pillaging.

6) Denying Quarter
a. Elements.
(1) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;
(2) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;
(3) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;
(4) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and
(5) The conduct took place in the context of and was associated with armed conflict.

b. Comments.
(1) Element (3) precludes this offense from being interpreted as limiting the application of lawful means or methods of warfare against enemy
7) **Taking Hostages**
   
a. **Elements.**
   
   (1) The accused seized, detained, or otherwise held hostage one or more persons;
   
   (2) The accused threatened to kill, injure, or continue to detain such person or persons;
   
   (3) The accused intended to compel a State, an international organization, a natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; and
   
   (4) The conduct took place in the context of and was associated with armed conflict.

   b. **Comments.**
   
   (1) Consistent with Section 4(B) of this Instruction, this offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by the law of armed conflict.

8) **Employing Poison or Analogous Weapons**
   
a. **Elements.**
   
   (1) The accused employed a substance or a weapon that releases a substance as a result of its employment;
   
   (2) The substance was such that exposure thereto causes death or serious damage to health in the ordinary course of events, through its asphyxiating, poisonous, or bacteriological properties;
   
   (3) The accused employed the substance or weapon with the intent of utilizing such asphyxiating, poisonous, or bacteriological properties as a method of warfare;
   
   (4) The accused knew or should have known of the nature of the substance or weapon; and
   
   (5) The conduct took place in the context of and was associated with armed conflict.

   b. **Comments.**
   
   (1) The “death or serious damage to health” required by Element (2) of this offense must be a direct result of the substance’s effect or effects on the human body (e.g., asphyxiation caused by the depletion of atmospheric
oxygen secondary to a chemical or other reaction would not give rise to this offense).

(2) The clause “serious damage to health” does not include temporary incapacitation or sensory irritation.

(3) The use of the “substance or weapon” at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.

(4) The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences (e.g., mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense).

9) Using Protected Persons as Shields
   a. Elements.
      (1) The accused positioned, or took advantage of the location of, one or more civilians or persons protected under the law of war;
      (2) The accused intended to use the civilian or protected nature of the person or persons to shield a military objective from attack or to shield, favor, or impede military operations; and
      (3) The conduct took place in the context of and was associated with armed conflict.

10) Using Protected Property as Shields
    a. Elements.
       (1) The accused positioned, or took advantage of the location of, civilian property or property protected under the law of war;
       (2) The accused intended to shield a military objective from attack or to shield, favor, or impede military operations; and
       (3) The conduct took place in the context of and was associated with armed conflict.

11) Torture
    a. Elements.
       (1) The accused inflicted severe physical or mental pain or suffering upon one or more persons;
       (2) The accused intended to inflict such severe physical or mental pain or suffering;
(3) Such person or persons were in the custody or under the control of the accused; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. Comments.

(1) Consistent with Section 4(B) of this Instruction, this offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed punishments. This offense does not include the incidental infliction of pain or suffering associated with the legitimate conduct of hostilities.

(2) Severe "mental pain or suffering" is the prolonged mental harm caused by or resulting from:

(a) the intentional infliction or threatened infliction of severe physical pain or suffering;

(b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(c) the threat of imminent death; or

(d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) "Prolonged mental harm" is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.

(4) Element (3) of this offense does not require a particular formal relationship between the accused and the victim. Rather, it precludes prosecution for pain or suffering consequent to a lawful military attack.

12) Causing Serious Injury

a. Elements.

(1) The accused caused serious injury to the body or health of one or more persons;

(2) The accused intended to inflict such serious injury;

(3) Such person or persons were in the custody or under the control of the accused; and

(4) The conduct took place in the context of and was associated with armed conflict.
b. Comments.
   (1) "Serious injury" includes fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs.

13) Mutilation or Maiming
   a. Elements.
      (1) The accused subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage;
      (2) The accused intended to subject such person or persons to such mutilation;
      (3) The conduct caused death or seriously damaged or endangered the physical or mental health or appearance of such person or persons.
      (4) The conduct was neither justified by the medical treatment of the person or persons concerned nor carried out in the interest of such person or persons;
      (5) Such person or persons were in the custody or control of the accused; and
      (6) The conduct took place in the context of and was associated with armed conflict.

14) Use of Treachery or Perfidy
   a. Elements.
      (1) The accused invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the law of war;
      (2) The accused intended to betray that confidence or belief;
      (3) The accused killed, injured, or captured one or more persons;
      (4) The accused made use of that confidence or belief in killing, injuring, or capturing such person or persons; and
      (5) The conduct took place in the context of and was associated with armed conflict.
15) Improper Use of Flag of Truce
   a. *Elements.*
      (1) The accused used a flag of truce;
      (2) The accused made such use in order to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there was no such intention on the part of the accused; and
      (3) The conduct took place in the context of and was associated with armed conflict.

16) Improper Use of Protective Emblems
   a. *Elements.*
      (1) The accused used a protective emblem recognized by the law of armed conflict;
      (2) The accused undertook such use for combatant purposes in a manner prohibited by the law of armed conflict;
      (3) The accused knew or should have known of the prohibited nature of such use; and
      (4) The conduct took place in the context of and was associated with armed conflict.
   b. *Comments.*
      (1) "Combatant purposes," as used in Element (2) of this offense, means purposes directly related to hostilities and does not include medical, religious, or similar activities.

17) Degrading Treatment of a Dead Body
   a. *Elements.*
      (1) The accused degraded or otherwise violated the dignity of the body of a dead person;
      (2) The accused intended to degrade or otherwise violate the dignity of such body;
      (3) The severity of the degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and
      (4) The conduct took place in the context of and was associated with armed conflict.
b. *Comments.*

(1) Element (2) of this offense precludes prosecution for actions justified by military necessity.

18) *Rape*

a. *Elements.*

(1) The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(2) The invasion was committed by force, threat of force or coercion, or was committed against a person incapable of giving consent; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (2) of this offense recognizes that consensual conduct does not give rise to this offense.

(2) It is understood that a person may be incapable of giving consent if affected by natural, induced, or age-related incapacity.

(3) The concept of “invasion” is linked to the inherent wrongfulness requirement for all offenses. In this case, for example, a legitimate body cavity search could not give rise to this offense.

(4) The concept of “invasion” is gender neutral.

B. *Substantive Offenses—Other Offenses Triable by Military Commission.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

1) *Hijacking or Hazarding a Vessel or Aircraft*

a. *Elements.*

(1) The accused seized, exercised control over, or endangered the safe navigation of a vessel or aircraft;

(2) The accused intended to so seize, exercise control over, or endanger such vessel or aircraft; and

(3) The conduct took place in the context of and was associated with armed conflict.
b. **Comments.**

(1) A seizure, exercise of control, or endangerment required by military necessity, or against a lawful military objective undertaken by military forces of a State in the exercise of their official duties, would not satisfy the wrongfulness requirement for this crime.

2) **Terrorism**

a. **Elements.**

(1) The accused killed or inflicted bodily harm on one or more persons or destroyed property;

(2) The accused:

(a) intended to kill or inflict bodily harm on one or more persons;

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and

(4) The killing, harm or destruction took place in the context of and was associated with armed conflict.

b. **Comments.**

(1) Element (1) of this offense includes the concept of causing death or bodily harm, even if indirectly.

(2) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

3) **Murder by an Unprivileged Belligerent**

a. **Elements.**

(1) The accused killed one or more persons;

(2) The accused:

(a) intended to kill or inflict great bodily harm on such person or persons

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;
(3) The accused did not enjoy combatant immunity; and

(4) The killing took place in the context of and was associated with armed conflict.

b. Comments.

(1) The term "kill" includes intentionally causing death, whether directly or indirectly:

(2) Unlike the crimes of willful killing or attacking civilians, in which the victim's status is a prerequisite to criminality, for this offense the victim's status is immaterial. Even an attack on a soldier would be a crime if the attacker did not enjoy "belligerent privilege" or "combatant immunity."

4) Destruction of Property by an Unprivileged Belligerent

a. Elements.

(1) The accused destroyed property;

(2) The property belonged to another person, and the destruction was without that person's consent;

(3) The accused intended to destroy such property;

(4) The accused did not enjoy combatant immunity; and

(5) The destruction took place in the context of and was associated with armed conflict.

5) Aiding the Enemy

a. Elements.

(1) The accused aided the enemy;

(2) The accused intended to aid the enemy; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. Comments.

(1) Means of accomplishing Element (1) of this offense include, but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.

(2) The requirement that conduct be wrongful for this crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.
(3) The requirement that conduct be wrongful for this crime may necessitate that, in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

6) Spying

a. Elements.

   (1) The accused collected or attempted to collect certain information;

   (2) The accused intended to convey such information to the enemy;

   (3) The accused, in collecting or attempting to collect the information, was lurking or acting clandestinely, while acting under false pretenses; and

   (4) The conduct took place in the context of and was associated with armed conflict.

b. Comments.

   (1) Members of a military organization not wearing a disguise and others who carry out their missions openly are not spies, if, though they may have resorted to concealment, they have not acted under false pretenses.

   (2) Related to the requirement that conduct be wrongful or without justification or excuse in this case is the fact that, consistent with the law of war, a lawful combatant who, after rejoining the armed force to which that combatant belongs, is subsequently captured, can not be punished for previous acts of espionage. His successful rejoining of his armed force constitutes a defense.

7) Perjury or False Testimony

a. Elements.

   (1) The accused testified at a military commission, in proceedings ancillary to a military commission, or provided information in a writing executed under an oath to tell the truth or a declaration acknowledging the applicability of penalties of perjury in connection with such proceedings;

   (2) Such testimony or information was material;

   (3) Such testimony or information was false; and

   (4) The accused knew such testimony or information to be false.
8) Obstruction of Justice Related to Military Commissions

   a. Elements.

      (1) The accused did an act;
      (2) The accused intended to influence, impede, or otherwise obstruct the due
          administration of justice; and
      (3) The accused did such act in the case of a certain person against whom the
          accused had reason to believe:

             (a) there were or would be proceedings before a military commission
                 or
             (b) there was an ongoing investigation of offenses triable by military
                 commission.

C. Other Forms of Liability and Related Offenses. A person is criminally liable as a
principal for a completed substantive offense if that person commits the offense
(perpetrator), aids or abets the commission of the offense, solicits commission of the
offense, or is otherwise responsible due to command responsibility. Such a person
would be charged as a principal even if another individual more directly perpetrated
the offense. In proving culpability, however, the below listed definitions and
elements are applicable. Additionally, if a substantive offense was completed, a
person may be criminally liable for the separate offense of accessory after the fact. If
the substantive offense was not completed, a person may be criminally liable of the
lesser-included offense of attempt or the separate offense of solicitation. Finally,
regardless of whether the substantive offense was completed, a person may be
criminally liable of the separate offense of conspiracy in addition to the substantive
offense. Each element need not be specifically charged.

1) Aiding or Abetting

   a. Elements.

      (1) The accused committed an act that aided or abetted another person or
          entity in the commission of a substantive offense triable by military
          commission;
      (2) Such other person or entity committed or attempted to commit the
          substantive offense; and
      (3) The accused intended to or knew that the act would aid or abet such other
          person or entity in the commission of the substantive offense or an
          associated criminal purpose or enterprise.

   b. Comments.

      (1) The term "aided or abetted" in Element (1) includes: assisting,
          encouraging, advising, instigating, counseling, ordering, or procuring
another to commit a substantive offense; assisting, encouraging, advising, counseling, or ordering another in the commission of a substantive offense; and in any other way facilitating the commission of a substantive offense.

(2) In some circumstances, inaction may render one liable as an aider or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so, that person may be considered to have aided or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) An accused charged with aiding or abetting should be charged with the related substantive offense as a principal.

2) Solicitation

a. Elements.

(1) The accused solicited, ordered, induced, or advised a certain person or persons to commit one or more substantive offenses triable by military commission; and

(2) The accused intended that the offense actually be committed.

b. Comments.

(1) The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to induce a person or persons to commit any offense triable by military commission. It is not necessary that the person or persons solicited, ordered, induced, advised, or assisted agree to or act upon the solicitation or advice. If the offense solicited is actually committed, however, the accused is liable under the law of armed conflict for the substantive offense. An accused should not be convicted of both solicitation and the substantive offense solicited if criminal liability for the substantive offense is based upon the solicitation.

(2) Solicitation may be by means other than speech or writing. Any act or conduct that reasonably may be construed as a serious request, order, inducement, advice, or offer of assistance to commit any offense triable by military commission may constitute solicitation. It is not necessary that the accused act alone in the solicitation, order, inducement, advising, or assistance. The accused may act through other persons in committing this offense.

(3) An accused charged with solicitation of a completed substantive offense should be charged for the substantive offense as a principal. An accused charged with solicitation of an uncompleted offense should be charged for the separate offense of solicitation. Solicitation is not a lesser-included offense of the related substantive offense.
3) Command/Superior Responsibility – Perpetrating

a. Elements.

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused’s subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding or abetting such offense or offenses; and

(4) The accused failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses.

b. Comments.

(1) The phrase “effective authority and control” in Element (1) of this offense includes the concept of relative authority over the subject matter or activities associated with the perpetrator’s conduct. This may be relevant to a civilian superior who should not be held responsible for the behavior of subordinates involved in activities that have no relationship to such superior’s sphere of authority. Subject matter authority need not be demonstrated for command responsibility as it applies to a military commander.

(2) A commander or other military or civilian superior, not in command, charged with failing adequately to prevent or repress a substantive offense triable by military commission should be charged for the related substantive offense as a principal.

4) Command/Superior Responsibility – Misprision

a. Elements.

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused’s subordinates had committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused knew or should have known that the subordinate or subordinates had committed, attempted to commit, conspired to commit, solicited, or aided or abetted such offense or offenses; and

(4) The accused failed to submit the matter to competent authorities for investigation or prosecution as appropriate.
b. **Comments.**

(1) The phrase, "effective authority and control" in Element (1) of this offense includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who cannot be held responsible under this offense for the behavior of subordinates involved in activities that have nothing to do with such superior's sphere of authority.

(2) A commander or superior charged with failing to take appropriate punitive or investigative action subsequent to the perpetration of a substantive offense triable by military commission should not be charged for the substantive offense as a principal. Such commander or superior should be charged for the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.

5) **Accessory After the Fact**

a. **Elements.**

(1) The accused received, comforted, or assisted a certain person;

(2) Such person had committed an offense triable by military commission;

(3) The accused knew that such person had committed such offense or believed such person had committed a similar or closely related offense; and

(4) The accused intended to hinder or prevent the apprehension, trial, or punishment of such person.

b. **Comments.**

(1) Accessory after the fact should be charged separately from the related substantive offense. It is not a lesser-included offense of the related substantive offense.

6) **Conspiracy**

a. **Elements.**

(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;
(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined it willfully, that is, with the intent to further the unlawful purpose; and

(3) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

b. Comments.

(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact "triable by military commission."

(3) The overt act must be done by one or more of the conspirators, but not necessarily the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains
guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

7) Attempt
   a. Elements.
      (1) The accused committed an act;
      (2) The accused intended to commit one or more substantive offenses triable by military commission;
      (3) The act amounted to more than mere preparation; and
      (4) The act apparently tended to effect the commission of the intended offense.
   b. Comments.
      (1) To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose. This intent need not involve knowledge that the offense is in fact "triable by military commission."
      (2) Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.
      (3) A person who purposely engages in conduct that would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.
      (4) It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended offense, solely because of the person's own sense that it was wrong, prior to the completion of the substantive offense. The voluntary abandonment defense is not allowed if the
abandonment results, in whole or in part, from other reasons; for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

(5) Attempt is a lesser-included offense of any substantive offense triable by military commission and need not be charged separately. An accused may be charged with attempt without being charged with the substantive offense.

7. EFFECTIVE DATE
This Instruction is effective immediately.

[Signature]
William J. Haynes II
General Counsel of the Department of Defense
MCI 2 is perhaps the most important of the eight Instructions signed on April 30, 2003 because, while "not a codification of the law," to quote the May 2, 2003 briefer, it is "an articulation, a distillation . . . of customary international law of armed conflict, which is the basis of the substantive law that military commissions would use." Perhaps in recognition of its centrality to the process, it also stands apart from the other seven in that it alone was issued in proposed form (on February 28, 2003) and subjected to a measure of public scrutiny before being made final. According to the briefing, DoD "received quite a number of comments, very useful comments, from various officials, from other governments, nongovernmental organizations, and private groups and individuals in and outside of government. It ended up being a very useful process, and allowed us to refine a lot of the language in" MCI 2.

Who was consulted? In answer to a question, "Do you have somebody from the United Nations consulting you on this?" (possibly referring to whether military commissions might be used to try persons detained in Iraq), the briefer was less than precise: "We haven't really been, unless we've specifically spoken to them about it, and asked if they minded. We have got in consultations from—some private, some publicly. Most who have wanted to make their consultations known have done so by putting their own comments on the Web or something like that. So we've avoided saying exactly who consulted, necessarily, in various areas." Comments are known to have been submitted (and made available to the public) by the National Institute of Military Justice, Human Rights Watch, the National Association of Criminal Defense Lawyers, the Bar Association of the District of Columbia, the Lawyers Committee for Human Rights, the American Civil Liberties Union, and Captain John E. Tuthill, a retired Naval Reserve judge advocate. These comments are reproduced above. Who else commented—and to what effect—is not yet known, and may never be.

Had this rulemaking been subject to the requirements of the Administrative Procedure Act, greater transparency would have been achieved. This is of course even more true in the case of MCIs Nos. 1 and 3-8, as to which there was no public opportunity to comment at all on drafts. Whether persons outside the government were afforded informal opportunities to comment on those other MCIs—and if so, who those persons were and what they said in their comments—is, again, not known for certain. DoD has been very guarded about this.

The HRW and NIMJ comments focused, among other things, on the need to clarify the sources relied on in the crimes and elements, and in general to furnish
the kind of explanatory material that military lawyers and judges have found so useful in connection with the MCM. This suggestion was not adopted. Presumably there exists within DoD a section-by-section analysis comparable to those that were prepared for the Military Rules of Evidence, the Rules for Courts-Martial, and other parts of the MCM. It appears that that information will not be disseminated in time to assist those who will play formal roles in military commission trials and direct and collateral reviews.

The May 2, 2003 briefer stated that there were numerous wording changes throughout the final text of MCI 2. In addition, “[t]here was some clarity in the ‘Wrongfulness and Defenses’ section, where it caused a little bit of confusion in the earlier draft and appeared as if there was a burden shifting, and we clarified that the burden is always on the prosecution to provide guilt beyond a reasonable doubt. A few of the other definitions had some wording changes with extra clarification.” This may convey the mistaken impression that little more occurred than the correction of typographical errors (although there were one or two of those).

The briefer noted, for example, that two offenses had been added that were not in the draft that was circulated for comment. These are “Torture,” which now appears as war crime No. 11, and “Causing Serious Injury,” which now appears as war crime No. 12. HRW and Captain Tuthill in particular had called attention to the omission of any reference to the crime of torture. The final version is an improvement over the comment draft to the extent that it clearly distinguishes between substantive offenses that are war crimes and substantive offenses that are in the category of “Other Offenses Triable by Military Commission.” This appears to have been in response to recommendations by NIMJ and HRW that the MCI indicate which of the listed crimes are a reflection of the law of war and which fall in some other category.

Section 5(B) was expanded between the draft and final versions, and now expressly includes any entity that is preparing to attack the United States. The definition was also modified, as suggested by NIMJ, to cover any organization of terrorists with “international”—as opposed to “global”—reach, to avoid any implication that, in order to qualify, the organization must be able to act literally anywhere in the world, as opposed to merely being able to act across or without regard to national boundaries.

The second comment to “Attempt” was expanded by adding the following sentence at the end: “The agreement need not include knowledge that any relevant offense is in fact ‘triable by military commission.’” Nothing in the final version of MCI 2 evinces an intent to create “mere membership” offenses, as was stated at the February 28, 2003 press briefing.

Is MCI 2 valid? The comments of both NACDL and LCHR invoked Article I, § 8, of the Constitution, which confers on Congress the power “to define and punish . . . Offences against the Law of Nations.” Perhaps for this reason, the drafters were at pains, as indicated above, to disclaim any substantive lawmaking by the President.
Congress has recognized in Art. 21, UCMJ, 10 U.S.C. § 821, that military commissions can try violations of the law of war, thereby inferentially enacting the customary and treaty-based law of war to the extent they "define" war crimes.

Does MCI 2 meet international norms? Two sets of norms could be applied: those set by human rights law, which regulates the relationship between states and individuals under their jurisdiction, and those set by humanitarian law, which governs the wartime relationship between belligerent states and protected persons, which include enemy persons. See generally René Provost, International Human Rights and Humanitarian Law (2002). Experience suggests that challenges and responses to the reach of MCI 2 will often fail to identify the arena in which the battle is being waged: domestic or international and, if international, human rights or humanitarian. Although doctrines overlap—nullum crimen sine lege and ex post facto, for example—the distinctions are still helpful.

NACDL, HRW, LCHR and the ACLU all called attention to the danger of an ex post facto problem in applying MCI 2 to new law of war offenses. The proceedings may also be challenged on the ground that they violate international norms (nullum crimen sine lege) which prohibit prosecution for newly defined crimes. In response, the final version added a sentence to § 3(A) as follows: "No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question." The last sentence of that section was also amended to read, "Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date." NACDL’s comments also appear to have prompted DoD to add the following at the end of § 4(B): "As provided in Section 5(C) of [MCO 1], the prosecution bears the burden of establishing the Accused's guilt beyond a reasonable doubt in all cases tried by a military commission. Each element of an offense enumerated herein must be proven beyond a reasonable doubt." While it is salutary to have this fundamental point reflected in MCI 2, it is important to remember that the PMO and MCO 1 are not restated in the MCIs, and that the MCIs must at all times be read in light of those documents.

A third example of how comments led to the tightening of language appears earlier in the same § 4(B). The February 28, 2003 draft had provided that certain defenses "may be applicable in certain trials by military commission." The final version, perhaps prompted by LCHR’s comments, uses the clearly preferable formula "may be applicable to certain offenses subject to trial by military commission." LCHR also appears to have been responsible for a small but potentially important change in the fourth sentence of this section, concerning when wrongfulness may be inferred. The ACLU’s comments seem to have prompted inclusion of the last two sentences of § 4(B), which echo MCO 1, § 5(C).

HRW, NACDL and the ACLU objected to the draft’s disclaimer of any statute of limitations in § 4(C). Their objections bore fruit, at least in part. The draft had referred in this regard to "[v]iolations of the laws of war and other crimes triable by military commission listed herein," cf. Rome Statute art. 29, but the final version deletes the reference to "other crimes triable by military commission." The clear
implication is that an otherwise pertinent statute of limitations may indeed apply to “other crimes.”

Several changes were made in the definitions in § 5. For example, the definition of “Combatant immunity,” § 5(C), was modified, perhaps in response to HRW, LCHR and NACDL comments, to refer only to “lawful combatant” rather than “lawful combatant in the armed forces of a legitimate party to an armed conflict,” as the draft had done. DoD did not adopt LCHR’s suggestion that “combatant immunity” or “belligerent privilege” be explicitly defined by reference to customary law. “In the context of and was associated with armed conflict” was slightly changed by inserting the sentence, “The focus of this element is not the nature or characterization of the conflict, but the nexus to it.” LCHR’s suggestion that DoD adopt the definition employed by the ICTY was not followed. The distinction between a “war crime,” which would fall within the jurisdiction of the commission and a “common crime,” which would not, may prove to be a matter of contention as cases come on for trial. In Tadic the International Criminal Tribunal for Former Yugoslavia required a nexus between the offense and the armed conflict. *The Prosecutor v. Tadic* (Opinion and Judgement), May 7, 1997, Case No. IT-941-T (ICTY Trial Chamber II); see also *The Prosecutor v. Delalic, Mucic, and Landzo* (Judgement), Nov. 16, 1998, Case No. IT-95-14-T (ICTY Trial Chamber). However, the International Criminal Tribunal for Rwanda imposed a far more restrictive standard, requiring the prosecution to establish beyond a reasonable doubt that the criminal behavior alleged was intended to carry out the war effort. *The Prosecutor v. Akayesu* (Judgement), Sept. 2, 1998, Case No. ICTR-96-4-T (ICTR Trial Chamber I); see also *The Prosecutor v. Kayishema and Ruzindana* (Judgement), May 21, 1999, Case No. ICTR-95-1-T (ICTR Trial Chamber); *The Prosecutor v. Rutaganda* (Judgement), Dec. 6, 1999, Case No. ICTR-96-3-T (ICTR Trial Chamber); *The Prosecutor v. Musema* (Judgement), Jan. 27, 2000, Case No. ICTR 96-13-T (ICTR Trial Chamber).

BADC asked whether part of the definition of “Terrorism” in what wound up as § 6(B)(2)(a)(3) was narrower than it should have been. For their part, HRW and LCHR suggested that the definition was overbroad. In the end, DoD changed both the elements and the comments in a variety of ways, such as deleting the requirement that bodily harm be “great.” It also substituted “The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion” for § 6(A)(18)(a)(3) of the draft, which had read “The killing or destruction was an attack or part of an attack designed to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government.” BADC also appears to have prompted DoD to modify the first element under “Conspiracy” to make it clear that the conspirators’ common purpose was “the commission or intended commission of one or more substantive offenses triable by military commission.” Compare [draft] § 6(B)(6)(a)(1) with [final] § 6(C)(6)(a)(1).

HRW’s comments appear to have impelled DoD to add the third comment to the provision on “Aiding the Enemy,” which appears at § 6(B)(5)(b)(3). However, the
ACLU's suggestion to delete that offense entirely (or, in the alternative, to revise it to track the title 18 offense of providing material support to terrorists, 18 U.S.C. § 2339A) and LCHR's suggestion that a materiality concept be added were not adopted.

HRW, LCHR and NIMJ were all troubled by use of the term "lurking" in the definition of "Spying." Since that vague term is currently used in Art. 106, UCMJ, 10 U.S.C. § 906, it is not surprising that it survived the editing process. On the other hand, the second comment under "Conspiracy," § 6(C)(b)(2), was modified in the interest of clarity.

DoD rejected HRW's and LCHR's suggestions regarding the rape provisions now found in § 6(A)(18). LCHR had urged incorporation of the definition employed by the ICTY and ICC. However, it did include a new fourth comment making it clear that the concept of "invasion" is gender neutral. LCHR had better luck with its suggestion that the "Aiding and Abetting" provision, § 6(C)(1)(a)(1), be confined to substantive offenses triable by military commission. DoD also made changes to the "Conspiracy" provision in response to LCHR's detailed comments, making it clear in the final version, § 6(C)(6)(a)(1), that joining an enterprise of persons who share a common criminal purpose would fall within the definition only if that purpose "involved, at least in part, the commission or intended commission of one or more substantive offense triable by military commission." The draft, § 6(B)(6)(a)(1), had required only "a common criminal purpose," without specifying that it be one whose goal would be an offense triable by military commission.

These examples of changes from the draft to the final version of what became MCI 2 are not intended to be an exhaustive catalogue. Rather, they suggest that, absent an official redline version that clearly highlights the editing, each and every part of the two iterations must be compared in order to uncover clues to the drafters' intent. The examples also suggest that the changes were pervasive and considered, and that DoD carefully reviewed the comments it received. The result is both good news and bad: it validates DoD's decision to solicit comments, but it raises a question as to why the invitation was confined to what became MCI 2. The answer may lie in the recognition within the Department and elsewhere in the Executive Branch that, after considerable delay, the time to conduct trials was finally at hand, and that further delay would be inimical to the national interest.

On February 4, 1999, the United States submitted four proposals entitled "draft elements of crimes" for use in International Criminal Court proceedings. While the United States is not a State Party to the Rome Statute, those submissions are nonetheless of considerable interest from the standpoint of what they reveal about the background of MCI 2. The first of the four 1999 proposals related to genocide (Article 6); the second related to crimes against humanity (Article 7); the third related to war crimes against belligerents or peacekeepers (Article 8); and the fourth related to inchoate offenses (Articles 25.3 and 28). The proposals, PCNICC/1999/DP4, as well as a June 1998 version, Annex of Definitional Elements for Part Two Crimes, A/CONF.183/C.1/L.10, offered definitions of genocide, crimes
against humanity, and war crimes, are reproduced below as background materials because they presumably served as the basis for MCI 2. Although the government has not offered an explanation for any of the changes, a comparison of the texts as well as the “General Comments” and “Terminology” sections that introduced the 1999 proposals and the “comments” on crimes against humanity and war crimes may be clues to the drafters’ intent in MCI 2.

More broadly, the comments of one European observer are worth recalling: “Although the proposal certainly had the virtue of throwing light on the nature and character of the individual acts constituting war crimes, its language (and its legal philosophy as well) strictly reflected the standards of English and American criminal law. In European countries, criminal law, and especially criminal procedure, are based on different criteria: continental judges would probably not feel at ease with very detailed definitions and would not recognize the need for such rigid guidance.” Gabriella Venturini, War Crimes in International Armed Conflicts, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 99, 101 (Mauro Politi & Giuseppe Nesi eds. 2001).

The table that appears below is offered as a starting point for comparing the crimes the United States proposed for ICC proceedings in 1999 and those set forth in MCI 2. Since the MCI 2 list is not exhaustive, see § 3(C), and given the extraordinary tempo and unpredictability of global developments, the possibility cannot be ruled out that a commission will be called upon to try a charge that is not listed there. In that event, it will be particularly important to be familiar with the longer list of war crimes identified in the 1999 proposals. Reference to Crimes and Elements and related doctrinal developments under the Rome Statute and in other fora that may shed light on law of war issues may be necessary not only in such cases, but also in cases involving “listed” MCI 2 crimes, notwithstanding the drafters’ unexplained effort to limit intersystem inferences through § 3(B) (“Effect of Other Laws”). No source that, applying the usual standards of legal reasoning, persuasively illuminates the part of the law of nations as to which MCI 2 purports to be “declarative of existing law,” § 3(A), can be off-limits.

MCI 2 merits study not only for the use to which it may be put in military commission trials but also as a reflection of current United States operational doctrine. See Noëlle Quénivet, A US Version of What Constitutes a “Military Objective”? infra (discussing MCI 2, § 5(D)).
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A US version of what constitutes a “military objective”?

A shift in the interpretation of a military objective by the US is evidenced in the recent Military Commission Instructions. A series of eight military commission instructions provide guidance to the military commissions established by the Military Order (13 November 2001) and by Military Commission Order No. 1 (21 March 2002) was issued on 30 April 2003 by the US Department of Defense. The second set of instructions relates to the crimes to be tried by these commissions.

The Military Commission Instruction (MCI) No. 2 contains the definition of a “military objective” in article 5D which, although it draws on the definition spelled out in article 52(2) of Additional Protocol I, deviates from that definition in a number of ways. Read in conjunction with article 5B of MCI No. 2, which states that other relevant provisions should not be given too much attention when applying or interpreting the MCI even if the language is very similar, it is clear that the language is designed to supplant the definition in API. This means that the military commissions, when examining whether a combatant/fighter targeted a military objective, can only make use of article 5D MCI No. 2 and should not refer to article 52(2). As article 40(c) of the US Army Field Manual had adopted the wording of article 52(2) of API in its entirety, the major differences between these two definitions now become very important.

According to article 5D MCI No. 2, military targets include objectives that effectively contribute to helping the opposing force continue to fight (“war-sustaining capability”). This new language allows a wider range of objectives to be targeted and includes virtually all of the infrastructure and services of a State. For example, a power-plant that provides electricity to, among others, a company producing ammunition may be viewed as a military objective since it sustains the war capability of the State. The definition illustrates the new US military strategy to think in terms of “systems” and to target any object that may be part of a 3C (control, command, communication) system, i.e., a system that keeps a war-monger in power and thus prolongs the war effort. Recent examples are to be found in the attacks of TV stations in Belgrade and in Baghdad as TV channels were considered as able to sustain the war effort by diffusing propaganda in favour of the government in place. There is no doubt that this was not the original idea of the drafters of the Additional Protocol I.

A key difference between MCI No.2 and Article 52(2) API is the omission of the word “definite” in front of the expression “military advantage”. The ICRC Commentary on article 52(2) of API clearly explains that “it is not legitimate to launch an attack which only offers potential or indeterminate advantages”. By failing to qualify the “military advantage”, the US government signifies that it may target objectives that may have a “potential” military advantage. The Commentary points out that “there must be a definite military advantage for every military objective that is attacked”. The requirement of definite military objective militates against the “system” approach adopted by the United States that may be more indirect.

Looking at the practice of the US in the last few years, it was already possible to see this shift in the interpretation of what constitutes a military objective. The Military Commission Instruction No. 2 simply formally acknowledges the change.

Responsibility

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SUBJECT: Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Military Commission Instruction No. 1, current edition

1. PURPOSE
This Instruction establishes the responsibilities of the Office of the Chief Prosecutor and components thereof.

2. AUTHORITY
This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (b), (c), and (d). The provisions of reference (e) are applicable to this Instruction.

3. OFFICE OF THE CHIEF PROSECUTOR
A. General. The Office of the Chief Prosecutor shall be a component of the Office of Military Commissions and shall be comprised of the Chief Prosecutor, Prosecutors, and other persons properly under the supervision of the Chief Prosecutor.
B. Chief Prosecutor.

1) The Chief Prosecutor shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

2) The Chief Prosecutor shall report directly to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

3) The Chief Prosecutor shall have authority to subpoena any individual to appear as a witness, to testify, or to produce any evidence in a case referred to military commissions or in a criminal investigation associated with a case that may be referred to a military commission.

4) The Chief Prosecutor shall direct the overall prosecution effort pursuant to references (a) and (b), ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Prosecutor.

5) The Chief Prosecutor shall ensure that all personnel assigned to the Office of the Chief Prosecutor review, and attest that they understand and will comply with, references (a) and (b) and all Supplementary Regulations and Instructions issued in accordance therewith.

6) The Chief Prosecutor shall inform the Deputy General Counsel (Legal Counsel) of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Prosecutor.

7) The Chief Prosecutor shall supervise all Prosecutors and other personnel assigned to the Office of the Chief Prosecutor including any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

8) The Chief Prosecutor, or his designee, shall fulfill applicable performance evaluation requirements associated with Prosecutors and other personnel properly under the supervision of the Office of the Chief Prosecutor.

9) The Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to perform the duties of the prosecution as set forth in Section 4(B)(2) of reference (a). The Chief Prosecutor may detail himself to perform such duties.

10) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors faithfully represent the United States in discharging their prosecutorial duties before military commissions conducted pursuant to references (a) and (b).

11) The Chief Prosecutor shall ensure that all Prosecutors and Assistant Prosecutors have taken an oath to perform their duties faithfully.
12) The Chief Prosecutor shall ensure that all personnel properly under the supervision of the Office of the Chief Prosecutor possess the appropriate security clearances.

C. Prosecutors.

1) Prosecutors shall be detailed by the Chief Prosecutor and may be either judge advocates of any United States armed force or special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States.

2) Prosecutors shall represent the United States as Prosecutors or Assistant Prosecutors as directed by the Chief Prosecutor and in accordance with references (a) and (b).

3) Prosecutors shall fulfill all responsibilities detailed in references (a) and (b), those set forth in this Instruction, and those assigned by the Chief Prosecutor.

4) Prosecutors shall ensure that all court reporters, security personnel, and interpreters who are to perform duties in relation to a military commission proceeding have taken an oath to perform their duties faithfully. As directed by the Presiding Officer, Prosecutors also shall administer appropriate oaths to witnesses during military commission proceedings.

4. DUTIES AND RESPONSIBILITIES OF THE PROSECUTION

A. Regular Duties. The Prosecution shall perform all duties specified or implied in reference (a) as responsibilities of the Prosecution.

B. Administrative Duties. The Prosecution shall, as directed by the Presiding Officer or the Appointing Authority, prepare any documentation necessary to facilitate the conduct of military commissions proceedings. The Prosecution shall, as directed by the Deputy General Counsel (Legal Counsel), prepare a trial guide to provide a standardized administrative plan for the conduct of military commission proceedings. Unless directed otherwise by the Appointing Authority, the Presiding Officer may, in his discretion, depart from this guide as appropriate.

C. Special Duties. The Prosecution shall perform all other functions, consistent with references (a) and (b), as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

5. POLICIES

B. **Prohibition on Certain Disclosures.** All Prosecutors must strictly comply with section 6(D)(5) and section 9 of reference (a) to ensure they do not improperly disclose classified information, national security information, or state secrets to any person not specifically authorized to receive such information.

C. **Statements To The Media.** Consistent with reference (f), the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Prosecutor may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

6. **EFFECTIVE DATE**

This Instruction is effective immediately.

[Signature]

William J. Haynes II
General Counsel of the Department of Defense
MCI 3 presents no significant changes from Military Commission Order No. 1 of March 21, 2002, regarding the Chief Prosecutor's duties and responsibilities. The term "trial counsel," familiar to military justice practitioners, appears nowhere in the present Instruction. Like the military commissions' absence of military judges, this distinctive terminology underscores the distinction between UCMJ practice and military commission practice. Indeed, the phrase "Uniform Code of Military Justice" does not appear in MCI 3.

Several questions initially raised by MCO 1 remain unresolved in MCI 3: for example, who first prepares charges, and the route by which charges reach the Chief Prosecutor. Charging specifics, such as who decides what charges will be brought, how charges are prepared, whether they need be sworn and, if so, by whom, and how they are served on the accused, all remain unarticulated. Not mentioned as among either the Chief Prosecutor's or the subordinate prosecutors' duties is the record of trial—who is responsible for its correctness? Is a copy served on either the convicted individual or his counsel, or both? Is it safe to presume that normal court-martial practice will be followed in these relatively minor administrative matters? Probably so. Not every trial issue and procedural aspect can be specified in so brief an Instruction, after all.

On the other hand, some questions that are unanswered in MCO 1 are resolved in MCI 3. For example, it is now clear that the Chief Prosecutor is appointed by and reports to the General Counsel of the Department of Defense. §§ 3(B)(1)-(2).

Section 3(B)(1) specifies that the Chief Prosecutor will be a Judge Advocate subordinate not to his/her service judge advocate general (or, if a Marine, to the Director of the Judge Advocate Division), but to the General Counsel of the Department of Defense. MCI 3's paragraphs relating to the Chief Prosecutor's supervision and direction, §§ 3(B)(2) and —(6), 4(B) and 4(C), and 5(C), make clear the General Counsel's authority over the Chief Prosecutor. Efficiency reports/fitness reports for subordinate prosecutors are prepared, in turn, by the Chief Prosecutor. § 3(B)(8); see generally Discussion of MCI 6 (Reporting Relationships for Military Commission Personnel), infra.

Authority to issue subpoenas, which in court-martial practice is conferred on the trial counsel, R.C.M. 703(e)(2)(C), is here granted to the Chief Prosecutor. § 3(B)(3).

Section 4(B) directs that "the Prosecution" prepare a trial guide for the conduct of commissions—from which Presiding Officers may depart. This, including
departure authority, is in keeping with the trial guide provided in Appendix 8 to the Manual for Courts-Martial.

Through four provisions, MCI 3 directs the Chief Prosecutor to give significant attention to maintaining the confidences of the commissions and their progress. Section 3(B)(5) directs the Chief Prosecutor to “ensure that all personnel assigned to [the prosecution] attest that they . . . will comply” with orders, regulations, and instructions issued for the commissions. Taking attestation a step further, § 3(B)(10) requires the Chief Prosecutor to “ensure that all Prosecutors . . . faithfully represent the United States . . . ,” although how he shall ensure that faithfulness goes unspecified. But as further insurance, § 3(B)(11) mandates that all prosecutors shall “have taken an oath to perform their duties faithfully.” Finally, even should there be a faithless oath-breaking digression from a commission instruction, § 5(C) adds a prohibition against communicating with the news media. Apparently there will be no embedded reporters at Guantánamo Bay.
Department of Defense  
Military Commission Instruction No. 4

April 30, 2003

SUBJECT: Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Military Commission Instruction No. 1, current edition

1. PURPOSE
This Instruction establishes the responsibilities of the Office of Chief Defense Counsel and components thereof.

2. AUTHORITY
This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (b), (c), and (d). The provisions of reference (e) are applicable to this Instruction.

3. OFFICE OF THE CHIEF DEFENSE COUNSEL
   A. General. The Office of the Chief Defense Counsel shall be a component of the Office of Military Commissions and shall be comprised of the Chief Defense Counsel, Defense Counsel, and other such persons properly under the supervision of the Chief Defense Counsel.
B. *Chief Defense Counsel*

1) The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the General Counsel of the Department of Defense.

2) The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

3) The Chief Defense Counsel shall supervise all defense activities and the efforts of Detailed Defense Counsel and other office personnel and resources pursuant to references (a) and (b), ensuring proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel and facilitating the proper representation of all Accused referred to trial before a military commission appointed pursuant to references (a) and (b).

4) The Chief Defense Counsel shall ensure that all personnel assigned to the Office of the Chief Defense Counsel review, and attest that they understand and will comply with, references (a) and (b) and all Supplementary Regulations and Instructions issued in accordance therewith. Furthermore, the Chief Defense Counsel shall regulate the conduct of Detailed Defense Counsel as deemed necessary, consistent with references (a) and (b) and subordinate instructions and regulations, and specifically shall ensure that Detailed Defense Counsel have been directed to conduct their activities consistent with applicable prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Annex B to Military Commission Instruction No. 5.

5) The Chief Defense Counsel shall inform the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the Office of the Chief Defense Counsel.


7) The Chief Defense Counsel, or his designee, shall fulfill applicable performance evaluation requirements associated with Defense Counsel and other personnel properly under the supervision of the Chief Defense Counsel.

8) The Chief Defense Counsel shall detail a judge advocate of any United States armed force to perform the duties of the Detailed Defense Counsel as set forth in Section 4(C)(2) of reference (a) and shall detail or employ any other personnel as directed by the Appointing Authority or the Presiding Officer in a particular case. The Chief Defense Counsel may not detail himself to perform the duties of Detailed Defense Counsel, nor does he form an attorney-client relationship with accused persons or incur any concomitant
confidentiality obligations.

a. The Chief Defense Counsel may, when appropriate, detail an additional judge advocate as Assistant Detailed Defense Counsel to assist in performing the duties of the Detailed Defense Counsel.

b. The Chief Defense Counsel may structure the Office of the Chief Defense Counsel so as to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to Detailed Defense Counsel.

9) The Chief Defense Counsel shall take appropriate measures to preclude Defense Counsel conflicts of interest arising from the representation of Accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including protected information) to fulfill this responsibility.

10) The Chief Defense Counsel shall take appropriate measures to ensure that each Detailed Defense Counsel is capable of zealous representation, unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all Defense Counsel (Detailed and Civilian) and take appropriate measures to ensure that Defense Counsel do not enter into agreements with other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation.

11) The Chief Defense Counsel shall ensure that an Accused tried before a military commission pursuant to references (a) and (b) is represented at all relevant times by Detailed Defense Counsel.

12) The Chief Defense Counsel shall administer all requests for replacement Detailed Defense Counsel requested in accordance with Section 4(C)(3) of reference (a). He shall determine the availability of such counsel in accordance with this Instruction.

13) The Chief Defense Counsel shall administer the Civilian Defense Counsel pool, screening all requests for pre-qualification and ad hoc qualification, making qualification determinations and recommendations in accordance with reference (a), this Instruction, and Military Commission Instruction No. 5, and ensuring appropriate notification to an Accused of civilian attorneys available to represent Accused before a military commission.

14) The Chief Defense Counsel shall ensure that all Detailed Defense Counsel and Civilian Defense Counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

15) The Chief Defense Counsel shall ensure that all personnel properly under the supervision of the Office of the Chief Defense Counsel possess the
appropriate security clearances.

C. Detailed Defense Counsel

1) Detailed Defense Counsel shall be judge advocates of any United States armed force.

2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with references (a) and (b). In this regard Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and without regard to personal opinion as to guilt; represent the interests of the Accused in any review process as provided by reference (a); and comply with the procedures accorded the Accused pursuant to Sections 5 and 6 of reference (a). Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself.

3) Detailed Defense Counsel shall have primary responsibility to prevent conflicts of interest related to the handling of the cases to which detailed.

4) Detailed Defense Counsel shall fulfill all responsibilities detailed in references (a) and (b), those set forth in this Instruction, and those assigned by the Chief Defense Counsel.

D. Selected Detailed Defense Counsel

1) The Accused may select a judge advocate of any United States armed force to replace the Accused’s Detailed Defense Counsel, provided that judge advocate has been determined to be available by the Chief Defense Counsel in consultation with the Judge Advocate General of that judge advocate’s military department.

2) A judge advocate shall be determined not to be available if assigned duties: as a general or flag officer; as a military judge; as a prosecutor in the Office of Military Commissions; as a judge advocate assigned to the Department of Defense Criminal Investigation Task Force or Joint Task Force Guantanamo; as a principal legal advisor to a command, organization, or agency; as an instructor or student at a service school, academy, college or university; or in any other capacity that the Judge Advocate General of the Military Department concerned may determine not to be available because of the nature or responsibilities of their assignments, exigent circumstances, military necessity, or other appropriate reasons.

3) Consistent with Section 6(B) of reference (a), the selection and replacement of new Detailed Defense Counsel shall not unreasonably delay military commission proceedings.

4) Unless otherwise directed by the Appointing Authority or the General Counsel of the Department of Defense, the Chief Defense Counsel will, after selection of a new Detailed Defense Counsel, relieve the original Detailed Defense Counsel.
Counsel of all duties with respect to that case.

E. Qualified Civilian Defense Counsel

1) The Accused may, at no expense to the United States, retain the services of a civilian attorney of the Accused's own choosing to assist in the conduct of his defense before a military commission, provided that the civilian attorney retained has been determined to be qualified pursuant to Section 4(C)(3)(b) of reference (a).

2) Consistent with Section 6(B) of reference (a), the retention of Civilian Defense Counsel shall not unreasonably delay military commission proceedings.

3) Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2) of reference (a).

4) Neither qualification of a Civilian Defense Counsel for membership in the pool of available Civilian Defense Counsel nor the entry of appearance in a specific case guarantees that counsel's presence at closed military commission proceedings or access to information protected under Section 6(D)(5) of reference (a).

5) The Chief Defense Counsel shall monitor the conduct of all qualified Civilian Defense Counsel for compliance with all rules, regulations, and instructions governing military commissions. The Chief Defense Counsel will report all instances of noncompliance with the rules, regulations, and instructions governing military commissions to the Appointing Authority and to the General Counsel of the Department of Defense with a recommendation as to any appropriate action consistent with reference (a) and this Instruction.

4. DUTIES AND RESPONSIBILITIES OF THE DEFENSE

A. Regular Duties. The Defense shall perform all duties specified or implied in reference (a) as responsibilities of the Defense.

B. Special Duties. The Office of the Chief Defense Counsel shall perform such other functions, consistent with references (a) and (b) and the mission of the Office of the Chief Defense Counsel, as may be directed by the Appointing Authority or the General Counsel of the Department of Defense.

5. POLICIES

A. Prohibition on Certain Agreements. No Defense Counsel may enter into agreements with any detainee other than his client, or such detainee's Defense Counsel, that might cause him or the client he represents to incur an obligation of confidentiality with such other detainee or Defense Counsel or to effect some other impediment to representation.
B. Prohibition on Certain Disclosures. All Defense Counsel must strictly comply with section 6(D)(5) and section 9 of reference (a) to ensure they do not improperly disclose classified information, national security information, or state secrets to an Accused or potential Accused or to any other person not specifically authorized to receive such information.

C. Statements to the Media. Consistent with reference (f), the Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for DoD information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Defense Counsel, as well as all members of the Civilian Defense Counsel pool and associated personnel may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Department of Defense.

6. EFFECTIVE DATE

This Instruction is effective immediately.

[Signature]

William J. Haynes II
General Counsel of the Department of Defense
DISCUSSION

Matthew S. Freedus

MCI 4 establishes and defines responsibilities of the Chief Defense Counsel, Detailed Defense Counsel and Civilian Defense Counsel. In doing so, it significantly impacts the accused’s right to counsel. In some respects it broadens the right to military counsel and restricts the right to civilian counsel.

The DoD General Counsel will designate a judge advocate as the Chief Defense Counsel. That title, however, is something of a misnomer, as this position is far more administrative than legal in nature. See, i.e., MCI 4, § 3(B)(1)-(15). The administrative duties of this position resemble those of a commanding officer of a trial defense command. See ANNOTATED GUIDE, MCO 1, § 4(C)(1), Discussion, at 25-26. For example, the CDC ensures that defense counsel have adequate resources and administrative support to effectively represent their clients. MCI 4, § 3(B)(3). The instruction also establishes that the CDC is responsible for (1) supervising, monitoring and evaluating all individuals assigned to the OCDC; (2) detailing military defense counsel; (3) determining whether individually requested defense counsel are available; and (4) screening and selecting potential civilian defense counsel. MCO 4, § 3(B).

Notably, the CDC does not perform the duties commonly associated with a criminal defense attorney. Indeed, this instruction expressly prohibits the CDC from detailing himself to a case, performing the “the duties of Detailed Defense Counsel,” forming “an attorney-client relationship with accused persons,” or incurring “any concomitant confidentiality obligations.” MCI 4, § 3(B)(8).

In contrast, the Chief Prosecutor’s authority is considerably broader in several ways. First, the Chief Prosecutor may detail himself to any case and represent the government before a commission. MCI 3, § 3(B)(9). Second, the Chief Prosecutor has the ability to detail trial counsel from the Department of Justice, including its division specializing in national security cases. The CDC, on the other hand, does not have the ability to detail federal public defenders with similar qualifications and experience as the prosecutors in the same case. Unlike Art. 27(c)(2), UCMJ, 10 U.S.C. § 827(c)(2), this instruction does not contain a rule of equivalency, which only amplifies this imbalance. Third, the CDC does not have subpoena power, which raises a significant issue of equal access to witnesses and evidence. Cf. MCI 3, § 3(B)(3); Arts. 36, 46, UCMJ, 10 U.S.C. §§ 836, 846.

MCI 4 parallels the judge advocate’s well-known duties to provide effective representation; to represent their client’s interests zealously within the bounds of the law and without regard to their personal opinions; and to avoid conflicts of interest at every critical stage of the trial process. See ANNOTATED GUIDE, MCO 1, §
4(C)(4), Discussion, at 29 (citing R.C.M. 502(d)(6); United States v. Rivas, 3 M.J. 282 (C.M.A. 1977); Strickland v. Washington, 466 U.S. 668 (1984); Arts. 27, 38, 70, 10 U.S.C. §§ 827, 38, 70; R.C.M. 305, 405, 506, 1202)). This Instruction provides, in a sense, greater continuity of representation than exists in courts-martial because there is no change in representation between trial and post-trial proceedings. In courts-martial, an appellate counsel stationed in or near the District of Columbia typically replaces the trial defense counsel for an appeal. Art. 70, 10 U.S.C. § 870; R.C.M. 1202. This continuity, however, must be viewed in light of the fact that MCO 1 and the MCIs contemplate an abbreviated trial process with a special emphasis on avoiding delay.

Another unique and controversial aspect of MCI 4 is that it prohibits an accused from representing himself or waiving his right to counsel, "notwithstanding any intention expressed by the Accused" to do so. MCI 4, § 3(C)(2). To quote the May 2, 2003 briefer, an "accused will always have a lawyer in every session." This may be designed to alleviate the problems and delays that the government has experienced in the ongoing case of United States v. Moussaoui, Crim. No. 01-455-A (E.D. Va.), where the defendant wished to dismiss his appointed counsel and proceed pro se.

MCI 4 answers questions that were posed in the ANNOTATED GUIDE as to MCO 1 concerning the availability and selection of individual defense counsel. We noted that MCO 1 did not indicate who would determine the availability of judge advocates with respect to the Choice of Counsel provision. See ANNOTATED GUIDE, MCO 1, § 4(C)(3)(a), Discussion, at 27. MCI 4, § 3(D) provides that the CDC will determine the availability of selected detailed defense counsel in consultation with the Judge Advocate General of the service concerned. Also, we noted that, unlike R.C.M. 506(b), MCO 1 did not disqualify certain categories of judge advocates from serving as selected military counsel. See ANNOTATED GUIDE, MCO 1, § 4(C)(3)(a), Discussion, at 27. This Instruction fills that gap and disqualifies certain categories of judge advocates. While MCI 4, § 3(D)(2) is clearly modeled on R.C.M. 506(b), there are at least three significant differences. First, this Instruction does not include R.C.M. 506's blanket disqualification of "trial counsel." R.C.M. 506(b)(1)(C). Instead, it only disqualifies those trial counsel assigned to the Office of Military Commissions. Presumably trial counsel assigned elsewhere are not necessarily disqualified. Second, this Instruction does not include R.C.M. 506's disqualification of "appellate defense or government counsel." Third, it creates a new category of disqualified judge advocates: those "assigned to the Department of Defense Criminal Investigation Task Force or Joint Task Force Guantanamo." The net effect of these departures may expand the population of judge advocates—particularly those with military justice experience—available to perform the role of Selected Detailed Defense Counsel.

The ANNOTATED GUIDE observed that MCO 1 places restrictions on the right to civilian counsel that do not exist under the UCMJ. For example, there is no requirement in courts-martial that civilian counsel be citizens of the United States.
Cf. Soriano v. Hosken, 9 M.J. 221 (C.M.A. 1980). Also, there is no standing requirement for civilian counsel to submit to a security clearance before representing an accused in a terrorist or national security case.

In essence, civilian counsel must be deemed eligible for a security clearance before they can join the pool of available civilian defense counsel. The operating assumption appears to be that all of these cases will involve some degree of classified information. According to the May 2, 2003 DoD briefing, this is "a prerequisite from the outset, before the trial even starts... so that we don't have to stop a trial, slow it down in the middle, and then get the appropriate clearances."

As noted in the ANNOTATED GUIDE, MCO 1 creates an extraordinary veto power over an accused's selection of civilian counsel. See ANNOTATED GUIDE, MCO 1, § 4(C)(3)(b), Discussion, at 28. MCI 4 bestows that power on the CDC. That is, the CDC is responsible for screening applications and making qualification determinations for membership in the pool of civilian defense counsel. There are no express limitations on the CDC's discretion in this regard and no provisions to appeal a debarment.

MCI 4 answers another important question left open by MCO 1 concerning the office's reporting requirements. See ANNOTATED GUIDE, MCO 1, § 4(C)(1), Discussion, at 25. It is interesting that prosecutors and defense counsel report to different officials, albeit both within the Department of Defense. The Chief Prosecutor reports to the Deputy General Counsel (Legal Counsel). Meanwhile, the CDC reports to the Deputy General Counsel (Personnel and Health Policy). See MCI 6, §§ 3(A)(3), -(5). This decentralization reflects a recognition that there ought to be some degree of separation between these chains of command to promote equality and to prevent undue influence. It remains to be seen whether this is an effective method of addressing those concerns.

The "Prohibition on Certain Agreements" contained in MCI 4, § (5)(A) could be read to impair the ability of defense counsel to enter into joint defense agreements that permit the accused to share information for the purpose of formulating a common legal strategy without breaching the attorney-client privilege. Such agreements are a common staple of multi-defendant cases, have been upheld by the federal courts, and rest upon the "common interest rule," sometimes referred to as the "joint defense privilege." United States v. Schwimmer, 892 F.2d 237, 243-44 (2d Cir. 1989), cert. denied, 502 U.S. 810 (1991). In circumstances where the prosecution is under no such restriction against sharing information, and the witnesses available to defense counsel will most likely themselves be accuseds before the commission, such a restriction on customary defense strategy and practice could prove highly controversial.

The "Statements to the Media" provision creates a standing gag order, which prohibits defense counsel from communicating "with news media representatives regarding cases and other matters related to military commissions" absent approval by the Appointing Authority or General Counsel. Despite this blanket prohibition, the DoD briefer suggested that requests to speak to the media would be liberally
granted, commenting that "it is possible and perhaps probable that those kinds of contacts would be authorized."
SUBJECT: Qualification of Civilian Defense Counsel

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Military Commission Instruction No. 1, current edition
(f) Section 1001 of Title 18 of the United States Code

1. PURPOSE

This Instruction establishes policies and procedures for the creation and management of the pool of qualified Civilian Defense Counsel authorized in Section 4(C)(3)(b) of reference (a) in accordance with reference (b).

2. AUTHORITY

This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (c) and (d). The provisions of reference (e) are applicable to this Instruction.

3. POLICIES AND PROCEDURES

A. Application Procedures

1) Civilian attorneys may be prequalified as members of the pool of attorneys eligible to represent Accused before military commissions at no expense to the United States if, at the time of application, they meet the eligibility criteria set forth in Section 4(C)(3)(b) of reference (a) as further detailed in this
Instruction, or they may be qualified on an ad hoc basis after being requested by an Accused. In both cases, qualification results in membership in the pool of available Civilian Defense Counsel.

2) An attorney seeking qualification as a member of the pool of available Civilian Defense Counsel shall submit an application, by letter, to:

Office of the General Counsel, Department of Defense
(Attn: Chief Defense Counsel, Office of Military Commissions)
1600 Defense Pentagon
Washington, DC 20301-1600

Applications will be comprised of the letter requesting qualification for membership, together with the following documents that demonstrate satisfaction of the criteria set forth in Section 4(C)(3)(b) of reference (a):

a. Section 4(C)(3)(b)(i), Civilian Defense Counsel shall be United States citizens. Applicants will provide proof of citizenship (e.g., certified true copy of passport, birth certificate, or certificate of naturalization).

b. Section 4(C)(3)(b)(ii), Civilian Defense Counsel shall be admitted to the practice of law in a State, district, territory or possession of the United States, or before a Federal court. Applicants will submit an official certificate showing that the applicant is an active member in good standing with the bar of a qualifying jurisdiction. The certificate must be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

c. Section 4(C)(b)(iii), Civilian Defense Counsel shall not have been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct.

i. An applicant shall submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney's fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state. Further, the applicant's statement shall identify each jurisdiction in which he has been admitted or to which he has applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer active, the date of and basis for
inactivation. The above information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the Chief Defense Counsel’s receipt of the application.

ii. Further, applicants shall submit a properly executed Authorization for Release of Information (Annex A), authorizing the Chief Defense Counsel or his designee to obtain information relevant to qualification of the applicant as a member of the Civilian Defense Counsel pool from each jurisdiction in which the applicant has been admitted or to which he has applied to practice law.

d. Section 4(C)(b)(iv), Civilian Defense Counsel shall be determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures described in Department of Defense Regulation, DoD 5200.2-R, “Personnel Security Program.”

i. Civilian Defense Counsel applicants who possess a valid current security clearance of SECRET or higher shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the adjudicating authority.

ii. Civilian Defense Counsel applicants who do not possess a valid current security clearance of SECRET of higher shall state in writing their willingness to submit to a background investigation in accordance with reference (g) and to pay any actual costs associated with the processing of the same. The security clearance application, investigation, and adjudication process will not be initiated until the applicant has submitted an application that otherwise fully complies with this Instruction and the Chief Defense Counsel has determined that the applicant would otherwise be qualified for membership in the Civilian Defense Counsel pool. Favorable adjudication of the applicant’s personnel security investigation must be completed before an applicant will be qualified for membership in the pool of Civilian Defense Counsel. The Chief Defense Counsel may, at his discretion, withhold qualification and wait to initiate the security clearance process until such time as the Civilian Defense Counsel’s services are likely to be sought.

e. Section 4(C)(b)(v), Civilian Defense Counsel shall have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. This requirement shall be satisfied
National Institute of Military Justice

DoD MCI No. 5, April 30, 2003

by the execution of the Affidavit And Agreement By Civilian Defense Counsel at Annex B to this Instruction. The Affidavit And Agreement By Civilian Defense Counsel shall be executed and agreed to without change, (i.e., no omissions, additions or substitutions). Proper execution shall require the notarized signature of the applicant. The Affidavit And Agreement By Civilian Defense Counsel shall be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

3) Applications mailed in a franked U.S. Government envelope or received through U.S. Government distribution will not be considered. Telefaxed or electronic mail application materials will not be accepted. Failure to provide all of the requisite information and documentation may result in rejection of the application. A false statement in any part of the application may preclude qualification and/or render the applicant liable for disciplinary or criminal sanction, including under reference (f).

B. Application Review

1) The Chief Defense Counsel or his designee shall review all Civilian Defense Counsel pool applications for compliance with references (a) and (b) and with this instruction.

2) The Chief Defense Counsel shall consider all applicants for qualification as members of the Civilian Defense Counsel pool without regard to race, religion, color, sex, age, national origin, or other non-disqualifying physical or mental disability.

3) The Chief Defense Counsel may reject any Civilian Defense Counsel application that is incomplete or otherwise fails to comply with references (a) and (b), or with this Instruction.

4) Subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the number of qualified attorneys that shall constitute the pool of available Civilian Defense Counsel. Similarly, subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the qualification of applicants for membership in such pool. This shall include determinations as to whether any sanction, disciplinary action, or challenge is related to relevant misconduct that would disqualify the Civilian Defense Counsel applicant.

5) The Chief Defense Counsel's determination as to each applicant's qualification for membership in the pool of qualified Civilian Defense Counsel shall be deemed effective as of the date of the Chief Defense Counsel's written notification publishing such determination to the applicant. Subsequent to this notification, the retention of qualified Civilian Defense Counsel is effected upon written entry of appearance, communicated to the military commission through the Chief Defense Counsel.

6) The Chief Defense Counsel may reconsider his determination as to an individual's qualification as a member of the Civilian Defense Counsel pool.
on the basis of subsequently discovered information indicating material nondisclosure or misrepresentation in the application, or material violation of obligations of the Civilian Defense Counsel, or other good cause, or the matter may be referred to the Appointing Authority or the General Counsel of the Department of Defense, who may revoke or suspend the qualification of any member of the Civilian Defense Counsel pool.

4. EFFECTIVE DATE
This Instruction is effective immediately.

[Signature]

William J. Haynes II
General Counsel of the Department of Defense.
ANNEX A to Department of Defense Military Commission Instruction No. 5, "Qualification of Civilian Defense Counsel"

UNITED STATES OF AMERICA
Authorization for Release of Information
(Carefully read this authorization to release information about you, then sign and date it in ink.)

I authorize the Chief Defense Counsel, Office of Military Commissions, Department of Defense, his designee or other duly authorized representative of the Department of Defense who may be charged with assessing or determining my qualification for membership in the pool of Civilian Defense Counsel available to represent Accused before military commissions, to obtain any information from any court, the bar of any State, locality, district, territory or possession of the United States, or from any other governmental authority.

This information may include, but is not limited to, information relating to: any application for a security clearance; my admission or application for admission to practice law in any jurisdiction, including action by the jurisdiction upon such application, together with my current status with regard to the practice of law in such jurisdiction; any sanction or disciplinary action to which I have been subject for misconduct of any kind; and any formal challenge to my fitness to practice law, regardless of the outcome of subsequent proceedings.

I authorize custodians of such records or information and other sources of information pertaining to me to release such at the request of the officials named above, regardless of any previous agreement to the contrary.

I understand that for certain custodians or sources of information a separate specific release may be required and that I may be contacted for the purposes of executing such at a later date.

I understand that the records or information released by custodians and other sources of information are for official use by the Department of Defense, only for the purposes provided herein, and that they may be redisclosed by the Department of Defense only as authorized by law.

Copies of this authorization that show my signature are as valid as the original signed by me. This authorization is valid for five (5) years from the date signed or upon termination of my affiliation with the Department of Defense, whichever is later.

______________________________  ________________  ________________
Signature (sign in ink)  SSN  Date
AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to Section 4(C)(3)(b) of Department of Defense Military Commission Order No. 1, “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism,” dated March 21, 2002 (“MCO No. 1”), Military Commission Instructions No. 4, “Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel” (“MCI No. 4”) and No. 5, “Qualification of Civilian Defense Counsel” (“MCI No. 5”), and in accordance with the President’s Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 F.R. 57833 (Nov. 16, 2001) (“President’s Military Order”), I [Name of Civilian Attorney], make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of Civilian Defense Counsel available to represent Accused before military commissions and serving in that capacity.

I. **Oaths or Affirmations.** I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the President’s Military Order, MCO No. 1, MCI No. 4, MCI No.5, and all other Military Commission Orders and Instructions concerning the rules, regulations and instructions applicable to trial by military commissions. I will read all future Orders and Instructions applicable to trials by military commissions.
B. I am aware that my qualification as a Civilian Defense Counsel does not guarantee my presence at closed military commission proceedings or guarantee my access to any information protected under Section 6(D)(5) or Section 9 of MCO No. 1.

II. Agreements. I hereby agree to comply with all applicable regulations and instructions for counsel, including any rules of court for conduct during the course of proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant Presiding Officer immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the President or, if designated, the Secretary of Defense), if there is any change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the Civilian Defense Counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well-prepared and will conduct the defense zealously, representing the Accused throughout the military commission process, from the inception of my representation through the completion of any post trial proceedings as detailed in Section 6(H) of MCO No. 1. I will ensure that these proceedings are my primary duty. I will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings.
C. The Defense Team shall consist entirely of myself, Detailed Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve Detailed Defense Counsel of duties specified in Section 4(C)(2) of MCO No. 1, I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During the pendency of the proceedings, unless I obtain approval in advance from the Presiding Officer to do otherwise, I will comply with the following restrictions on my travel and communications:

1. I will not travel or transmit documents from the site of the proceedings without the approval of the Appointing Authority or the Presiding Officer. The Defense Team and I will otherwise perform all of our work relating to the proceedings, including any electronic or other research, at the site of the proceedings (except that this shall not apply during post-trial proceedings detailed in Section 6(H) of MCO No. 1).

2. I will not discuss or otherwise communicate or share documents or information about the case with anyone except persons who have been designated as members of the Defense Team in accordance with this Affidavit and Agreement and other applicable rules, regulations and instructions.
F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under MCO No. 1.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material. Furthermore, no document or material constituting protected information under MCO No. 1, regardless of its classification level, may leave the site of the proceedings.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.

I. I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.
J. I agree that I shall reveal to the Chief Defense Counsel and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

/s/ __________________________
Print Name: __________________________
Address: __________________________
Date: __________________________

STATE OF )

COUNTY OF )

Sworn to and subscribed before me, by __________________________, this ___ day of __________________________, 20__.

Notary

My commission expires:
**DISCUSSION**

*Mary M. Cheh*

This Instruction, together with MCI 4 and MCO 1, establishes the process of eligibility to serve as Civilian Defense Counsel. It also identifies important limitations placed on lawyers who may serve in that capacity. The limitations are referenced not only in the Instruction itself but also in an annexed form, “Affidavit and Agreement by Civilian Defense Counsel,” which a lawyer must sign to apply and qualify as a Civilian Defense Counsel.

The Instruction anticipates that there will be a pool of available Civilian Defense Counsel, but it does not specify how large or small it will be. The Chief Defense Counsel is authorized to determine the number, and, presumably, such an approach preserves flexibility. Yet, it also raises questions about whether the pool will be adequate for a meaningful selection by the Accused, and, how final selections will be made if there are more qualified persons than positions in the pool. Will it be first qualified, first in? Or will there be some unwritten criteria of merit? The problem need not arise if the Chief Defense Counsel simply follows what appears to be the intent of § 3(A) and creates a pool of whatever size to accommodate any and all persons who have qualified to serve.

In order to qualify, an attorney must first apply by letter to the Chief Defense Counsel. The letter must include documents to prove eligibility to serve as set out in MCO 1, namely, United States citizenship, admission to practice law (active and in good standing), and the absence of any sanctions or disciplinary action by any government authority for “relevant” misconduct. The applicant must also have a current security clearance at the Secret level or higher or state his or her willingness to undergo a background investigation to secure one. The security investigation will not be initiated unless the applicant has properly applied to serve in the pool and until the Chief Defense Counsel has determined that the person would otherwise be qualified to serve. Moreover, the Chief Defense Counsel is permitted, “at his discretion, [to] withhold qualification and wait to initiate the security clearance process until such time as the Civilian Defense Counsel’s services are likely to be sought.” But this may create a “Catch-22” because security clearance investigations can take weeks or months, and an individual may fail to qualify because he or she has not obtained a clearance in a sufficiently timely fashion.

The reference in § 3(A)(2)(d)(ii) to a Civilian Defense Counsel whose “services are likely to be sought” and the reference in § 3(A)(1) to counsel who may be qualified on an ad hoc basis “after being requested by the Accused” presents a question not confronted by any of the Instructions. Just how is it that non-citizens (the only persons who are currently subject to trial by military commission), held
incommunicado, with little or no knowledge of the United States legal system, and little or no understanding of the English language, will be in a position to know about or request a civilian attorney, much less a specific civilian attorney? MCI 1 clearly states that none of the Instructions creates any right or benefit for the accused, and so there is nothing to suggest how an accused might learn of, evaluate, or sensibly ask for civilian legal assistance.

A final requirement to apply to qualify as a Civilian Defense Counsel is execution of the "Affidavit and Agreement by Civilian Defense Counsel." This document, which may not be altered in any way, commits the attorney to some fairly non-controversial obligations such as notifying the government of changes in one's application information, reading applicable rules and regulations related to military commissions, being well-prepared, and representing one's client zealously. It also includes, however, some more unusual obligations that materially affect counsel's working conditions, ability to travel and communicate, and relationship with the client.

Taken together, these undertakings reveal that, when serving as Civilian Defense Counsel, the attorney effectively parachutes into a closely controlled military environment. He agrees that the military commission case will be his "primary duty," and that he will not seek to delay proceedings for unrelated professional or personal reasons. The attorney agrees that the government is not responsible for any fees or costs associated with his service as defense counsel. He also promises to work only with a Defense Team consisting of military defense counsel and other personnel provided by the military authorities. In other words, there will be no civilian law clerks, support staff, consulting attorneys, joint defense agreements, or any other outside help. Indeed since the accused will always be represented by a military defense counsel as well as any Civilian Defense Counsel, and since the military defense counsel may be the only defense lawyer permitted to attend some closed proceedings, the civilian attorney agrees to "work co-operatively" with that person "to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary." While it is quite likely that the efforts of both the civilian and military counsel can be smoothly combined, the Instruction provides no solution for conflicts in the relationship. The situation is quite unlike that of an out-of-state lawyer being assisted by a local member of the bar because, in the military commission context, the civilian lawyer will not have chosen the person he is working with.

The civilian lawyer agrees not to travel from the site of the proceedings without advance permission from the Presiding Officer. He also agrees not to transmit any documents from the site without prior approval. All pretrial and trial work "relating to the proceedings," including electronic and other research, will be done only at the site. The lawyer agrees to follow all rules related to the handling of classified information. Further, and far more controversially, the civilian lawyer must promise not to share any documents or any information "about the case" with "anyone" except those on the defense team. The civilian lawyer is further silenced
by his promise, applicable even after the proceedings have ended, not to make any statement "public or private" "regarding" any closed sessions or any classified information. This is very broad language and could cover statements such as "I think there were far too many closed sessions," or "The Accused was unduly hampered from putting on a case because he wasn't able to see most of the evidence which was, in my opinion, unnecessarily classified." Of course it is quite unclear what remedy the government would have in such a circumstance. Although a breach of the agreement during the proceedings might result in the lawyer's disqualification, a breach afterwards might not carry any consequence at all. The government might make a referral to a disciplinary body or, depending on the circumstances, may use the breach to recover any profits the lawyer may have earned from talking or writing about his experiences. See, e.g., Snepp v. United States, 444 U.S. 507 (1980). The Instruction does not, however, address any of these issues.

The most dramatic and worrisome restrictions that the Civilian Defense Counsel must agree to, however, relate to the civilian attorney's relationship with his client. The attorney must acknowledge that his service as Civilian Defense Counsel does not guarantee presence at closed military commission proceedings or access to protected information, as defined in MCO 1, § 6(D)(5). Further, the attorney must acknowledge that reasonable restrictions may be placed on the time and duration of his contacts with the Accused. Military authorities will determine what these restrictions are. And, most controversially, the attorney agrees that his communications with the client may be monitored for security and intelligence purposes. The government promises not to use any information acquired or derived from the monitoring against the Accused, but such protection would not extend to communications that would facilitate a criminal act or is not related to seeking or giving of legal advice. Ethically, the attorney is bound to advise his client of the possibility of monitoring, see, e.g., ABA, STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed.), Standard 4-3.1 (Commentary) ("Because it is critical to a healthy lawyer client relationship that a client not be surprised by the revelation of confidences made by an attorney sometime in the future, counsel should fully and clearly explain to the client the applicable extent of (and limitations upon) confidentiality in the relevant jurisdiction."), and it is reasonable to expect that this may chill a full and free exchange between the defense counsel and his client.

The agreement also requires the attorney to reveal information, including client confidences, to prevent future crimes that the attorney believes are likely to lead to death, substantial bodily harm, or significant impairment of national security. This obligation goes beyond ordinary ethical rules in two respects. First, it mandates disclosure rather than simply permitting it. Second, it demands disclosure to prevent "significant impairment" of national security whereas most ethical regimes permit disclosure only to prevent death or serious bodily harm. The idea of significant impairment of national security is not further explained.
Once an attorney has submitted a completed application to serve as a Civilian Defense Counsel, the Chief Defense Counsel “shall determine the qualifications of applicants for membership” in the pool of qualified defense counsel. There is some ambiguity in this language; that is, will a determination of qualification be limited to the criteria set out in the Instruction, *i.e.*, is the applicant a citizen, is a disciplinary action disqualifying, etc.? Or might qualification include additional factors settled on by the Chief Defense Counsel in his discretion? The better reading, relying chiefly on § 3(A)(1), seems to be that the criteria for qualification are set out in the Instruction and that the role of the Chief Defense Counsel is to see if the applicant meets those criteria.
SUBJECT: Reporting Relationships for Military Commission Personnel

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Military Commission Instruction No. 1, current edition

1. PURPOSE
This Instruction establishes supervisory and performance evaluation relationships for military commission personnel.

2. AUTHORITY
This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (b), (c), and (d). The provisions of reference (e) are applicable to this Instruction.

3. POLICIES AND PROCEDURES
A. Supervisory and Performance Evaluation Relationships. Individuals appointed, assigned, detailed, designated or employed in a capacity related to the conduct of military commission proceedings conducted in accordance with references (a) and (b) shall be subject to the relationships set forth below. Unless stated otherwise, the person to whom an individual “reports,” as set forth below, shall be deemed to be such individual’s supervisor and shall, to the extent possible, fulfill all performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinate’s Military Service performance evaluation regulations.
1) Appointing Authority: Any Appointing Authority designated by the Secretary of Defense pursuant to reference (a) shall report to the Secretary of Defense in accordance with reference (c).

2) Legal Advisor to Appointing Authority: The Legal Advisor to the Appointing Authority shall report to the Appointing Authority.

3) Chief Prosecutor: The Chief Prosecutor shall report to the Deputy General Counsel (Legal Counsel) of the Department of Defense and then to the General Counsel of the Department of Defense.

4) Prosecutors and Assistant Prosecutors: Prosecutors and Assistant Prosecutors shall report to the Chief Prosecutor and then to the Deputy General Counsel (Legal Counsel) of the Department of Defense.

5) Chief Defense Counsel: The Chief Defense Counsel shall report to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense and then to the General Counsel of the Department of Defense.

6) Detailed Defense Counsel: Detailed Defense Counsel shall report to the Chief Defense Counsel and then to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.


8) Commission Members: Commission members shall continue to report to their parent commands. The consideration or evaluation of the performance of duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member.

9) Other Personnel: All other military commission personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks detailed or employed by the Appointing Authority pursuant to Section 4(D) of reference (a), if not assigned to the Office of the Chief Prosecutor or the Office of the Chief Defense Counsel, shall report to the Appointing Authority or his designee.

B. Responsibilities of Supervisory/Reporting Officials. Officials designated in this Instruction as supervisory/reporting officials shall:

1) Supervise subordinates in the performance of their duties.

2) Prepare fitness or performance evaluation reports and, as appropriate, process awards and citations for subordinates. To the extent practicable, a reporting official shall comply with the rated subordinate’s Military Service regulations regarding the preparation of fitness or performance evaluation reports and in executing related duties.
4. EFFECTIVE DATE
This Instruction is effective immediately.

William J. Haynes II
General Counsel of the Department of Defense
DISCUSSION

Adele H. Odegard

MCI 6 covers supervisory and reporting relationships among commission personnel. The supervisory relationship includes the responsibility to submit performance evaluation reports. The instruction covers three groups of personnel: commission members (those who actually hear evidence and act as fact finders and sentencing authorities); Review Panel members (those who act as members of an appellate body); and all others (the appointing authority, lawyers, and support personnel).

The issuance of a separate MCI solely on the issue of how commission personnel are supervised and evaluated likely reflects the drafters' sensitivity to public criticism on the issue of unlawful command influence. Unlawful command influence—the use of supervisory military authority to dictate the outcome or the sentence in a criminal proceeding, or to create a conflict of interest between a participant's duty toward the court-martial and his or her individual career interests—is "the mortal enemy of military justice." United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986). Military law also recognizes that even the appearance of unlawful command influence must be avoided, because it erodes public confidence in the fairness of military justice.

Section 3(A)(8) states that commission members will continue to report to their parent commands, and that evaluation of their performance as members of a commission is prohibited in preparing their evaluation and fitness reports. This provision is consistent with R.C.M. 104(b)(1), which prohibits the evaluation of servicemembers' performance as court-martial panel members in their military fitness reports. Though salutary, it is not realistic if commission members will serve substantially full time in that capacity. In such a circumstance, their supervisors would be in the difficult position of submitting a bland fitness report that does not reflect the members' primary duty for the rating period—a situation which does nothing to enhance the military career of the commission member, and may in fact harm the member's chances to remain competitive for promotion and command.

Section 3(A)(8) makes no distinction between the Presiding Officer and other commission members regarding rating chain and supervisory responsibilities. A commission's Presiding Officer acts in a quasi-judicial capacity. See MCO 1, §§ 4(A)(4) and -(5). The Manual for Courts-Martial prohibits a convening authority or the convening authority's staff from preparing or reviewing a military judge's fitness report. R.C.M. 104(b)(2). The fact that a Presiding Officer will be rated by his/her parent organization, even though evaluation of the officer's performance as a
commission member may be prohibited, calls into question the independence of the judicial officer. Independence for officers who serve as judges within the military justice system has long been a concern. See, e.g., John S. Cooke, Military Justice and the Uniform Code of Military Justice, 200 ARMY L. 1 (Mar. 2000). The Supreme Court has commented that the insulation from the command and from the convening authority for military judges set forth in the Manual for Courts-Martial and service regulations protects military judges from unlawful command influence, thereby providing sufficient due process protection for servicemembers subjected to courts-martial. See Weiss v. United States, 510 U.S. 163 (1994).

Lastly, MCO 1 states that retired servicemembers may be members of military commissions, see § 4(A)(3), and MCI 6 does not exempt them from rating and supervision requirements. It is likely that retired personnel who are recalled to active duty will be detailed solely for duty as commission members. It seems superfluous to impose a rating requirement for such individuals, and then to prohibit their performance as commission members to be evaluated, if their only duty is as commission members.

Section 3(A)(7) of MCI 6 states that members of the Review Panel shall report to the Secretary of Defense. The Review Panel members review the post-trial actions of the appointing authority and either forward the case to the Secretary for disposition or return it to the appointing authority for further proceedings. See MCO 1, § 6(H)(4). If the Secretary is the appointing authority, then Review Panel members may be required to return cases to him, after review, for corrective action. Whether or not he is the appointing authority, the Secretary of Defense reviews all cases and makes a recommendation to the President as to final disposition. MCO 1, § 6(H)(5). Under either scenario, the Secretary is in a supervisory relationship over the Review Panel members. Realistically, this structure defeats the purpose of an independent Review Panel; members report to the very official—the Secretary of Defense—who prepares the case for presidential action, see above, or, if the President delegates authority, serves as final authority. See PMO § 4(c)(8). Because the arrangements do not convey the appearance of independence, an adverse effect on public confidence in the process may result.

Other issues with supervisory relationships recur throughout MCI 6. For example, the Chief Prosecutor and Chief Defense Counsel both have the General Counsel for the Secretary of Defense as their second-level supervisor. See §§ 3(A)(3) and -(5). The military appellate courts have cautioned that an individual who supervises multiple personnel who participate in a specific court-martial can raise the appearance of bias in the proceedings. See United States v. Wiesen, 56 M.J. 172 (2001), aff'd on reconsideration, 57 M.J. 48 (2002).

In general, MCI 6 presumes that the military’s regulatory requirements that servicemembers be evaluated on their duties and that fitness reports be prepared on their performance at regular intervals will not be affected because of service related to military commissions. See § 3(A). This assumption is dangerous in its unintended effects. MCI 6 in fact creates more problems than it solves: it raises the
appearance of unlawful command influence; compromises the independence of persons who serve in judicial capacities (Presiding Officers and Review Panel members), and may place career progression at risk for commission members. A far better solution may be to annotate the files of all commission personnel with a statement that these individuals were performing “unspecified special duty” and their time performing that duty is not rated.
SUBJECT: Sentencing

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Military Commission Instruction No. 1, current edition

1. PURPOSE
This Instruction promulgates policy, assigns responsibilities, and prescribes procedures for matters related to sentencing of persons with regard to whom a finding of guilty is entered for an offense referred for trial by a military commission appointed pursuant to references (a) and (b).

2. AUTHORITY
This Instruction is issued pursuant to section 7(A) of reference (a) and in accordance with references (b), (c), and (d). The provisions of reference (e) are applicable to this Instruction.

3. AVAILABLE SENTENCES
   A. General. Reference (a) permits a military commission wide latitude in sentencing. Any lawful punishment or condition of punishment is authorized, including death, so long as the prerequisites detailed in reference (a) are met. Detention associated with an individual’s status as an enemy combatant shall not be considered to fulfill any term of imprisonment imposed by a military commission. The sentence determination should be made while bearing in mind that there are several principal reasons for a sentence given to those who violate the law. Such reasons include: punishment of the wrongdoer; protection of society from the wrongdoer; deterrence of the wrongdoer and those who know of his crimes and sentence from committing
the same or similar offenses; and rehabilitation of the wrongdoer. In determining an appropriate sentence, the weight to be accorded any or all of these reasons rests solely within the discretion of commission members. All sentences should, however, be grounded in a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

B. Conditions of Imprisonment. Decisions regarding the location designated for any imprisonment, the conditions under which a sentence to imprisonment is served, or the privileges accorded one during any period of imprisonment should generally not be made by the commission. Those decisions and actions, however, may be appropriate subjects for recommendation to the person making a final decision on the sentence in accordance with Section 6(H) of reference (a).

C. Prospective Recommendations for Sentence Modification. A sentence imposed by military commission may be accompanied by a recommendation to suspend, remit, commute or otherwise modify the adjudged sentence in concert with one or more conditions upon which the suspension, remission, commutation, or other modification is contingent (usually relating to the performance, behavior or conduct of the Accused). Unless otherwise directed, a decision or action in accordance with such a recommendation will be effected by direction or delegation to the Appointing Authority by the official making a final decision on the sentence in accordance with Section 6(H) of reference (a).

4. SENTENCING PROCEDURES

A. General. Reference (a) permits the military commission substantial discretion regarding the conduct of sentencing proceedings. Sentencing proceedings should normally proceed expeditiously. In the discretion of the Presiding Officer, as limited by the Appointing Authority, reasonable delay between the announcement of findings and the commencement of sentencing proceedings may be authorized to facilitate the conduct of proceedings in accordance with Section 6(B) of reference (a).

B. Information Relevant to Sentencing. Section 6(E)(10) of reference (a) permits the Prosecution and Defense to present information to aid the military commission in determining an appropriate sentence. Such information may include a recommendation of an appropriate sentence, information regarding sentence ranges for analogous offenses (e.g., the sentencing range under the Federal Sentencing Guidelines that could be applicable to the Accused for the most analogous federal offenses), and other relevant information. Regardless of any presentation by the Prosecution or Defense, the military commission shall consider any evidence admitted for consideration prior to findings regarding guilt. The Presiding Officer may limit or require the presentation of certain information consistent with references (a) and (b).
C. Cases Involving Plea Agreements. In accordance with Section 6(A)(4) of reference (a), after determining the voluntary and informed nature of a plea agreement approved by the Appointing Authority, the military commission is bound to adjudge findings and a sentence pursuant to that plea agreement. Accordingly, the Presiding Officer may exercise the authority granted in Section 6(E) of reference (a) to curtail or preclude the presentation of information and argument relative to the military commission’s determination of an appropriate sentence.

D. Special Duties. In cases involving plea agreements or recommendations for certain conditions of imprisonment or prospective sentence modification, the Prosecution and Defense shall provide whatever post-trial information or recommendation as is relevant to any subsequent decision regarding such condition or suspension, remission, commutation, or other modification recommendation associated with the sentence.

5. EFFECTIVE DATE
This Instruction is effective immediately.

[Signature]
William J. Haynes II
General Counsel of the Department of Defense
The Secretary of Defense's MCO 1, § 6(G), which deals with sentencing, provides no guidance regarding what sentence, or form of sentence, ought be imposed for any particular offense, except for the requirement that the sentence be "appropriate." That provision's list of forms of punishment, which includes "other lawful punishment," adds little more, where no body of law outside the Procedures for Trials by Military Commissions and the MCIs is directly applicable to determine what is "lawful."

With a single exception noted below, MCI 7 provides no additional guidance, other than to reiterate the commission's "wide latitude in sentencing" and to list the traditional goals of modern penology: retribution, rehabilitation, and specific and general deterrence. Among these goals, MCI 7 singles out for special mention "the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general." MCI 7, § 3(A). Resort to the criteria and practice of sentencing under the law of war would thus appear to be consistent with, if not required by, the letter of the Instructions, as well as with R.C.M. 1003(b)(11), under which, "In cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war." Other provisions familiar to counsel, including U.S. CONST. amend. 8; Art. 55, UCMJ, 10 U.S.C. § 855; and Art. 87, GPW, while not explicitly made applicable, provide further landmarks for reference. In addition, a body of law is developing in the international criminal tribunals to guide sentencing decisionmaking both at trial and on appeal. E.g., Musema v. The Prosecutor (Judgement), Nov. 16, 2001, Case No. ICTR-96-13-A (ICTR Appeals Chamber) (gravity of offense as primary consideration). Particularly given the paucity of other guidance in MCI 7, reference to that body of law seems entirely appropriate. As to issues relating to specific forms of punishment see ANNOTATED GUIDE, MCO 1, § 6(G), Discussion, at 67-69.

MCI 7 provides only one other suggestion for determining an appropriate sentence: an invitation to counsel to provide the commission with the sentencing range under the Federal Sentencing Guidelines. No reference is made to the statutory maxima of title 18 of the United States Code or the UCMJ, or to any table of maximum punishments, though these, too, may well provide helpful standards of comparison—the latter two in particular with regard to the war crimes and related offenses defined in MCI 2.

The Federal Sentencing Guidelines themselves may be of limited utility. They do not apply to trials by court-martial. 18 U.S.C. § 3551(a); United States v. Garner, 39 M.J. 721 (NMCMR 1993). Moreover, they may be impractical or
impossible to apply even as a standard of comparison, since they require information about an accused's criminal history, which may be difficult to ascertain in the circumstances of trials by commission remote from the accused's home. More helpful may be concepts embodied in the permissible departures from the Guidelines, for factors such as substantial assistance, acceptance of responsibility, and magnitude of the accused's role in the offense.

One factor not mentioned in MCI 7, but thought by military courts to be inherent in determining whether a sentence is "appropriate," is the need for uniformity. As one court recently explained,

In discharging our statutory duty to ensure that a sentence is appropriate, we are obliged to consider general interests of sentence uniformity, particularly in the absence of measures such as sentencing guidelines found in criminal trials in the United States District Courts. Art. 66(c), UCMJ; United States v. Durant, 55 M.J. 258, 260-61 (2001); United States v. Sothen, 54 M.J. 294, 296-97 (2001). More specifically, sentence comparison is appropriate in closely related cases involving highly disparate sentences. Durant, 55 M.J. 260-61. Where we find sentences to be highly disparate in closely related cases, we must determine whether there is a rational basis for the differences between the sentences. United States v. Lacy, 50 M.J. 286, 287-88 (1999).


A notable feature of MCI 7 is its prohibition on the consideration of time served pursuant to detention as an enemy combatant "to fulfill any term of imprisonment imposed by a military commission." This oddly-worded provision does not prohibit a commission's consideration of time served in determining either the length of a sentence to imprisonment, or whether further imprisonment is appropriate at all. The prohibition against credit for time served differs from customary, and often mandatory, civilian, military and international practice. 18 U.S.C. § 3585; Rome Statute art. 78(2). Taken together with MCO 1's failure to provide for release of an accused who is not found guilty, the unavailability of _habeas corpus_, the Instruction's _caveat_ that the commission should "generally not" designate the location for imprisonment, MCI 7, § 3(B), and the absence of any provision for release of a prisoner upon completion of a sentence, the Instruction runs the risk of converting a finite sentence into merely one of several stages of incarceration.

Section 4(A) provides that "Sentencing proceedings should normally proceed expeditiously." This must be read in conjunction with MCO 1, § 6(E)(10), which contemplates a bifurcated trial with a separate sentencing phase, consistent with United States civilian and military trial practice, and with constitutional requirements for capital cases. R.C.M. 1001 _et seq._; _Gregg v. Georgia_, 428 U.S. 153 (1976); _Lockett v. Ohio_, 438 U.S. 586 (1978); _United States v. Matthews_, 16 M.J. 354
(1983). MCI 7, § (4)(B) also refers to MCO 1, § 6(E)(10), which permits counsel to present information relevant to sentencing. Despite the absence of explicit reference to evidence in aggravation, extenuation or mitigation, there can be little doubt that such evidence constitutes "Information Relevant to Sentencing" under MCI 7, § (4)(B), and that sufficient time to gather and present such evidence must be accorded to all parties. That requirement is especially critical under circumstances in which neither the parties nor the commission will have the benefit of any form of pre-sentence report.

The Instruction’s plea agreements provisions, § 4(C), depart significantly from military practice. Pretrial agreements under the UCMJ customarily include a convening authority’s agreement not to approve a sentence in excess of a certain amount, leaving the accused free to seek a lesser sentence at a court-martial ("beating the pretrial"). In contrast, a plea agreement under MCI 7, § 4(C) binds the commission to adjudge the specific sentence provided therein. See generally ANNOTATED GUIDE, MCO 1, § 6(A)(4), Discussion, at 41-42.
SUBJECT: Administrative Procedures

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)
(c) Section 113(d) of Title 10 of the United States Code
(d) Section 140(b) of Title 10 of the United States Code
(e) Military Commission Instruction No. 1, current edition

1. PURPOSE
This Instruction promulgates policy, assigns responsibilities, and prescribes procedures for the conduct of trials by a military commission appointed pursuant to references (a) and (b).

2. AUTHORITY
This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (b), (c), and (d). The provisions of reference (e) are applicable to this Instruction.

3. COMMISSION PERSONNEL
   A. Appointment and Removal of Commission Members.
      1) In accordance with reference (a), the Appointing Authority shall appoint at least three but no more than seven members and one or two alternate members. The Appointing Authority may remove members and alternate members for good cause. In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that proceedings simply continue without the member, or convene a new commission. In the absence of guidance from the Appointing Authority regarding replacement, the Presiding Officer shall select an alternate member to replace the member in question.
2) The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate. Consistent with reference (a), any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member.

3) From time to time, it may be appropriate for a Presiding Officer to forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue. The Presiding Officer may issue any appropriate instructions to the member whose continued service is in question. A military commission shall not engage in deliberations on findings or sentence prior to the Appointing Authority's decision in any case in which the Presiding Officer has recommended a member's removal.

B. **Military Commission Security Officer.** The Appointing Authority may detail a Security Officer to advise a military commission on matters related to classified and protected information. In addition to any other duties assigned by the Appointing Authority, the Security Officer shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times and that only personnel with the appropriate clearances and authorizations are present when classified or protected materials are presented before military commissions.

C. **Other Military Commission Personnel.** The Appointing Authority may detail court reporters, interpreters, security personnel, bailiffs, clerks, and any other personnel to a military commission as deemed necessary. In the absence of a detailing by the Appointing Authority, the Chief Prosecutor shall be responsible to ensure the availability of necessary or appropriate personnel to facilitate the impartial and expeditious conduct of full and fair trials by military commission.

4. **INTERLOCUTORY QUESTIONS**

A. **Certification of Interlocutory Questions.** The Presiding Officer shall generally adjudicate all motions and questions that arise during the course of a trial by military commission. In accordance with Section 4(A)(5)(d) of reference (a), however, the Presiding Officer shall 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. In addition, the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

B. **Submission of Interlocutory Questions.** The Presiding Officer shall determine what, if any, documentary or other materials should be forwarded to the Appointing Authority in conjunction with an interlocutory question.
C. **Effect of Interlocutory Question Certification on Proceedings.** While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

5. **IMPLIED DUTIES OF THE PRESIDING OFFICER**

The Presiding Officer shall ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission in accordance with reference (a). Such functions include, for example, scheduling the time and place of convening of a military commission, ensuring that an oath or affirmation is administered to witnesses and military commission personnel as appropriate, conducting appropriate in camera meetings to facilitate efficient trial proceedings, and providing necessary instructions to other commission members. The Presiding Officer shall rule on appropriate motions or, at his discretion consistent with reference (a), may submit them to the commission for decision or to the Appointing Authority as a certified interlocutory question.

6. **DISCLOSURES**

   A. **General.** Unless directed otherwise by the Presiding Officer upon a showing of good cause or for some other reason, counsel for the Prosecution and the Defense shall provide to opposing counsel, at least one week prior to the scheduled convening of a military commission, copies of all information intended for presentation as evidence at trial, copies of all motions the party intends to raise before the military commission, and names and contact information of all witnesses a party intends to call. Motions shall also be provided to the Presiding Officer at the time they are provided to opposing counsel. Unless directed otherwise by the Presiding Officer, written responses to any motions will be provided to opposing counsel and the Presiding Officer no later than three days prior to the scheduled convening of a military commission.

   B. **Notifications by the Prosecution.** The Prosecution shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the Accused as soon as practicable, and in no instance later than one week prior to the scheduled convening of a military commission.

   C. **Notifications by the Defense.** The Defense shall give notice to the Prosecution of any intent to raise an affirmative defense to any charge at least one week prior to the scheduled convening of a military commission.

   D. **Evidence Related to Mental Responsibility.** If the Defense indicates an intent to raise a defense of lack of mental responsibility or introduce expert testimony regarding an Accused's mental condition, the prosecution may require that the Accused submit to a mental examination by a military psychologist or psychiatrist, and both parties shall have access to the results of that examination.
7. EFFECTIVE DATE

This Instruction is effective immediately.

[Signature]

William J. Haynes II
General Counsel of the Department of Defense
As its title suggests, MCI 8 addresses several different topics: appointment and removal of members and appointment of other personnel of a military commission; interlocutory questions; implied duties of the Presiding Officer; and disclosures (i.e., discovery).

Commission Personnel (MCI 8, § 3)

Section 3(A) elaborates on procedures in MCO 1, § 4(A), for appointing and removing commission members. It reiterates that the Appointing Authority may remove members for “good cause,” but provides no additional definition of “good cause.” The context of § 3(A)(2) makes apparent that “good cause” includes grounds for a challenge in courts-martial, e.g., lack of impartiality. See R.C.M. 912(f). In courts-martial, “good cause” includes matters not directly related to the member’s qualification to sit, but these must be extraordinary (e.g., illness or true military exigency). See R.C.M. 506; see also ANNOTATED GUIDE, MCO 1, § 4(A)(3), Discussion, at 16.

In courts-martial, “good cause” is not required to remove a member before the court-martial is assembled. R.C.M. 505(c)(1). Like MCO 1, § 4(A)(3), this rule leaves open some uncertainty whether “good cause” is required for removal before the Commission has assembled or even convened. Unlike in courts-martial, see R.C.M. 911, nothing in MCO 1 or MCIs 1-8 provides for a specific point of “assembly.”

Section 3(A)(1) gives the Appointing Authority several options after excusing a member for good cause, including convening a new commission. Such a step might be most appropriate and efficient if several members had to be excused, but the authority is not limited to such severe cases. Convening a new commission after the excusal of only one member (even if alternates are on hand) is permitted by the Instruction. Such a step could raise former jeopardy issues (assuming principles like those under the Fifth Amendment apply to military commissions—MCO 1, § 5(P) bars retrial only after a finding becomes final as defined in § 6(H)(2)). In any event, once the commission is underway, creating a new military commission, or any changes in membership, under circumstances where the need was not manifest could create the appearance of unfair manipulation.

The authority given to the Presiding Officer to select an alternate seems unlikely to arise very often. This authority would be triggered only if the Appointing Authority has removed one or more members; it seems unlikely that the
Appointing Authority would not also exercise one of the options to designate a replacement. If the Appointing Authority failed to do so, the selection of an alternate (where more than one remained) could pose questions. What criteria should the Presiding Officer apply? Would the alternates' interaction with the Presiding Officer during the progress of the case to that point be a permissible consideration, and what might the perception be of the fairness of the choice?

Section 3(A)(2) generally parallels the voir dire process in courts-martial, see R.C.M. 912, but because peremptory challenges are not permitted under MCO 1, the scope of questioning is somewhat narrower. Protecting the safety of the members also supports authority to limit the content and format of questioning.

Unlike R.C.M. 912, this instruction grants broad discretion whether to permit questioning at all. The Presiding Officer might, for example, require the parties to make a specific showing of likelihood for a challenge before permitting questioning. Cf. R.C.M. 902(d). It would seem, however, that to foster the fact and appearance of impartiality, and in the interest of avoiding inducing counsel to independently investigate members' backgrounds, providing basic information as a matter of routine, as well as asking basic questions about each member's knowledge and attitude about the case, would be appropriate.

Section 3(A)(3) clarifies that only the Appointing Authority may determine whether to remove any member for cause. It leaves it to the discretion of the Presiding Officer whether to forward a question of removal to the Appointing Authority, and whether to accompany such question with a recommendation. Potentially, this could mean that the Presiding Officer can deny a challenge—by not forwarding it. Whether a party could "go over the head" of the Presiding Officer by submitting a challenge directly to the Appointing Authority is not addressed.

The Presiding Officer's decision whether to proceed while a removal question is pending with the Appointing Authority will, presumably, be driven by such factors as the likelihood of removal and point in the proceedings at which the issue arises. Because the Commission as an entity may make some rulings, see MCO 1, § 6(D), and individual members may question witnesses, see MCO 1, § 6(D)(2)(c), the continuing participation of a member who may be removed could be problematic.

The last sentence of § 3(A)(3) forbids deliberations on findings or sentence when the Presiding Officer "has recommended a member's removal." If the Presiding Officer forwarded information regarding removal for cause without a recommendation, as the first sentence in this subsection permits, deliberations would not be prohibited. If the Presiding Officer views a question about removal to be substantial enough to forward to the Appointing Authority, it seems the better practice would be to accompany it with a recommendation, and not to proceed with deliberations while such a question was pending.

It is worth noting what this section dealing with appointment of members does not include: any discussion of the form or format for documenting the appointment of members. Compare this with the requirements in courts-martial. R.C.M. 504(d). Similarly, neither this nor any other instruction in this series, nor
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MCO 1, provide for the form and documentation of the charges or their referral to a commission. It is axiomatic that the jurisdiction of a military commission, like a court-martial, depends on its being properly appointed (convened) and on the charges being properly referred to it. See R.C.M. 201(b). Therefore, documenting that these steps were properly taken is important. Leaving such details to case-by-case development may invite unnecessary litigation over the commission's authority (jurisdiction)—at the commission itself, on review, and in any collateral attack.

Section 3(B) authorizes appointment of a security officer to advise on handling and protecting classified matters. It has no direct analog in courts-martial, although a convening authority or military judge presumably has the inherent authority to call upon the services of a security officer if necessary. See R.C.M. 502(e). Given the high likelihood that military commissions will handle classified matters, the appointment of a security officer to advise on and safeguard such matters make sense. The rule specifies that the Security Officer's role is advisory; the final decision with respect to the treatment of classified matters would be left to the Commission or the Appointing Authority.

Section 3(C) provides for appointing court reporters, interpreters, and others. It tracks MCO 1, § 4(D), and generally parallels practice in courts-martial. See Art. 28, UCMJ, 10 U.S.C. § 828; R.C.M. 502(d). The second sentence provides that the Chief Prosecutor "shall ensure the availability" [note: not "detail"] of necessary personnel if the Appointing Authority fails to detail needed personnel. However, Art. 28 provides that the "convening authority of a . . . military commission . . . shall detail . . . qualified court reporters" as well as interpreters. Therefore, it would seem to be error for the Chief Prosecutor to provide court reporters or interpreters. Whether there is any remedy for such a defect is another matter. See MCO 1, § 6(H)(4). Persons such as bailiffs and clerks are ordinarily not formally detailed to courts-martial and the trial counsel (prosecutor) often arranges for these on an informal basis. Because of the likelihood that military commissions will involve special concerns for the security of information and the safety of participants, a more formal process for assigning these personnel may well be warranted.

Interlocutory Questions (MCI 8, § 4)

The first sentence makes explicit what is implied in MCO 1: that the Presiding Officer rules on motions and questions during the trial except as otherwise specifically provided. The second two sentences reiterate the requirement in MCO 1, § 4(A)(5)(d): interlocutory questions that would effect a termination of the proceedings must be certified to the Appointing Authority—a major limitation on the Presiding Officer's authority. See ANNOTATED GUIDE at 21 for further discussion.

Materials that could be forwarded with the question include: transcripts of relevant testimony, documentary evidence, and briefs by the parties, or a summary
of some or all of these. In the case of any summary, the Presiding Officer might seek the concurrence of the parties in the summary.

**Implied Duties of the Presiding Officer (MCI 8, § 5)**

This section amplifies MCO 1, § 4(A)(5)(c), by stating that the Presiding Officer may execute “ancillary functions.” This somewhat parallels R.C.M. 801. It lists several examples (so, as to the examples, these powers are now explicit—although not entirely without some questions).

The first example, “scheduling the time and place of convening of a military commission,” is arguably in conflict with MCO 1, § 6(B)(4), which says the commission “shall . . . [h]old each session at such time and place as may be directed by the Appointing Authority.” As was pointed out in the ANNOTATED GUIDE, at 46, however, reposing all such authority in the Appointing Authority could be cumbersome and inefficient. This rule alleviates that problem. Of course, the Appointing Authority retains overall authority to schedule the case and designate the place of trial.

The third example, “conducting appropriate in camera proceedings to facilitate efficient trial proceedings,” is unclear. BLACK’S LAW DICTIONARY (7th ed. 1999) defines “in camera” as “1. In the judge’s private chambers. 2. In the courtroom with all spectators excluded. 3. (Of a judicial action) taken when court is not in session.” The Instruction’s language could refer to the Presiding Officer’s authority to close proceedings under MCO 1, § 6(B)(3). However, that provision does not use the term “in camera,” and the phrase “to facilitate efficient trial proceedings” does not seem to correspond with the purposes of such closure. The context makes it seem more likely that, although the Presiding Officer is not a judge, this provision authorizes the Presiding Officer to meet privately with counsel. This authority is far less clear, and surely more limited, than the authority of a military judge to conduct sessions outside the presence of members under Art. 39(a), UCMJ, 10 U.S.C. § 839(a). Article 39(a) sessions (which also require the presence of the accused), are formal proceedings on the record. The authority described in this rule more closely parallels the authority for a military judge to hold off-the-record conferences with counsel (the accused may or may not be present) under R.C.M. 802. R.C.M. 802 conferences are to “promote a fair and expeditious trial”—much the same purpose as the proceedings described here—but are generally limited to administrative or procedural matters.

The fourth example, “providing necessary instructions to other commission members,” is more explicit authority than provided in MCO 1, and presumably includes authority to instruct on matters of law, such as elements of offenses, evidentiary issues, and procedural matter. Neither MCO 1 nor this rule specifies whether such instructions can or must be given in open court or in the closed deliberation of the members. See also MCO 1, § 6(E)(9) and accompanying discussion in the ANNOTATED GUIDE at 65-66.
Disclosures (MCI 8, § 6)

Section 6(A) generally mirrors the open discovery practice used in courts-martial. See R.C.M. 701. R.C.M. 701 requires that most information be provided before the beginning of the trial, subject to the authority of the military judge to establish specific deadlines in particular cases. This rule requires most information to be provided one week before the “scheduled convening of a military commission.” As used here, the term “convenes” seems to mean simply to “meet.” The rule appears to contemplate the required disclosures will occur before the initial meeting of the commission. It may be, however, that a commission would meet to attend to preliminary matters, such as securing the appearance of counsel, dealing with challenges for cause, or addressing motions, well before trial, and, in some cases matters dealt with at such an earlier session (such as the disposition of a motion) might affect a party’s decisions about what witnesses to call or evidence to present. Presumably such issues can be dealt with as “directed otherwise by the Presiding Officer upon a showing of good cause,” but the choice of the term “convening” and its apparent requirement that the required information be disclosed one week in advance of the initial meeting of the commission may cause uncertainty and additional paperwork in some cases—foiling the goal of efficiency the early notice is designed to foster.

The same one-week deadline applies to the prosecution and the defense. The prosecution’s choice of witnesses and evidence may affect the defense’s choices (and vice versa, in some cases). May the parties amend their lists after the deadline and after seeing the others’ lists? Again, the “directed otherwise by the Presiding Officer upon a showing of good cause,” may resolve this problem, but at least until counsel have some experience with the application of this rule, the parties may be concerned about how much they are obliged to disclose and when.

This is especially so because the rule does not specify the remedies or sanctions for failure to comply. R.C.M. 701(g)(3) allows prohibiting a party from presenting an undisclosed witness or evidence, but also provides for other remedies, like a continuance, and the latter is probably most frequently used. Once again, with neither a rule nor experience to rely on, the parties will probably have to err on the side of over- rather than under-inclusion, even though that entails its own risks. In a court-martial, or civilian trial, excluding defense witnesses for lack of notice would raise due process (or adequacy of counsel) concerns. It is uncertain how such principles would apply here.

The rule does not specify whether evidence to be used on sentencing is included in the disclosure requirement: does “at trial” also include the sentencing proceedings? Given the substantial likelihood that many military commissions may involve capital offenses, this is significant.

Section 6(B) requires the prosecution to deliver to the defense evidence that is exculpatory. This is narrower than the requirement in courts-martial: R.C.M. 701(a)(6) requires the prosecution to provide the defense with evidence that
reasonably tends to negate or reduce the degree of guilt of the accused, or to reduce the punishment. "Exculpate" means "to clear of blame" and would not necessarily include evidence that reduces the degree of guilt or the punishment.

Section 6(C), requiring certain notifications by the defense, is broader than the requirement in courts-martial. R.C.M. 701(b)(2) requires the defense to give notice of alibi, innocent ingestion, or lack of mental responsibility, or intent to introduce expert testimony as to the accused's mental condition. No requirement exists to give notice of other affirmative defenses. Also, in courts-martial, if the defense withdraws its intent to rely on a disclosed defense, R.C.M. 701(b)(5) prohibits admitting evidence of the intention and related disclosures. No such protection is provided here, and the standard of admissibility "probative value to a reasonable person," MCO 1, § 6(D)(1), would seem to permit such evidence.

Section 6(D), dealing with mental examinations of the accused, broadly parallels R.C.M. 706, which provides for ordering a mental examination of an accused when it appears that the accused may lack mental responsibility for an offense. However, R.C.M. 706 includes detailed procedures to protect the accused's right against self-incrimination. In essence, the prosecution is not given access to the accused's underlying statements, and is limited to learning of the results—that is the conclusions of the examiners whether the accused lacked mental responsibility. This subsection contains no such detailed protections. It may be that by specifying that the "parties shall have access to the results of that examination" (emphasis added), the rule implies that they will not have access to the underlying information provided by the accused. This may be a thin reed for the defense to rely on, at least until the rule is interpreted more fully, and defense counsel would be wise to explore with the prosecution and the Appointing Authority or Presiding Officer what protections the accused's statements may receive.
COMMITTEE OF THE WHOLE

PROPOSAL SUBMITTED BY THE UNITED STATES OF AMERICA

ANNEX ON DEFINITIONAL ELEMENTS FOR PART TWO CRIMES

A. Genocide

(a) Part 2 offence: Any of several acts "committed with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such".

(b) Elements

(i) That the accused intentionally committed one or more of the following acts against a person in a national, ethnical, racial, or religious group, because of that person's membership in that group:
   a. Killing;
   b. Causing serious bodily or mental harm;
   c. Inflicting conditions of life intended to bring about physical destruction of the group in whole or in part;
   d. Imposing measures intended to prevent births within the group; or
   e. Forcibly transferring children of the group to another group;

(ii) That when the accused committed such act, there existed a plan to destroy such group in whole or in part;

(iii) That when the accused committed such act, the accused had intent to take part in or had knowledge of the plan to destroy such group in whole or in part.
B. Crimes against humanity

1. General Comments

The following comments apply to all of Part B:

(a) In contrast to war crimes, crimes against humanity need not take place during an armed conflict and the relevant acts must be accompanied by an intent to take part in, or knowledge of, a widespread [or/and] systematic attack. The accused need not be personally responsible for the widespread or systematic attack.

(b) For purposes of the section, "attack" means any activity intended to harm or cause harm to the victim(s) through use of force or compulsion. It does not necessarily involve military conduct.

(c) "Widespread" means the attack is massive in nature and directed against a large number of persons. It excludes isolated offences.

(d) "Systematic" means the attack constitutes or is part of, or in furtherance of, a preconceived plan or policy, or repeated practice over a period of time. It excludes isolated offences.

2. Murder

(a) Part 2 offence: Murder.

(b) Elements

(i) That the accused intended to kill or cause death to one or more persons;

(ii) That the accused killed or caused the death of one or more persons;

(iii) That the killing was without lawful justification or excuse; and

(iv) That the killing was carried out in conscious furtherance of a widespread [or/and] systematic attack.

(c) Comment. The "without lawful justification or excuse" requirement means that lawful acts of war would be excluded.

3. Extermination

(a) Part 2 offence: Extermination.

(b) Elements

(i) That the accused intended to kill or cause the death of a population, or a large portion of a population;

(ii) That the accused killed or caused the death of a population, or a large portion of a population;
(iii) That the killing was without lawful justification or excuse; and
(iv) That the killing was carried out with conscious participation in a widespread [or/and] systematic attack.

(c) Comments.
(i) "Caused to be killed" can include an intentional failure to provide essential food, shelter and/or medical care when under custody or control of the accused;
(ii) The third element in this offence would mean, for example, that a siege or an embargo would not result in culpability with respect to this offence;
(iii) Extermination is distinguished from genocide in that it does not require the targeting of the population to be based solely on nationality, race, ethnicity, or religion. It is distinguished from murder in that it involves an intent to kill, and killing of, a population, or a large portion of a population, as opposed to one person.

4. Enslavement
(a) Part 2 offence: Enslavement.
(b) Elements
(i) That the accused intended to own or cause to be owned one or more persons and the fruits of their labour;
(ii) That one or more persons was deprived of all essential individual rights or forced to do labour without any compensation;
(iii) That the deprivation or forced labour was without lawful justification or excuse; and
(iv) That the enslavement was carried out with conscious participation in a widespread [or/and] systematic attack.
(c) Comment. The "without lawful justification or excuse" requirement would mean, for example, that the detention or internment of protected persons, defined in accordance with the Geneva Conventions of 1949, would not result in culpability with respect to this offence.

5. Unlawful Imprisonment
(a) Part 2 offence: Imprisonment in flagrant violation of international law or fundamental legal norms.
(b) **Elements**

(i) That the accused intended to imprison or cause to be imprisoned a group of people, a population, or part of a population, with the knowledge that such imprisonment was unlawful;

(ii) That the accused unlawfully imprisoned or caused to be imprisoned such persons;

(iii) That in carrying out the imprisonment, the accused systematically conducted or caused to be carried out unlawful arrests, detentions or use of sham legal process that departed substantially from established indispensable governing norms; and

(iv) That the imprisonment was carried out with conscious participation in a widespread [or/and] systematic attack.

(c) **Comments**

(i) *Imprisonment.* The term "imprisonment" means all forms of physical detention or confinement to a particular place.

(ii) The "unlawful" requirement means, for example, that the following cases do not constitute an offence: the lawful detention of persons by a competent court after conviction or pursuant to a probable cause determination by a pre-trial chamber; the lawful arrest or detention of persons for non-compliance with the lawful order of a court or in order to secure fulfilment of any obligation prescribed by law; or the lawful detention of persons for the prevention of the spreading of infectious diseases or to otherwise safeguard health and safety.

6. **Torture**

(a) **Part 2 offence:** Torture.

(b) **Elements**

(i) That the accused intended to inflict severe physical or mental pain or suffering to one or more persons;

(ii) That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon one or more persons;
That the acts did not arise from or were not inherent in or incidental to lawful sanctions; and

That the acts were carried out with conscious participation in a widespread [or/and] systematic attack.

7. Deportation

(a) Part 2 offence: Deportation or forcible transfer of population.

(b) Elements

(i) That the accused intended to unlawfully deport or transfer a population or group of people from their lawful place of residence;

(ii) That the accused knew of the lawful residence of the population or group in the place from which the accused expelled them;

(iii) That the accused caused the population or group to be forcibly deported or transferred;

(iv) That the deportation or transfer was without, and the accused knew it was without, justification based on security considerations, other imperative reason of public welfare, or other lawful authority; and

(v) That the forcible movement was carried out with conscious participation in a widespread [or/and] systematic attack.

(c) Comment. The requirement that the act be without justification precludes prosecutions for justified movements such as: any movement of a population consistent with article 49 of the Fourth Geneva Convention of 1949; any movement in case of an emergency or calamity threatening the life or well-being of the population; any service of punishment lawfully imposed; and any movement required as a necessary adjunct of a lawful internment.

8. Rape, sexual abuse or enforced prostitution

(a) Part 2 offence: Rape or other sexual abuse of comparable gravity, or enforced prostitution.

(b) Elements

(i) That the accused intended to attack a person or persons through acts of a sexual nature;
(ii) That the accused committed or caused to be committed one of the following acts by force:
   a. Rape;
   b. Sexual abuse; or
   c. Enforced prostitution; and

(iii) That the acts were committed with conscious participation in a widespread [or/and] systematic attack.

(c) Comments

(i) Rape. The actus reas of rape is the forcible penetration, however slight, of any part of the body of another by the accused's sexual organ, or forcible penetration, however slight, of the anal or genital opening of another by any object;

(ii) Sexual abuse. The actus reas of sexual abuse is any contact of a sexual nature by force or threat of force of comparable gravity to rape. It specifically includes the offences of sexual mutilation, enforced pregnancy and enforced sterilization;

(iii) Enforced prostitution. The actus reas of enforced prostitution is enslavement of a sexual nature wherein the "forcible" element need not be present for each individual sex act, but is generally present regarding a mandated activity that involves acts of a sexual nature;

(iv) Committed by force means that the sexual act was accomplished by force or threat of force against the victim or a third person. The threat of force can be either expressed or implied, and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress or psychological oppression if the victim does not comply. Evidence of consent may negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties.
9. Persecution

(a) **Part 2 offence**: Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds and in connection with other crimes within the jurisdiction of the Court.

(b) **Elements**

(i) That the accused intended to deprive an identifiable group of persons of life, liberty or security of person because of the target group's political, racial, national, ethnic, cultural or religious affiliation;

(ii) That the accused unlawfully deprived one or more members of the group of life, liberty or security of person;

(iii) That the deprivation caused death or serious bodily or mental harm or complete loss of human dignity; and

(iv) That the deprivation was carried out in conjunction with one or more of the other crimes described in this statute and with conscious participation in a widespread [or/and] systematic attack.

C. War crimes

1. **General comments**. The following comments apply to all of part C:

(a) **Military necessity**. The principle of military necessity authorizes that use of force, not otherwise specifically prohibited by the law of armed conflict, required for mission accomplishment or submission of the enemy.

(b) **Military purpose**. The term "military purpose" means any function that makes an effective contribution to military action or offers a military benefit.

(c) **Collateral damage**. Collateral damage includes that incidental injury or additional damage that was not intended by an attack or course of action. It is not unlawful to cause incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. The principle of proportionality, however, may prohibit some attacks on legitimate military objectives that would cause collateral damage or injury which is clearly excessive in the light of the overall military advantage anticipated.
(d) **Proportionality.** The principle of proportionality prohibits attacks which are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be clearly excessive in relation to the overall military advantage anticipated.

(e) **Military objective.** A military objective is any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

(f) **Civilian object.** A civilian object is any object which is not a military objective.

(g) All war crimes contain an element that the act in question took place in the course of armed conflict. This means that the offence must have been associated with the conduct of military operations during the course of hostilities in which the scope, duration and intensity of the use of force amounted to that of an armed conflict. For example, larceny or murder that take place among troops within a unit would not be war crimes merely because the offences occurred during a time period when armed conflict was taking place.

(h) In several cases, there is a particular *mens rea* requirement for war crimes which involves a level of knowledge of the commander or other accused. Decisions by military commanders and others responsible for planning, deciding upon or executing attacks can only be judged on the basis of their assessment of the information reasonably available to them under the circumstances at the relevant time.

2. **Murder**

(a) **Part 2 offences:** Wilful killing, killing or wounding a combatant who, having laid down his arms or having no longer a means of defence, has surrendered at discretion; violence to life and person, in particular murder of all kinds.

(b) **Elements**

(i) That the act or omission took place in the course of armed conflict;

(ii) That the accused intended to kill or cause death to one or more persons taking no active part in hostilities; and
(iii) That the accused killed or caused death to one or more persons taking no active part in hostilities.

(c) Comments. This crime encompasses faults of omission. If death is the foreseeable consequence of such omission, intent can be inferred. Examples include withholding food rations to prisoners of war or medical care to wounded enemy combatants in order to cause death.

3. Torture

(a) Part 2 offences: Torture; violence to life and person, in particular cruel treatment and torture; wilfully causing great suffering, or serious injury to body or health.

(b) Elements

(i) That the act took place in the course of armed conflict;
(ii) That the accused intended to inflict severe physical or mental pain or suffering upon one or more persons;
(iii) That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon one or more persons; and
(iv) That the acts did not arise from or were not inherent in or incidental to lawful sanctions.

4. Inhumane treatment

(a) Part 2 offences: Wilfully causing great suffering or serious injury to body or health; violence to life and person, in particular mutilation; inhuman treatment, including biological experimentation; subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and that causes death to or seriously endangers the health of such person or persons; committing outrages upon personal dignity, in particular humiliating and degrading treatment.

(b) Elements

(i) That the act took place in the course of armed conflict;
(ii) That the accused committed an act against a certain person or subjected that person to a particular medical or biological procedure or treatment;
(iii) (for inhuman treatment) That the act was intended to and did, in fact, subject the victim to mutilation, extreme
suffering grossly out of proportion to the treatment expected of one human being from another or grave injury to the victim's human dignity; or

(iv)  (for biological experimentation) That the intent of the procedure or treatment was non-therapeutic and was neither justified by medical reason nor carried out in the victim's interest; and

(v)  (for both inhuman treatment and biological experimentation) That the act or treatment caused death or serious bodily or mental harm.

5. Extensive destruction or unlawful appropriation

(a) Part 2 offences: Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict; pillaging a town or place, even when taken by assault.

(b) Elements

(i) That the act took place in the course of armed conflict;

(ii) That the accused intended to unlawfully destroy, damage or appropriate certain real or personal property;

(iii) That the accused destroyed, damaged or appropriated that property;

(iv) That the destruction, damage or appropriation was without lawful justification or excuse, including military necessity; and

(v) That the amount of destruction, damage or appropriation was extensive and was carried out in a manner devoid of concern for the consequences to the rights of the victim(s).

(c) Comment. Causing collateral damage cannot constitute this offence. Likewise, destruction or appropriation justified by military necessity is not unlawful.

6. Compelling hostile acts

(a) Part 2 offences: Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; compelling the nationals of the hostile party to take part in the operations of war directed against their
own country, even if they were in the belligerent's service before the commencement of the war.

(b) **Elements**

(i) That the act took place in the course of international armed conflict;

(ii) That the accused coerced a certain person, by act or threat, to engage in hostile acts against that person's own country;

(iii) That the person coerced was a prisoner of war or a civilian national of the hostile power; and

(iv) That the accused knew of the nationality or prisoner of war status of the coerced person.

(c) **Comment.** Implicit in the second element is the fact that the acts compelled cannot be constituted by lawful prisoner of war or civilian labour as defined by articles 49 to 57 of Geneva Convention (III) Relative to the Treatment of Prisoners of War, of 1949, and articles 51 and 52 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949.

7. **Denying judicial guarantees**

(a) **Part 2 offences:** Wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial, declaring abolished suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(b) **Elements**

(i) That the act took place in the course of armed conflict;

(ii) That the accused caused judicial proceedings to be concluded which resulted in some punishment of a certain prisoner of war or civilian;

(iii) That the accused intended to deprive the person of a fair and regular trial; and

(iv) (for international armed conflicts) that such act was performed without according the person a fair and regular trial as defined by the Third and Fourth Geneva Conventions of 1949; or
(v) (for non-international armed conflicts) that such act was performed without judgement by a regularly constituted court or without according indispensable judicial guarantees.

(c) Comment. For international armed conflicts, the substance of this offence is the violation of one or more of the penal provisions of articles 82 to 88 and 99 to 108 of Geneva Convention (III) Relative to the Treatment of Prisoners of War of 1949; and articles 64 to 78 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949. For non-international armed conflicts, the elements of the offence are only met when the combined violations of penal provisions rise to the level of denying indispensable judicial guarantees recognized by all civilized peoples.

8. Deportation

(a) Part 2 offences: Unlawful deportation or transfer; ordering the displacement of the civilian population for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.

(b) Elements

(i) That the act took place in the course of an armed conflict;

(ii) That the accused intended to unlawfully deport or transfer a population or group of people from their lawful place of residence;

(iii) That the accused caused a population or group to be forcibly deported or transferred; and

(iv) That the deportation or transfer was without, and the accused knew it was without, justification based on security considerations, other imperative reason of public welfare, or other lawful authority; and

(v) (for international armed conflicts) That the population or group of people deported or transferred were persons protected by Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949.

(c) Comment. States are authorized, for reasons of security, to intern civilians in some situations in accordance with articles 41 to 43, 68 and 78 to 104 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949. It is the Prosecutor's burden to prove that
internment of civilians was not undertaken for security purposes once a prima facie case is made for that defence.

9. Unlawful confinement
   (a) Part 2 offence: Unlawful confinement.
   (b) Elements
       (i) That the act took place in the course of an international armed conflict;
       (ii) That the accused intended to confine or cause to be confined a group of people, a population or part of a population, with the knowledge that such confinement was unlawful;
       (iii) That the accused unlawfully confined, or caused to be confined, such persons;
       (iv) That in carrying out the confinement, the accused systematically conducted or caused to be carried out unlawful arrests, detentions or use of sham legal process that departed substantially from established indispensable governing norms; and
       (v) That the confinement was, and the accused knew at the time the confinement was, unlawful.
   (c) Comment. Confinement. The term "confinement" means all forms of detention that substantially interfere with a person's liberty.

10. Taking hostages
   (a) Part 2 offence: Taking of hostages.
   (b) Elements
       (i) That the act took place in the course of armed conflict;
       (ii) That the accused intentionally seized, detained or otherwise held hostage a certain person without lawful justification or excuse;
       (iii) That the accused threatened to injure, kill or continue to detain such person; and
       (iv) That the act was performed with the intent to compel a State, an international intergovernmental organization, a natural or juridical person, or a group of persons to do or refrain from doing any act as an explicit or implicit condition for the safe release of the person.
11. Attacking of civilians

(a) Part 2 offences: Intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities.

(b) Elements

(i) That the act took place in the course of armed conflict;
(ii) That the accused intentionally directed an attack against a civilian population as such;
(iii) That none of the civilians against whom the attack was directed were taking part in hostilities or located in proximity to, or within, a lawful military objective at the time the attack was initiated;
(iv) That the accused knew the object of the attack to be a civilian population, as such, not taking part in hostilities or located in proximity to, or within, a lawful military objective at the time the attack was initiated; and
(v) That the attack resulted in death or serious injury to civilians.

(c) Comment. Causing incidental injury or collateral damage does not constitute attacking civilians, as the intent and knowledge requirements would not be satisfied.

12. Causing unnecessary damage

(a) Part 2 offence: Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which is not justified by military necessity.

(b) Elements

(i) That the act took place in the course of international armed conflict;
(ii) That the accused intentionally launched an attack;
(iii) That the attack resulted in collateral damage or incidental injury;
(iv) That the use of force causing collateral damage was not justified by military necessity; and
(v) That the accused knew that such use of force was not justified by military necessity.

c) Comment. The knowledge element is key to military necessity analysis for this offence. Since the military necessity evaluation is necessarily subjective, the analysis must be based upon the perspective of the accused prior to the attack and incorporate consideration of the exigent circumstances.

12 (alternative). Causing disproportionate damage

(a) Part 2 offence: Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread long term and severe damage to the natural environment that would be excessive in relation to the concrete and direct overall military advantage anticipated.

(b) Elements

(i) That the act took place in the course of an international armed conflict;

(ii) That the accused intentionally launched an attack;

(iii) That the attack resulted in collateral damage or incidental injury;

(iv) That the collateral damage or incidental injury was clearly excessive in relation to the overall military advantage anticipated;

(v) That the accused knew that such collateral injury or damage would be disproportionate to the military advantage gained.

c) Comment. The knowledge element is key to proportionality analysis for this offence. Since the evaluation is necessarily subjective, the proportionality knowledge threshold must be high and analysis must be based on the perspective of the accused prior to the attack.

13. Attacking an undefended town

(a) Part 2 offence: Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings that are undefended.

(b) Elements

(i) That the act took place in the course of international armed conflict;

(ii) That the accused intentionally launched an attack against a certain town, village, dwelling or building;
That the object of the attack was open for immediate, unresisted occupation;

(iv) That the accused knew that the object of the attack was open for immediate, unresisted occupation; and

(v) That the attack was not justified by military necessity.

13 (alternative). Attacking a non-defended locality

(a) Part 2 offence: Making [declared] non-defended localities and demilitarized zones the object of attack.

(b) Elements

(i) That the act took place in the course of international armed conflict;

(ii) That the accused intentionally launched an attack against a certain non-defended locality or within a certain zone;

(iii) That the attack resulted in death or serious injury to one or more persons;

(for demilitarized zones)

(iv) That the parties to the conflict conferred on the zone, by agreement, the status of demilitarized zone, and the accused knew that this status had been conferred; and

(v) That since the demilitarized zone status was conferred, the zone met, and the accused knew the zone met, the following conditions:

   a. All combatants, as well as mobile weapons and mobile military equipment, had been evacuated;

   b. No hostile use had been made of its fixed military installations or establishment;

   c. No acts of hostility had been committed by its authorities or by its population; and

   d. Any activity linked to the military effort of the adversary had ceased; or
(for non-defended localities)

(vi) That the locality was, and the accused knew that the locality was, an inhabited place near or in a zone where forces were in contact which was open for occupation by the forces of the accused, and had been declared to the forces of the accused to be non-defended by the appropriate authorities;

(vii) That since the declaration of non-defended status, the locality met, and the accused knew that the locality met, the following conditions:

a. All combatants, as well as mobile weapons and mobile military equipment, had been evacuated;

b. No hostile use had been made of its fixed military installations or establishments;

c. No acts of hostility had been committed by its authorities or by the population; and

d. No activities in support of military operations had been undertaken therein.

14. Attacking protected objects

(a) Part 2 offences: Intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historical monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

(b) Elements

(i) That the act took place in the course of armed conflict;

(ii) That the accused intentionally attacked one or more of the following: a building dedicated to religion, art, science or charitable purposes, a historical monument or a hospital or place where the sick and wounded are collected;

(iii) That the accused intended the object of that attack to be the building, object or place that was attacked;

(iv) That the object of attack was not being used for a military purpose at the time of the attack; and

(v) That the accused knew that the object of attack was not being used for a military purpose at the time of the attack.
15. **Perfidy**

(a) **Part 2 offences:** Killing or wounding treacherously individuals belonging to the hostile nation or army; killing or wounding treacherously a combatant adversary, making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury.

(b) **Elements**

(i) That the act took place in the course of armed conflict;

(ii) That the accused intended to kill or cause serious injury to an adversary;

(iii) That the accused committed an act resulting in the death or serious injury of an adversary;

(iv) That the accused intended the death or injury to be accomplished by inviting the confidence of an adversary to believe himself to be entitled to, or obliged to accord, protection under the international law of armed conflict, with intent to betray that confidence; and

(v) That the death or injury occurred as a direct result of such misrepresentations.

(c) **Comments.** The perfidious activity described in element (4) could include improper use of a flag of truce, uniform of the enemy or the United Nations or distinctive emblems of the Geneva Convention. However, such uses would not result in culpability if not perfidious as defined by the elements (e.g., if the use of an enemy uniform does not cause detrimental belief in an obligation or protection). Ruses of war are legitimate so long as they do not involve perfidy.

16. **Denying quarter**

(a) **Part 2 offence:** Declaring that no quarter will be given.

(b) **Elements**

(i) That the act took place in the course of armed conflict;

(ii) That the accused was a person in command or had authority over certain forces;

(iii) That the accused made a declaration or gave an order to those subordinate forces to the effect that any bona fide surrender by the enemy be refused, even if it would be
reasonable to accept and that all enemy persons proffering surrender be killed;

(iv) That in so declaring or ordering, the accused intended that his stated intent be executed.

(c) Comment. Bringing a preponderance of force to bear against enemy military objectives or enemy personnel does not constitute denial of quarter. Neither is a commander obligated to offer an opportunity to surrender before carrying out an attack, since surprise or speed may be critical to the success of the attack.

17. Sexual offences

(a) Part 2 offences: Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization and any other form of sexual violence also constituting a grave breach of the Geneva Conventions.

(b) Elements

(i) That the act took place in the course of armed conflict;

(ii) That the accused intended to commit a certain sexual act upon a certain person or forced that person to engage in a certain sexual act;

(iii) That the accused committed or caused to be committed one of the following acts by force:
   a. Rape;
   b. Sexual abuse; or
   c. Enforced prostitution.

(c) Comments

(i) Rape. The actus reas of rape is the forcible penetration, however slight, of any part of the body of another by the accused's sexual organ, or forcible penetration, however slight, of the anal or genital opening of another by any object;

(ii) Sexual abuse. The actus reas of sexual abuse is any contact of a sexual nature by force or threat of force of comparable gravity to rape. It specifically includes the offences of sexual mutilation, enforced pregnancy and enforced sterilization;

(iii) Enforced prostitution. The actus reas of enforced prostitution is enslavement of a sexual nature wherein the
"forcible" element need not be present for each individual sex act, but is generally present regarding a mandated occupation that involves acts of a sexual nature.

(iv) Committed by force means that the sexual act was accomplished by force or threat of force against the victim or a third person. The threat of force can be either express or implied, and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress or psychological oppression if the victim does not comply. Evidence of consent may negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, where resistance is overcome by threats of death or great bodily harm or where the victim is unable to resist because of the lack of mental or physical faculties.

18. Immunizing an area with protected persons

(a) Part 2 offence: Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.

(b) Elements

(i) That the act took place in the course of international armed conflict;

(ii) That at the time of the offence, the accused was defending a military objective from likely attack;

(iii) That the accused caused either the military objective, one or more civilian persons or one or more persons protected under one of the Geneva Conventions of 1949 to be moved so that the military objective and the civilian personnel or protected persons would be either located together or otherwise positioned so that an attack against the military objective would seriously endanger the civilian personnel or protected persons; and

(iv) That the accused's actions were intended to shield the military objective from attack, to shield, favour or impede
19. Attacking objects displaying a protective emblem

(a) Part 2 offence: Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions.

(b) Elements

(i) That the act took place in the course of armed conflict;
(ii) That the accused intentionally attacked a building, an object, a medical unit or transport, or person that was properly displaying a distinctive protective emblem of the Geneva Conventions;
(iii) That the accused intended the object of the attack to be the person or object attacked and knew the object of attack was properly displaying a distinctive protective emblem of the Geneva Conventions; and
(iv) That the object of attack was not, and the accused knew it was not, being used for a military purpose at the time of the attack.

21. Starvation

(a) Part 2 offence: Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.

(b) Elements

(i) That the act or omission took place in the course of international armed conflict;
(ii) That the accused engaged in an act or omission to attack, destroy, remove or render useless objects indispensable to the nourishment and survival of the civilian population of an adverse party;
(iii) That the accused's act or omission was intended for the specific purpose of denying nourishment necessary for the survival of the civilian population of an adverse party; and
(iv) That as a result of the accused's acts, one or more persons died from starvation.

(c) Comments. An omission can only constitute this offence if the accused omitted to fulfill a lawful duty, for example, feeding prisoners under his care.

22. Using illegal weapons

(a) Part 2 offences: Employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering: (i) poison or poisoned weapons; (ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict; (v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction.

(b) Elements

(i) That the act took place in the course of international armed conflict;

(ii) That the accused intentionally attacked an adversary in that armed conflict with:
   a. Bullets which expand or flatten easily in the human body;
   b. Bacteriological agents or toxins; or
   c. Chemical weapons; and

(iii) That at the time of the offence, the accused was aware of the nature of the weapon he or she was using and its prohibited status under international law.

(c) Comments

(i) Chemical weapons means chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction. It does not include riot control agents as they are defined in that Convention. Use
of chemical weapons against a civilian population might also constitute one or more crimes against humanity regardless of the context.

(ii) *Bacteriological agents or toxins* means any microbial or other biological agent or toxin, whatever its origin or method of production.
Preparatory Commission for the International Criminal Court
New York
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Proposal submitted by the United States of America

Draft elements of crimes

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I. General comments

1. The Elements of Crimes are intended to assist the Court in the interpretation and application of articles 6, 7 and 8 of the Statute. They should also provide a tool for the Prosecutor and defense counsel to identify appropriate issues during litigation. Specifically, the Elements of Crimes describe the factual findings that would establish culpability and justify conviction for each offence under the Statute.

2. The Elements of Crimes derive from the definitions found in articles 6, 7 and 8. They do not change the definition of any offence; they do not alter the jurisdiction of the Court; and they are consistent with the Statute. Any question of interpretation must be resolved consistently with the Statute. The Elements do not replace the general principles of law found in other articles in the Statute. In some instances, the Elements clarify the specific manner in which general principles of criminal law would be applied to a specific offence. For example, article 30 clarifies that material elements of offences must be committed with intent and knowledge. This obviates the need to have the Elements state that the accused “intentionally” committed a certain act. However, many offences also have a mens rea element requiring specific intent. In those instances, the Elements may provide the separate element that explains the requisite motivation or consequential intent for that particular offence (e.g., killing with the specific intent to destroy a population as opposed to merely intentionally killing).

3. Each offence defined as a crime in the Statute is listed below with an accompanying set of elements. Since some crime definitions in the Statute duplicate what is essentially the same offence (e.g., deportation under article 8.2(a)(vii) and under 8.2(b)(viii)), cross-references are used to avoid duplicating elements lists. In some instances, a particular paragraph in the Statute subsumes several different offences (e.g., the several distinct sexual offences found in article 8.2(b)(xxii)). In those cases, separate sets of elements are provided for each offence or crime covered by the paragraph. Unless stated otherwise, all element lists are cumulative prerequisites to establish guilt.

4. Articles 25 and 28 describe theories of culpability that do not always involve completed criminal acts committed by the accused's own hand (e.g., attempts, command responsibility). The elements listed for articles 6, 7 and 8 would appear to be inapplicable to instances where the act is incomplete or liability is vicarious. Therefore, an “Inchoate offences” section is provided which explains the application of the crime-specific elements to situations covered by articles 25 and 28.

II. Terminology

The following meanings should be applied to terms as used within this Elements of Crimes annex:

1. Appropriate (v.) means to exercise dominion over an object belonging to another person, against that person’s will, for the purpose of making it serve one’s own use or pleasure.

2. Attack means any activity directly intended to harm or cause harm to the victim(s) through use of force or compulsion. It does not necessarily involve military operations.

3. Attack directed against any civilian population means a course of conduct involving the multiple commission of the act in question against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.
4. Civilian object means any object that is not a military objective.

5. Collateral damage means that incidental injury or additional damage that was not intended by an attack or course of action. Incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective is not per se unlawful. However, the norm codified in article 8.2(a)(iv) (sometimes referred to as the principle of proportionality) may prohibit some attacks on legitimate military objectives that would cause collateral damage or injury that is clearly excessive in the light of the overall military advantage anticipated.

6. Committed by force means that the sexual act was accomplished by coercion or force or threat of force against the victim or a third person. The threat of force can be either express or implied and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress or psychological oppression if the victim does not comply. Besides direct threats by the perpetrator, this term encompasses situations where the accused takes advantage of immediate conditions that are shown to be inherently coercive. Evidence of consent may negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, if resistance is overcome by threats of death or great bodily harm or if the victim is unable to resist because of the lack of mental or physical faculties.

7. Conditions of life means circumstances involving the deprivation of resources indispensable for survival. They would include deprivation of food, water, shelter or medical supplies.

8. Conscript or enlist (v.) means to cause to enter into military service.

9. Hors de combat means a combatant who: (a) is in the power of an adverse party to a conflict; (b) has clearly expressed an intention to surrender; or (c) has been rendered unconscious or otherwise incapacitated owing to wounds or sickness, and therefore is incapable of defending himself. This status only applies provided that he or she exhibits no hostile intent, abstains from any hostile act and does not attempt to escape.

10. Imprison means to detain or confine to a particular place without consent, either directly or through the imposition of some other severe deprivation of physical liberty.

11. In the course of armed conflict and in the course of international armed conflict mean in direct association with the conduct of military operations arising from a total or partial military occupation or from hostilities in which the scope, duration and intensity of the use of force amounts to that of an armed conflict under international law. The presence of this element requires, for war crimes, that the alleged acts be closely related to the hostilities. For example, common crimes that occur among or between troops within a unit would not be war crimes merely because the offences occurred during a time period when armed conflict was taking place; the offence must be associated with a military operation.

12. Lawful justification or excuse means justification based on security, military or operational considerations or other imperative reasons of public welfare or other specific lawful authorization or requirement. For example, where authorized by the law of armed conflict, military necessity constitutes "lawful justification or excuse". An element requiring an absence of lawful justification or excuse is included in situations where the actus reus of the offence is similar or identical to a lawful act. It is, in effect, a defence that is specific to certain offences, i.e., a lawful purpose for a particular act relieves the accused of criminal responsibility. The scienter requirement of knowledge of a justification's inadequacy permits a defence, especially
in the case of obedience to a directive or fulfilment of a duty, when an accused may have reasonably believed that the excuse or justification was lawful. For a justification or excuse to be lawful, the activity in question must be consistent with applicable treaties and the principles and rules of general international law, including the established principles of the law of armed conflict, or general principles of law derived by the Court from national laws of legal systems of the world, where those national laws are not inconsistent with the present Statute and with international law.

13. Liberty means the freedom to move, act and make individual decisions as normally guaranteed by universally recognized rules of international law and the laws of the relevant State or society.

14. Military necessity means that which is required to accomplish a lawful military mission. The principle of military necessity authorizes that use of force, not otherwise specifically prohibited by the law of armed conflict, required for mission accomplishment or submission of the enemy. Since the evaluation is necessarily subjective, ex post facto analysis of a military necessity determination must focus only on the decision maker’s perspective at the time of the decision.

15. Military objective, insofar as objects are concerned, means objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

16. Military purpose means any goal or function that makes an effective contribution to military action or offers a military benefit.

17. Open for immediate, unresisted occupation means that the locality has been declared by appropriate authorities to the forces of the accused to be undefended; all combatants, as well as mobile weapons and mobile military equipment, have been removed; no hostile use has been or is being made of any fixed military installations or establishments; no acts of hostility have been committed by its authorities or population; and no activities in support of military operations have been undertaken therein.

18. Prolonged period of time means a period in excess of six months.

19. Poison means any substance specifically designed to cause death through the toxic properties of toxic chemicals or agents which would be released as a result of the employment of munitions or devices. It does not include riot control agents designed to cause temporary incapacitation. It includes asphyxiating gases as well as any other analogous liquid, material or device.

20. Sexual nature means involving the sexual organs and/or the intent to sexually arouse. An act of a sexual nature means an act of intentional touching of the sexual organs with the intent to sexually arouse either the accused, the victim or a third party when applicable (e.g., sexual slavery).

21. Systematic means that the attack constitutes, is part of or is in furtherance of a preconceived plan or policy, or repeated intentional practice over a period of time. It excludes isolated offences.

22. Taking no active part in hostilities means abstaining from any hostile act and not otherwise directly supporting the conduct of military operations.

23. Transfer means to unlawfully displace, without consent, by expulsion or other coercive acts, from an area in which the transferee is lawfully present, to another area.
24. *Widespread* means the attack is massive in nature and directed against a large number of persons. It excludes isolated offences.

III. Article 6: Crimes of genocide

Article 6(a): Genocide by killing

Elements
1. That the accused intended to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.
2. That the accused killed one or more persons in that group in furtherance of that intent.
3. That the person or persons were killed in conscious furtherance of a widespread or systematic policy or practice aimed at destroying such group.

Article 6(b): Genocide by harming

Elements
1. That the accused intended to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.
2. That the accused committed an act against one or more persons in that group in furtherance of that intent.
3. That the act resulted in serious mental or physical harm.
4. That the person or persons were harmed in conscious furtherance of a widespread or systematic policy or practice aimed at destroying such group.

Article 6(c): Genocide by inflicting conditions of life

Elements
1. That the accused intended to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.
2. That the accused inflicted certain conditions of life upon one or more persons in that group in furtherance of that intent.
3. That the conditions of life were intended to physically destroy that group.
4. That the conditions of life contributed to the physical destruction of that group.
5. That the conditions of life were inflicted in conscious furtherance of a widespread or systematic policy or practice aimed at destroying such group.

Article 6(d): Genocide by preventing births

Elements
1. That the accused intended to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.
2. That the accused forcibly imposed certain measures upon one or more persons in that group in furtherance of that intent.
3. That the measures imposed were intended to prevent births within that group.
4. That the measures imposed had the effect of preventing births within that group.
5. That the measures were imposed in conscious furtherance of a widespread or systematic policy or practice aimed at destroying such group.

Article 6(e): Genocide by transferring children

Elements
1. That the accused intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
2. That the accused forcibly transferred one or more persons under the age of fifteen from that person's or those persons' lawful residence in furtherance of that intent.
3. That the person or persons were transferred in conscious furtherance of a widespread or systematic policy or practice aimed at destroying such group.
Preparatory Commission for the International
Criminal Court
New York
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Draft elements of crimes

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IV. Article 7: Crimes against humanity

Article 7.1(a): Crime against humanity of murder

Elements
1. That the accused intended to kill or cause death to one or more persons.
2. That the accused killed or caused the death of one or more persons.
3. That the killing was without, and the accused knew it was without, lawful justification or excuse.
4. That the killing was part of, and the accused knew it was part of, a widespread or systematic attack directed against a civilian population.

Comments
As with all matters of fact, the accused’s knowledge of a particular fact, e.g., the existence of a widespread or systematic attack, can be inferred from the circumstances and other facts presented to the Court.

Article 7.1(b): Crime against humanity of extermination

Elements
1. That the accused intended to kill or cause the death of a population, or a large portion of a population.
2. That the accused killed or caused the death of a population, or a large portion of a population.
3. That the killing was without, and the accused knew it was without, lawful justification or excuse.
4. That the killing was part of, and the accused knew it was part of, a widespread or systematic attack against a civilian population.

Comments
The lawful justification or excuse element of this offence would mean, for example, that a siege or an embargo would not result in culpability with respect to this offence.

The killing in this case need not be a direct act of violence. The actus reus can include the intentional infliction of conditions of life, inter alia, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.

Extermination is distinguished from genocide in that it does not require the targeting of the population to be based solely on nationality, race, ethnicity or religion. It is distinguished from murder in that it involves an intent to kill, and killing of, a population, or a portion of a population, as opposed to one person.
Article 7.1(c): Crime against humanity of enslavement

Elements
1. That the accused intended to exercise powers attaching to the right of ownership over one or more persons.
2. That the accused either purchased or sold one or more persons or deprived them of their liberty and forced them to do labour without compensation.
3. That any deprivation of liberty or forced labour was without, and the accused knew it was without, lawful justification or excuse.
4. That the purchase, sale or deprivation and forced labour was part of, and the accused knew it was part of, a widespread or systematic attack against a civilian population.

Comments
The "without lawful justification or excuse" requirement would mean, for example, that forced labour, mandated as part of a lawfully imposed judicial sentence, would not result in culpability.

"Purchased or sold" need not be limited to the establishment of technical legal ownership but can include effectively equivalent transactions.

Article 7.1(d): Crime against humanity of deportation

Elements
1. That the accused intended to transfer a population from its lawful place of residence.
2. That the accused caused one or more persons in that population or group to be forcibly transferred from their lawful place of residence through expulsion or other coercive acts.
3. That the forcible transfer was part of a plan or policy designed to result in the transfer of the target population.
4. That the forcible transfer was without, and the accused knew it was without, lawful justification or excuse.
5. That the transfer was part of, and the accused knew it was part of, a widespread or systematic attack against a civilian population.

Comments
The requirement that the act be without lawful justification or excuse precludes prosecutions for justified movements such as: any movement of a population consistent with article 49 of the Fourth Geneva Convention, 1949; any movement in case of an emergency or calamity threatening the life or well-being of the population; any sentence of punishment lawfully imposed; and any movement required as a necessary adjunct of a lawful internment.
Article 7.1(e): Crime against humanity of imprisonment

Elements
1. That the accused intended to imprison one or more persons.
2. That the accused imprisoned such person or persons.
3. That the imprisonment was, and the accused knew it was, in violation of fundamental rules of international law.
4. That the imprisonment was part of, and the accused knew it was part of, a widespread or systematic attack against a civilian population.

Comments
The "in violation of fundamental rules of international law" parallels the "without lawful justification or excuse" element of other offences and in this instance it means, for example, that detention of persons for the prevention of the spreading of infectious diseases or to otherwise safeguard health and safety would not constitute an offence under this article.

*As defined in section II, the term "imprison" includes other severe deprivations of physical liberty.*

Article 7.1(f): Crime against humanity of torture

Elements
1. That the accused intended to inflict severe physical or mental pain or suffering on one or more persons.
2. That the accused had custody of or control over such person or persons at the time of the offence.
3. That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon such person or persons.
4. That the acts were not inherent in or incidental to lawful sanctions.
5. That the acts resulting in pain or suffering were part of, and the accused knew they were part of, a widespread or systematic attack against a civilian population.

Article 7.1(g)-1: Crime against humanity of rape

Elements
1. That the accused intended to attack one or more persons through acts of a sexual nature.
2. That the accused penetrated any part of the body of another person with the accused's sexual organ, or penetrated the anal or genital opening of another person with any object or other part of the accused's body.
3. That the penetration was committed by force.
4. That the assault was part of, and the accused knew it was part of, a widespread or systematic attack against a civilian population.
Article 7.1(g)–2: Crime against humanity of sexual slavery

Elements
1. That the accused intended to attack one or more persons by causing them to engage in acts of a sexual nature.
2. That the accused deprived one or more persons of their liberty.
3. That the accused, through force or threat, caused the person or persons to engage in acts of a sexual nature.
4. That such deprivation and acts were part of, and the accused knew they were part of, a widespread or systematic attack against a civilian population.

Comments
Besides physically detaining or confining a person to a particular place without consent, the deprivation of liberty required by this offence could also include severe deprivations of autonomy and freedom of movement, which are universally recognized as impermissible under international law.

Article 7.1(g)–3: Crime against humanity of enforced prostitution

Elements
1. That the accused intended to attack one or more persons by causing them to engage in acts of a sexual nature.
2. That the accused, in furtherance of this intent, deprived one or more persons of their liberty and forced them to engage in acts of a sexual nature with one or more other persons.
3. That the accused received some pecuniary or other material benefit in exchange for or in connection with the sex acts of the person or persons.
4. That the deprivation of liberty and forced acts were part of, and the accused knew they were part of, a widespread or systematic attack against a civilian population.

Article 7.1(g)–4: Crime against humanity of forced pregnancy

Elements
1. That the accused intended to affect the ethnic composition of a population or to carry out another grave violation of international law.
2. That, in furtherance of that intent, the accused imprisoned one or more persons within a confined area.
3. That the person imprisoned had been previously raped or otherwise forcibly impregnated, and the accused knew that such person had been previously raped or forcibly impregnated.
4. That the imprisonment was without, and the accused knew it was without, lawful justification or excuse.
5. That the imprisonment was part of, and the accused knew it was part of, a widespread or systematic attack against a civilian population.

Comments

The "without lawful justification or excuse" element in this offence would, for example, preclude prosecution for acts committed as a logical consequence of domestic laws involving pregnancy.

Article 7.1(g)–5: Crime against humanity of enforced sterilization

Elements

1. That the accused intended to terminate the natural reproductive capacity of one or more persons.
2. That the accused committed an act that resulted in the termination of the natural reproductive capacity of such person or persons.
3. That the act was committed without such person's or persons' consent.
4. That the act was without, and the accused knew it was without, lawful justification or excuse.
5. That the act was part of, and the accused knew it was part of, a widespread or systematic attack against a civilian population.

Article 7.1(g)–6: Crime against humanity of sexual violence

Elements

1. That the accused intended to attack one or more persons through acts of a sexual nature.
2. That the accused committed by force an act against one or more persons.
3. That the act was of a sexual nature or caused the person or persons to engage in activity of a sexual nature.
4. That the act involved a level of violence comparable to that of rape.
5. That the act was part of, and the accused knew it was part of, a widespread or systematic attack against a civilian population.

Article 7.1(h): Crime against humanity of persecution

Elements

1. That the accused intended to severely deprive an identifiable group of persons of life or other fundamental rights universally recognized under international law.
2. That the deprivation was motivated by:
   (a) The target group's race or gender;
(b) The target group's political, racial, national, ethnic, cultural or religious affiliation; or
(c) Other grounds universally recognized as impermissible under international law.

3. That the accused deprived one or more members of the group or life, or other fundamental rights universally recognized under international law.

4. That the deprivation was without, and the accused knew it was without, lawful justification or excuse.

5. That the deprivation was carried out in conjunction with another offence within the subject-matter jurisdiction of the present Statute.

6. That the deprivation was part of, and the accused knew it was part of, a widespread or systematic attack against a civilian population.

Comments
The “without lawful justification or excuse” element of this offence precludes, for example, prosecution for legitimate enforcement of immigration and naturalization laws.

Article 7.1(i): Crime against humanity of enforced disappearance

Elements
1. That the accused intended to deny one or more persons the right to enjoy normal legal protections for a prolonged period of time.

2. That, in furtherance of this intent, the accused arrested, detained or abducted one or more persons.

3. That the arrests, detentions or abductions were accomplished with the authorization, support or acquiescence of a State or political organization.

4. That the arrests, detentions or abductions were followed by a refusal to acknowledge the arrests, detentions, or abductions by the accused and other persons with official responsibility to make such acknowledgement.

5. That the arrests, detentions or abductions resulted in the inability of the person or persons to enjoy normal legal protections for a prolonged period of time.

6. That the arrests, detentions or abductions were part of, and the accused knew they were part of, a widespread or systematic attack against a civilian population.

Article 7.1(j): Crime against humanity of apartheid

Elements
1. That the accused committed one or more of the crimes against humanity defined in article 7 of the Statute or acts of a similar character that were grossly inconsistent with the treatment expected of one human being from another under generally accepted rules of international law.

2. That there existed an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
3. That the crime was committed in the context of such institutionalized regime and with the intent of maintaining that regime.

4. That the accused's acts were committed with the intent of maintaining that regime.

5. That the acts were part of, and the accused knew they were part of, a widespread or systematic attack against a civilian population.

Comments

Excepting the unusual circumstance of an act rising to the level required by element 1 but not being otherwise covered in article 7, satisfying the first element of this offence necessarily mandates satisfaction of all the elements of another crime against humanity. It thus becomes an aggravated form of another crime against humanity.

Article 7.1(k): Crime against humanity of inhumane acts

Elements

1. That the accused intended to subject one or more persons to great suffering or serious injury to body or to mental or physical health.

2. That the accused committed an act or acts against such person or persons that were grossly inconsistent with universally recognized principles of humanity and generally accepted rules of international law and were of similar character to acts covered by other crimes against humanity defined in article 7 of the Statute.

3. That act or acts subjected the person or persons to great suffering or serious injury to body or to mental or physical health.

4. That the act or acts were part of, and the accused knew they were part of, a widespread or systematic attack against a civilian population.

Notes

1 See PCNICC/1999/DP.4.
Preparatory Commission for the International Criminal Court
New York
16–26 February 1999
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Draft elements of crimes

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V. Article 8: War crimes

Article 8.2 (a) (i): War crime of murder

(See also art. 8.2 (b) (vi), art. 8.2 (c) (i))

**Elements**

1. That the act took place in the course of international armed conflict.
2. That the accused intended to kill or cause death to one or more civilians taking no active part in hostilities or one or more combatants placed hors de combat.
3. That the accused killed or caused death to one or more civilians taking no active part in hostilities or one or more combatants placed hors de combat.
4. That the acts were committed without, and the accused knew they were committed without, lawful justification or excuse.

**Comments**

The actus reus for this offence can include failures to fulfil a duty. If death is the foreseeable consequence of such failure, intent can be inferred. Examples include withholding food rations to prisoners of war or medical care to wounded enemy combatants with the intent of causing death.

The "without lawful justification or excuse" element of this offence would mean, for example, that the killing of an escaping prisoner of war would not result in culpability for this offence.

Article 8.2 (a) (ii)—1: War crime of torture

(See also art. 8.2 (a) (iii), art. 8.2 (c) (i))

**Elements**

1. That the act took place in the course of international armed conflict.
2. That the accused intended to inflict severe physical or mental pain or suffering upon one or more persons.
3. That the accused had custody of or control over such person or persons at the time of the offence.
4. That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon such person or persons.
5. That the acts were not inherent in or incidental to lawful sanctions.

**Comments**

The effects of weapons, the use of which is not prohibited by the Statute, do not constitute "severe physical or mental pain or suffering".
Article 8.2 (a) (ii)–2: War crime of inhuman treatment

(See also art. 8.2 (b) (x), art. 8.2 (c) (i), art. 8.2 (e) (xi))

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused committed an act against one or more persons that forcibly subjected the person or persons to extreme physical or mental pain or suffering grossly inconsistent with universally recognized principles of humanity and generally accepted rules of international law.
3. That the act was committed without, and the accused knew it was committed without, lawful justification or excuse.
4. That the act caused death or serious bodily or mental harm to the person or persons.

Article 8.2 (a) (ii)–3: War crime of biological experimentation

(See also art. 8.2 (b) (x), art. 8.2 (c) (i), art. 8.2 (e) (xi))

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused subjected one or more persons to a particular medical or biological procedure or treatment.
3. That the intent of the procedure or treatment was non-therapeutic and was neither justified by medical reasons nor carried out in the person's or persons' best interests.
4. That the procedure or treatment was not freely consented to by the person or persons.
5. That the act was committed without, and the accused knew it was committed without, lawful justification or excuse.
6. That the act caused death or serious bodily or mental harm to the person or persons.

Article 8.2 (a) (iii): War crime of torture

(See also art. 8.2 (a) (ii), art. 8.2 (c) (i))

Elements/Comments
Use elements for article 8.2 (a) (ii)–1.

Article 8.2 (a) (iv): War crime of destruction or appropriation of property

(See also art. 8.2 (b) (xiii), art. 8.2 (b) (xvi), art. 8.2 (e) (v), art. 8.2 (e) (xii))
Elements

1. That the act took place in the course of international armed conflict.
2. That the accused intended to destroy or appropriate certain property that did not constitute a military objective and whose destruction or appropriation would not serve a military purpose.
3. That the accused destroyed or appropriated that property.
4. That the destruction or appropriation was without, and the accused knew it was without, lawful justification or excuse.
5. That the amount of destruction or appropriation was extensive.

Comments

Destruction or appropriation justified by military necessity would not result in culpability for this offence since neither the "without lawful justification or excuse" element nor the military purpose element would be satisfied.

Article 8.2 (a) (v): War crime of compelling hostile acts

(See also art. 8.2 (b) (xv))

Elements

1. That the act took place in the course of international armed conflict.
2. That the accused coerced a certain person, by act or threat, to take part in military operations against that person's own country or forces.
3. That the person coerced was a prisoner of war or a civilian national of the hostile Power.
4. That the accused knew of the nationality or prisoner-of-war status of the coerced person at the time of coercion.
5. That the coercion was without, and the accused knew it was without, lawful justification or excuse.

Comments

Implicit in element 5 is the fact that the acts compelled do not include those acts defined by articles 49 to 57 of Geneva Convention III Relative to the Treatment of Prisoners of War of 1949 and articles 51 and 52 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 1949.

Article 8.2 (a) (vi): War crime of denying judicial guarantees

(See also art. 8.2 (b) (xiv), art. 8.2 (c) (iv))

Elements

1. That the act took place in the course of international armed conflict.
2. That the accused caused a punishment to be imposed on a prisoner of war or civilian.
3. That the accused intended to deprive the person of a fair and regular trial.

4. That such act was performed without according the person a fair and regular trial as prescribed by the Third and Fourth Geneva Conventions of 1949.

Comments

For international armed conflicts, the substance of this offence is the violation of one or more of the penal provisions of articles 82 to 88 and 99 to 108 of Geneva Convention III Relative to the Treatment of Prisoners of War of 1949 and articles 64 to 78 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 1949.

Article 8.2 (a) (vii)–1: War crime of deportation

(See also art. 8.2 (b) (viii), art. 8.2 (e) (viii))

Elements

1. That the act took place in the course of an international armed conflict.

2. That the accused intended to transfer one or more persons from their lawful place of residence.

3. That the accused caused one or more persons to be forcibly transferred from their lawful place of residence through expulsion or other coercive acts.

4. That the forcible transfer was without, and the accused knew it was without, lawful justification or excuse.

5. That the person or persons transferred were persons protected by Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 1949.

Comments

States are authorized, for reasons of security and military necessity, to intern civilians in some situations in accordance with articles 41 to 43, 68 and 79 to 104 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 1949. It is the Prosecutor’s burden to prove that internment of civilians was not undertaken for security or other lawful purposes once a prima facie case is made for that defence.

Article 8.2 (a) (vii)–2: War crime of unlawful confinement

Elements

1. That the act took place in the course of international armed conflict.

2. That the accused intended to imprison one or more persons.

3. That the accused imprisoned such person or persons within a confined area.

4. That the imprisonment was, and the accused knew at the time the imprisonment was, without lawful justification or excuse.
Comments

The "without lawful justification or excuse" requirement means, for example, that detention of persons for the prevention of the spreading of infectious diseases or to otherwise safeguard health and safety would not constitute an offence.

Unlike the crime against humanity of imprisonment, element 2 for this offence requires imprisonment to a confined area. The elements are not satisfied by mere deprivation of liberty.

Article 8.2 (a) (viii): War crime of taking hostages

(See also art. 8.2 (c) (iii))

Elements

1. That the act took place in the course of international armed conflict.
2. That the accused seized, detained or otherwise held hostage one or more persons.
3. That the seizure, detention or holding was without, and the accused knew it was without, lawful justification or excuse.
4. That the accused threatened to injure, kill, continue to detain such person or otherwise harm such person's or persons' interests.
5. That the threat was made with the intent to compel a State, an international intergovernmental organization, a natural or juridical person, or a group of persons to do or refrain from doing any act as an explicit or implicit condition for the safe release of the person.

Article 8.2 (b) (i): War crime of attacking civilians

(See also art. 8.2 (b) (iii), art. 8.2 (c) (i), art. 8.2 (c) (iii))

Elements

1. That the act took place in the course of international armed conflict.
2. That the accused, through a directed use of force, intended to attack one or more civilians as such.
3. That the accused directed an attack against one or more persons, knowing that person or persons to be civilian.
4. That the attack was without, and the accused knew it was without, lawful justification or excuse.
5. That the attack resulted in death or serious injury to one or more civilians.

Comments

Causing incidental injury does not constitute intentionally attacking civilians since the intent and knowledge requirements would not be satisfied. Thus, civilians located in proximity to or within a lawful military objective at the time of the attack may be killed or injured by an attack without giving rise to culpability under this offence.
**Article 8.2 (b) (ii): War crime of attacking protected objects**

(See also art. 8.2 (b) (iii), art. 8.2 (b) (ix), art. 8.2 (e) (ii), art. 8.2 (e) (iii), art. 8.2 (e) (iv))

**Elements**

1. That the act took place in the course of international armed conflict.
2. That the accused intended to attack one or more of the following objects: a building dedicated to religion, art, science or charitable purposes, an historic monument, a hospital or place where the sick and wounded are collected, installations, material or vehicles involved in a humanitarian assistance or peacekeeping mission, or any other civilian object.
3. That the accused directed an attack against one or more of such objects.
4. That the target of the attack was not, and the accused knew it was not, a military objective at the time of the attack.
5. That the attack was without, and the accused knew it was without, lawful justification or excuse.

**Comments**

*Causing collateral damage does not constitute attacking protected objects, as the intent and knowledge requirements would not be satisfied. Thus, protected objects located in proximity to or within a lawful military objective at the time of the attack may be destroyed without giving rise to culpability under this offence. Likewise, protected objects that make an effective contribution to military action can be the direct object of attack because they will have become military objectives.*

**Article 8.2 (b) (iii)–1: War crime of attacking civilians (peacekeepers)**

(See also art. 8.2 (b) (i), art. 8.2 (e) (i), art. 8.2 (e) (iii))

**Elements/Comments**

*Use elements for article 8.2 (b) (i), replacing the term “civilian(s)” throughout with “person(s) engaged in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations”.*

**Article 8.2 (b) (iii)–2: War crime of attacking protected objects (peacekeepers)**

(See also art. 8.2 (b) (ii), art. 8.2 (b) (ix), art. 8.2 (e) (ii), art. 8.2 (e) (iii), art. 8.2 (e) (iv))

**Elements/Comments**

*Use elements for article 8.2 (b) (ii), replacing element 2 with the following:*

2. That the accused intended to attack an installation, vehicle or other object involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
Article 8.2 (b) (iv): War crime of causing disproportionate damage

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused launched an attack resulting in:
   (a) Incidental injury to civilians;
   (b) Collateral damage to civilian objects; or
   (c) Widespread, long-term and severe damage to the natural environment.
3. That the incidental injury, collateral damage or environmental damage was clearly excessive in relation to the concrete and direct overall military advantage anticipated.
4. That, when launching the attack, the accused knew that such incidental injury, collateral damage or environmental damage would be disproportionate to the concrete and direct overall military advantage gained.

Comments
The knowledge element is key to the “excessive damage” or “proportionality” analysis for this offence. Since the evaluation is necessarily subjective, the proportionality knowledge threshold must be high and analysis must be based on the perspective of the accused in planning and conducting the attack, based on what was known at the time of the attack, and with appropriate consideration of the exigent circumstances. The requirement that the military advantage be “concrete and direct” necessitates that it not be a fanciful or vague claim to future benefit. However, the focus on “overall” military advantage admits of legitimate military benefits that may or may not be temporally or geographically associated with the specific attack in question or its object.

Article 8.2 (b) (v): War crime of attacking an undefended town

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused directed an attack against a certain town, village, dwelling or building.
3. That the object of the attack was open for immediate, unresisted occupation.
4. That the accused knew that the object of the attack was open for immediate, unresisted occupation.
5. That the object of the attack was not a legitimate military objective.

Article 8.2 (b) (vi): War crime of murder

(See also art. 8.2 (a) (i), art. 8.2 (c) (i))

Elements/Comments
Use elements for article 8.2 (a) (ii), deleting the words “one or more civilians taking no active part in hostilities or” in elements 2 and 3.
Article 8.2 (b) (vii): War crime of perfidy

(See also art. 8.2 (b) (xi), art. 8.2 (e) (ix))

Elements
1. That the act took place in the course of armed conflict.
2. That the accused intended to kill or cause serious injury to an adversary.
3. That the accused committed an act resulting in the death or serious injury of an adversary.
4. That the accused intended the death or injury to be accomplished by inviting the confidence of an adversary to believe himself or herself to be entitled to, or obliged to accord, protection under the international law of armed conflict, with intent to betray that confidence.
5. That the death or injury occurred as a result of such misrepresentations.

Comments
The perfidious activity described in element 4 could include improper use of a flag of truce, uniform of the enemy or the United Nations or distinctive emblems of the Geneva Convention. However, such uses would not result in culpability if not perfidious as defined by the elements (e.g., if the use of an enemy uniform does not cause detrimental belief in an obligation or protection arising under the law of armed conflict, it is not perfidious). Ruses of war are legitimate so long as they do not involve perfidy.

Article 8.2 (b) (viii)–1: War crime of transferring Occupying Power citizens

Elements
1. That the act took place in the course of a military occupation with respect to territory where authority of a hostile army was actually established and exercised.
2. That the accused intended to effect the compulsory transfer, on a large scale, of parts of the population of the Occupying Power into such occupied territory.
3. That the accused effected such transfer of nationals of the Occupying Power into such occupied territory.
4. That the accused intended that such transfer would endanger the separate identity of the local population in such occupied territory.
5. That the transfer worsened the economic situation of the local population and endangered their separate identity.
6. That the transfer was without, and the accused knew it was without, lawful justification or excuse.

Comments
The “without lawful justification or excuse” element of this offence would mean, for example, that the compulsory movement of civilians for the purpose of the fulfilment of the obligations of the Occupying Power under international law with respect to territory it
occupies (e.g., article 43 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land) would not result in culpability with respect to this offence.

Article 8.2 (b) (viii)–2: War crime of deportation

(See also art. 8.2 (a) (vii), art. 8.2 (e) (viii))

Elements/Comments

Use elements for article 8.2 (a) (vii)–1, but delete element 5 regarding the protected status of the transferees.

Article 8.2 (b) (ix): War crime of attacking protected objects

(See also art. 8.2 (b) (ii), art. 8.2 (b) (iii), art. 8.2 (e) (ii), art. 8.2 (e) (iii), art. 8.2 (e) (iv))

Elements/Comments

Use the elements for article 8.2 (b) (ii), deleting the words “or any other civilian object” in element 2.

Article 8.2 (b) (x)–1: War crime of inhuman treatment

(See also art. 8.2 (a) (ii), art. 8.2 (c) (i), art. 8.2 (c) (xi))

Elements/Comments

Use elements for article 8.2 (a) (ii)–2.

Article 8.2 (b) (x)–2: War crime of scientific experiments

(See also art. 8.2 (a) (ii), art. 8.2 (c) (i), art. 8.2 (c) (xi))

Elements/Comments

Use elements for article 8.2 (a) (ii)–3.

Article 8.2 (b) (xi): War crime of perfidy

(See also art. 8.2 (b) (vii), art. 8.2 (e) (ix))

Elements/Comments

Use elements for article 8.2 (b) (vii).
Article 8.2 (b) (xii): War crime of denying quarter

(See also art. 8.2 (e) (x))

Elements
1. That the act took place in the course of armed conflict.
2. That the accused was a person in command who had forces under the accused's effective command and control or authority and control.
3. That the accused made a declaration or gave an order to those subordinate forces that any bona fide surrender by the enemy be refused, even if it would be reasonable to accept, and that all enemy persons proffering surrender be killed.
4. That in so declaring or ordering, the accused intended that his or her stated intent be executed.
5. That one or more persons were killed by forces acting in furtherance of the declaration of the accused.

Comments

Bringing a preponderance of force to bear against enemy military objectives or enemy personnel does not constitute denial of quarter. Neither is a commander obligated to offer an opportunity to surrender before carrying out an attack, since surprise or speed may be critical to the success of the attack.

Article 8.2 (b) (xiii): War crime of destruction or appropriation of property

(See also art. 8.2 (a) (iv), art. 8.2 (b) (xvi), art. 8.2 (c) (v), art. 8.2 (e) (xii))

Elements/Comments

Use elements for article 8.2 (a) (iv) but delete element 5 requiring "extensive" characterization. Note that the threshold for war crimes, however, should preclude prosecution for any destruction or appropriation that is not extensive.

Article 8.2 (b) (xiv): War crime of denying judicial guarantees

(See also art. 8.2 (a) (vi), art. 8.2 (c) (iv))

Elements/Comments

Use elements for article 8.2 (a) (vi).
Article 8.2 (b) (xv): War crime of compelling hostile acts

(See also art. 8.2 (a) (v))

Elements/Comments
Use elements for article 8.2 (a) (v).

Article 8.2 (b) (xvi): War crime of pillaging

(See also art. 8.2 (a) (iv), art. 8.2 (b) (xiii), art. 8.2 (c) (v), art. 8.2 (e) (xii))

Elements/Comments
Use elements for article 8.2 (a) (iv). Add the following element:
6. That the destruction or appropriation was carried out in an arbitrary manner, devoid of concern for the consequences.

Article 8.2 (b) (xvii): War crime of employing poison

(See also art. 8.2 (b) (xviii))

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused intentionally attacked an adversary in that armed conflict with poison.
3. That, at the time of the attack, the accused was aware of the nature of the weapon he was using and its prohibited status under the circumstances.

Article 8.2 (b) (xviii): War crime of employing poison

(See also art. 8.2 (b) (xvii))

Elements/Comments
Use elements for article 8.2 (b) (xvii).

Article 8.2 (b) (xix): War crime of employing expanding bullets

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused intentionally attacked an adversary in that armed conflict with bullets designed to expand or flatten easily in the human body.
3. That, at the time of the attack, the accused was aware of the nature of the weapon he was using and its prohibited status under the circumstances.
Article 8.2 (b) (xx): War crime of employing other prohibited weapons

Elements/Comments
To be completed if and when included in an annex to the Statute.

Article 8.2 (b) (xxi): War crime of degrading treatment

(See also art. 8.2 (c) (ii))

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused intended to humiliate and degrade one or more persons and thereby inflict severe mental pain or suffering upon them.
3. That the accused committed an act or acts that resulted in the degradation and humiliation of such person or persons and the infliction of severe mental pain or suffering upon such person or persons.
4. That the accused had custody of or control over such person or persons at the time of the offence.
5. That the act or acts were not inherent in, or incidental to, lawful sanctions.
6. That the act or acts were without, and the accused knew they were without, lawful justification or excuse.

Article 8.2 (b) (xxii)–1: War crime of rape

(See also art. 8.2 (c) (vi))

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused intended to attack one or more persons through acts of a sexual nature.
3. That the accused penetrated any part of the body of another person with the accused’s sexual organ, or penetrated the anal or genital opening of another person with any object or other part of the accused’s body.
4. That the penetration was committed by force.

Comments
It should be noted that the existence of specific crimes of sexual violence in articles 8.2 (b) (xxii) and 8.2 (e) (vi) does not undermine the fact that those same acts might constitute the essential element of some other offence under the Statute.

Article 8.2 (b) (xxii)–2: War crime of sexual slavery

(See also art. 8.2 (e) (vi))
Elements
1. That the act took place in the course of international armed conflict.
2. That the accused intended to attack one or more persons by causing them to engage in acts of a sexual nature.
3. That the accused deprived one or more persons of their liberty.
4. That the accused, through force or threat, caused the person or persons to engage in acts of a sexual nature.

Comments
Besides physically detaining or confining a person to a particular place without consent, the deprivation of liberty required by this offence could also include severe deprivations of autonomy and freedom of movement that are universally recognized as impermissible under international law.

Article 8.2 (b) (xxii)–3: War crime of enforced prostitution
(See also art. 8.2 (c) (vi))

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused intended to attack one or more persons by causing them to engage in acts of a sexual nature.
3. That the accused, in furtherance of this intent, deprived one or more persons of their liberty and forced them to engage in acts of a sexual nature with one or more other persons.
4. That the accused received some pecuniary or other material benefit in exchange for or in connection with the sex acts of the person or persons.

Article 8.2 (b) (xxii)–4: War crime of forced pregnancy
(See also art. 8.2 (c) (vi))

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused intended to affect the ethnic composition of a population or to carry out another grave violation of international law.
3. That, in the furtherance of that intent, the accused imprisoned one or more persons within a confined area.
4. That the person imprisoned had been previously raped or otherwise forcibly impregnated, and the accused knew that such person had been previously raped or forcibly impregnated.
5. That the imprisonment was without, and the accused knew it was without, lawful justification or excuse.
Comments
The "without lawful justification or excuse" element in this offence would, for example, preclude prosecution for acts committed as a logical consequence of domestic laws involving pregnancy.

Article 8.2 (b) (xxii)–5: War crime of enforced sterilization
(See also art. 8.2 (e) (vi))

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused intended to terminate the natural reproductive capacity of one or more persons.
3. That the accused committed an act that resulted in the termination of the natural reproductive capacity of such person or persons.
4. That the act was committed without such person's or persons' consent.
5. That the act was without, and the accused knew it was without, lawful justification or excuse.

Article 8.2 (b) (xxii)–6: War crime of sexual violence
(See also art. 8.2 (e) (vi))

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused intended to attack one or more persons through acts of a sexual nature.
3. That the accused committed, by force, an act against one or more persons.
4. That the act was of a sexual nature or caused the person or persons to engage in activity of a sexual nature.
5. That the act involved a level of violence comparable to that of rape.

Article 8.2 (b) (xxiii): War crime of immunizing an area with protected persons

Elements
1. That the act took place in the course of international armed conflict.
2. That, at the time of the offence, the accused was defending a military objective from possible attack.
3. That the accused caused the military objective, one or more civilian persons, one or more persons protected under one of the Geneva Conventions of 1949 or objects connected with such persons to be moved so that the military objective and the civilian personnel or
protected persons would be either located together or otherwise positioned so that an attack against the military objective would seriously endanger the civilian personnel or protected persons.

4. That the accused's actions were intended to shield the military objective from attack, to shield, favour or impede military operations or to otherwise undermine the adversary's will to attack or continue an attack.

Comments

Intent to shield from attack, or to shield, favour or impede military operations can be inferred from the circumstances.

Article 8.2 (b) (xxiv): War crime of attacking a protected emblem

(See also art. 8.2 (e) (ii))

Elements

1. That the act took place in the course of international armed conflict.
2. That the accused intentionally attacked a building, an object, a medical unit or transport, or person that was properly displaying a distinctive protective emblem of the Geneva Conventions.
3. That the accused intended the object of the attack to be the person or object attacked and knew the object of attack was properly displaying a distinctive protective emblem of the Geneva Conventions.
4. That the object of attack was not, and the accused knew it was not, being used for a military purpose at the time of the attack.

Article 8.2 (b) (xxv): War crime of starvation

Elements

1. That the act took place in the course of international armed conflict.
2. That the accused engaged in an act, as a method of warfare, to attack, destroy, remove or render useless objects indispensable to the survival of a civilian population.
3. That the accused's act was intended as a method of warfare with the specific purpose of denying such objects to the targeted civilian population.
4. That, as a result of the accused's acts, one or more persons died from starvation.

Comments

As with murder, the actus reus for this offence could be the failure to fulfil a lawful duty: for example, feeding prisoners under the accused's care. This offence does not impose or imply a duty of care that does not otherwise exist in international law (e.g., to provide food for a civilian population).
Article 83 (d): War crime of conscripting children

(See also art. 8.2 (e) (vii))

Elements
1. That the act took place in the course of international armed conflict.
2. That the accused intended to conscript or enlist certain persons into the national armed forces or to otherwise use them for active participation in hostilities.
3. That the accused committed an act that caused the conscription or enlistment into the national armed forces, or otherwise caused the active participation in hostilities, of one or more persons under fifteen years of age.
4. That, at the time of the act, the accused knew that the person or persons enlisted, conscripted or used had not yet attained fifteen years of age.

Comments
This offence does not require an element of force; any act yielding causation is sufficient, including merely authorizing an enlistment or conscription. Therefore, consent on the part of the under-age person is not a defence to enlistment or conscription. However, since no mere acquiescence would “cause” an under-age person to be used for active participation in hostilities, some positive act is required if the under-age person is neither conscripted nor enlisted. In this regard, a scenario in which a person who had not yet attained fifteen years of age, who chose of his or her own volition to participate in a levée en masse, would not result in culpability.

Article 8.2 (b) (xxvi): War crime of murder

(See also art. 8.2 (a) (i), art. 8.2 (b) (vi))

Elements/Comments
Use elements for article 8.2 (a) (i), deleting the word “international” in element 1 and deleting the words “one or more civilians taking no active part in hostilities or” in elements 2 and 3.

Article 8.2 (c) (i)–2: War crime of torture

(See also art. 8.2 (a) (ii), art. 8.2 (a) (iii))

Elements/Comments
Use elements for article 8.2 (a) (ii)–1, deleting the word “international” in element 1.

Article 8.2 (c) (i): War crime of inhuman treatment

(See also art. 8.2 (a) (ii), art. 8.2 (b) (x), art. 8.2 (b) (xxi), art. 8.2 (e) (ii), art. 8.2 (e) (xii))
Elements/Comments
Use elements for article 8.2 (a) (ii)–2, deleting the word "international" in element 1.

Article 8.2 (c) (ii): War crime of degrading treatment

(See also art. 8.2 (b) (xxi))

Elements/Comments
Use elements for article 8.2 (b) (xxi), deleting the word "international" in element 1.

Article 8.2 (c) (iii): War crime of taking hostages

(See also art. 8.2 (a) (viii))

Elements/Comments
Use elements for article 8.2 (a) (viii), deleting the word "international" in element 1.

Article 8.2 (c) (iv): War crime of denying judicial guarantees

(See also art. 8.2 (a) (vi), art. 8.2 (b) (xiv))

Elements/Comments
Use elements for article 8.2 (a) (vi), deleting the word "international" in element 1 and replacing element 4 with the following:

4. That such act was performed without judgement by a regularly constituted court and without according judicial guarantees recognized as indispensable by all civilized peoples.

Article 8.2 (e) (i): War crime of attacking civilians

(See also art. 8.2 (b) (i), art. 8.2 (b) (iii), art. 8.2 (c) (iii))

Elements/Comments
Use elements for article 8.2 (b) (i), deleting the word "international" in element 1.

Article 8.2 (e) (ii): War crime of attacking a protected emblem

(See also art. 8.2 (b) (xxiv))

Elements/Comments
Use elements for article 8.2 (b) (xxiv), deleting the word "international" in element 1.
Article 8.2 (e) (iii)-1: War crime of attacking civilians

(See also art. 8.2 (b) (i), art. 8.2 (b) (iii), art. 8.2 (e) (i))

Elements/Comments

Use elements for article 8.2 (b) (i), deleting the word “international” in element 1 and replacing the term “civillian(s)” throughout with “person(s) engaged in humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations”.

Article 8.2 (e) (iii)-2: War crime of attacking protected objects (peacekeepers)

(See also art. 8.2 (b) (ii), art. 8.2. (b) (iii), art. 8.2 (b) (iv), art. 8.2 (b) (ix), art. 8.2 (e) (ii), art. 8.2 (e) (iii), art. 8.2 (e) (iv))

Elements/Comments

Use the elements for article 8.2 (b) (ii), deleting the word “international” in element 1 and replacing element 2 with the following:

2. That the accused intended to attack an installation, vehicle or other object involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.

Article 8.2 (e) (iv): War crime of attacking protected objects

(See also art. 8.2 (b) (ii), art. 8.2. (b) (iii), art. 8.2 (b) (ix), art. 8.2 (e) (ii), art. 8.2 (e) (iii))

Elements/Comments

Use the elements for article 8.2 (b) (ii), deleting the word “international” in element 1 and deleting the words “or any other civilian object” in element 2.

Article 8.2 (e) (v): War crime of pillaging

(See also art. 8.2 (a) (iv), art. 8.2 (b) (xiii), art. 8.2 (b) (xvi), art. 8.2 (e) (xii))

Elements/Comments

Use elements for article 8.2 (a) (iv), deleting the word “international” in element 1 and adding the following element:

6. That the destruction or appropriation was carried out in an arbitrary manner, devoid of concern for the consequences.

Article 8.2 (e) (vi)-1: War crime of rape

(See also art. 8.2 (b) (xxii))
Elements/Comments

Use elements for article 8.2 (b) (xxii)-1, deleting the word "international" in element I.

Article 8.2 (e) (vi)-2: War crime of sexual slavery

(See also art. 8.2 (b) (xxii))

Elements/Comments

Use elements for article 8.2 (b) (xxii)-2, deleting the word "international" in element I.

Article 8.2 (e) (vi)-3: War crime of enforced prostitution

(See also art. 8.2 (b) (xxii))

Elements/Comments

Use elements for article 8.2 (b) (xxii)-3, deleting the word "international" in element I.

Article 8.2 (e) (vi)-4: War crime of forced pregnancy

(See also art. 8.2 (b) (xxii))

Elements/Comments

Use elements for article 8.2 (b) (xxii)-4, deleting the word "international" in element I.

Article 8.2 (e) (vi)-5: War crime of enforced sterilization

(See also art. 8.2 (b) (xxii))

Elements/Comments

Use elements for article 8.2 (b) (xxii)-5, deleting the word "international" in element I.

Article 8.2 (e) (vi)-6: War crime of sexual violence

(See also art. 8.2 (b) (xxii))

Elements/Comments

Use elements for article 8.2 (b) (xxii)-6, deleting the word "international" in element I.
Article 8.2 (e) (vii): War crime of conscripting children

(See also art. 8.2 (b) (xxvi))

Elements/Comments
Use elements for article 8.2 (b) (xxvi), deleting the word “international” in element 1 and the word “national” in elements 2 and 3.

Article 8.2 (e) (viii): War crime of displacing civilians

(See also art. 8.2 (b) (viii))

Elements
1. That the act took place in the course of armed conflict.
2. That the accused intended to transfer a civilian population from its lawful place of residence.
3. That the accused caused a civilian population to be forcibly transferred from its lawful place of residence through expulsion or other coercive acts.
4. That the forcible transfer was without, and the accused knew it was without, lawful justification or excuse.
5. That the forcible transfer was not for the security of the civilians involved or imperative military reasons.

Article 8.2 (e) (ix): War crime of perfidy

(See also art. 8.2 (b) (vii), art. 8.2 (b) (xii))

Elements/Comments
Use elements for article 8.2 (b) (vii), deleting the word “international” in element 1.

Article 8.2 (e) (x): War crime of denying quarter

(See also art. 8.2 (b) (xii))

Elements/Comments
Use elements for article 8.2 (b) (xii), deleting the word “international” in element 1.

Article 8.2 (e) (xi)–1: War crime of inhuman treatment

(See also art. 8.2 (a) (ii), art. 8.2 (b) (x), art. 8.2 (c) (i))

Elements/Comments
Use elements for article 8.2 (a) (ii)–2, deleting the word “international” in element 1.
Article 8.2 (e) (xi)–2: War crime of scientific experiments

(See also art. 8.2 (a) (ii), art. 8.2 (b) (x), art. 8.2 (c) (i))

Elements/Comments

Use elements for article 8.2 (a) (ii)–3, deleting the word “international” in element 1.

Article 8.2 (e) (xii): War crime of destruction or appropriation of property

(See also art. 8.2 (a) (iv), art. 8.2 (b) (xiii), art. 8.2 (b) (xvi), art. 8.2 (c) (v))

Elements/Comments

Use elements for article 8.2 (a) (iv), deleting the word “international” in element 1 and deleting element 5 requiring “extensive” characterization. Note that the threshold for war crimes should preclude prosecution for any destruction or appropriation that is not extensive.
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Draft elements of crimes

Addendum

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VI. Inchoate offences

Article 25.3 (b): Solicitation

An order, solicitation or inducement to commit an offence under the Statute does not require a modification to the elements for the offence in question. In such instance, the following elements would simply be added as a prerequisite for considering the offence:

1. That the accused intended to cause one or more persons to commit the offence in question.
2. That the accused ordered, solicited or induced through offer of some benefit one or more persons to commit the offence in question.
3. That the order, solicitation or inducement caused the crime to occur or to be attempted.

When these three elements are satisfied, the accused is considered to be a principal actor, and the actus reus is imputed directly to the accused for purposes of considering the elements of the specific offence under articles 6, 7 or 8 or the elements of attempt under article 25.3 (f). Thus, for example, an accused who orders a treacherous killing under article 8.2 (b)(xi) is simply considered to have "killed" the victim for purposes of the applicable element.

Article 25.3 (c), (d): Aiding and abetting

Like solicitation in article 25.3 (b), an accused who aids, abets or otherwise assists the commission or attempted commission of a crime is simply considered a principal and the actus reus is imputed directly to the accused when considering the elements of the offence under articles 6, 7 or 8. The following elements should be added as a prerequisite to the imposition of liability for aiding and abetting an offence:

1. That the accused intended to contribute to the commission of the offence in question.
2. That the accused intentionally performed some act that had the effect of contributing to the commission or attempted commission of the offence in question.

When these two elements have been satisfied, the accused is considered to be a principal actor, and the actus reus is imputed directly to the accused for purposes of considering the elements of the substantive offence under articles 6, 7 or 8.

Article 25.3 (e): Incitement

For crimes of genocide, an accused is vicariously liable if he or she "directly and publicly incites others to commit genocide". Like solicitation, incitement to commit an offence under the Statute does not require a modification to the elements for the genocide offence in question. In such instance, the following elements would simply be added as a prerequisite for considering the offence:

1. That the accused intended to cause one or more persons to commit the crime of genocide in question.
2. That the accused committed a public act that had the direct effect of causing one or more persons to commit the crime of genocide in question.

When these two elements have been satisfied, the accused is considered to be a principal actor and the *actus reus* is imputed directly to the accused for purposes of considering the elements of the offence of genocide in question.

**Article 25.3 (f): Attempts**

Attempted commissions of the various crimes listed in articles 6, 7 and 8 involve a change to the elements of the offences listed in this document. For a crime of attempt to take place, the *actus reus* element of the particular offence in question need not take place. However, an additional element regarding an act constituting a substantial step must be inserted. The elements for the offence of attempted commission of a particular crime are:

1. That the accused committed a certain act.
2. That the act was committed with the intention of committing a crime under the Statute (such intention would include the intention to meet all the elements of the given offence under articles 6, 7 or 8).
3. That the act amounted to a substantial step in commencing the execution of the crime.
4. That the crime does not occur due to circumstances independent of the accused’s intentions.

The “substantial step” requirement for this offence means that the act must amount to more than mere preparation. The fact that the crime must fail to occur owing to circumstances independent of the accused’s intentions means that no offence of attempt exists if the crime failed to occur because the accused completely and voluntarily gave up the criminal purpose and abandoned the effort to commit the crime.

**Article 28.1: Command responsibility**

Vicarious liability due to command responsibility would not require a change to the elements of the offence in question; the elements would operate in the same way as a solicitation or order. In such instance, the following elements would simply be added as a prerequisite for considering the offence:

1. That the accused was a military commander or a person effectively acting as a military commander.
2. That forces under the accused’s effective command and control or authority and control committed one or more crimes under articles 6, 7 or 8 of the Statute.
3. That the crime or crimes in question would not have occurred had the accused effectively exercised proper control over his or her forces.
4. That the accused knew, or owing to circumstances at the time should have known, that the forces were committing or about to commit such crime or crimes.
5. That the accused failed to either take necessary and reasonable measures within his or her power to prevent or repress the commission of the offence or offences.
or to submit the matter to competent authorities for investigation and prosecution.

When these five elements are satisfied, the accused is considered to be a principal actor, and the actus reus is imputed directly to the accused for purposes of considering the elements of the specific offence under articles 6, 7 or 8.

Article 28.2: Superior responsibility

Vicarious liability due to superior responsibility should be considered in the same way as command responsibility, but with the following prerequisite elements:

1. That the accused had effective authority and control in a superior and subordinate relationship, but was not a military commander or a person effectively acting as a military commander.

2. That subordinates under the accused’s effective authority and control committed one or more crimes under articles 6, 7 or 8 of the Statute.

3. That the crime or crimes in question involved activities within the effective responsibility and control of the accused.

4. That the crime or crimes in question would not have occurred had the accused effectively exercised proper control over his or her subordinates.

5. That the accused knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crime or crimes.

6. That the accused failed to either take necessary and reasonable measures within his or her power to prevent or repress the commission of the offence or offences, or to submit the matter to competent authorities for investigation and prosecution.

When these six elements are satisfied, the accused is considered to be a principal actor, and the actus reus is imputed directly to the accused for purposes of considering the elements of the specific offence under articles 6, 7 or 8.
GLOSSARY

ACLU ................................................................. American Civil Liberties Union
BADC ................................................................. Bar Association of the District of Columbia
CDC ................................................................. Chief Defense Counsel
DoD ................................................................. Department of Defense
FSG ................................................................. Federal Sentencing Guidelines
GPW ................................................................. Geneva Convention Relative to the Treatment of Prisoners of War
HRW ................................................................. Human Rights Watch
ICC ................................................................. International Criminal Court
ICTR ................................................................. International Criminal Tribunal for Rwanda
ICTY ................................................................. International Criminal Tribunal for the Former Yugoslavia
LCHR ................................................................. Lawyers Committee for Human Rights
MCI ................................................................. Military Commission Instruction
MCM ................................................................. Manual for Courts-Martial
MCO ................................................................. Military Commission Order
NACDL .............................................................. National Association of Criminal Defense Lawyers
NIMJ ................................................................. National Institute of Military Justice
OCDC ............................................................... Office of the Chief Defense Counsel
OGC ................................................................. Office of General Counsel
PMO ................................................................. President’s Military Order (Nov. 13, 2001)
PTMC ............................................................... Procedures for Trials by Military Commissions (prescribed in MCO)
R.C.M. ............................................................... Rules for Courts-Martial
UCMJ ................................................................. Uniform Code of Military Justice
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