



Memorandum

July 25, 2006

TO: House Armed Services Committee
Attention: Lorry Fenner

FROM: Jennifer K. Elsea
Legislative Attorney
American Law Division

SUBJECT: Comparison of Procedural Rules in Criminal Proceedings

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

The following sources and abbreviations are used:

M.C.M.: Manual for Courts-Martial, 2002 ed.

R.C.M.: Rules for Courts-for Courts-Martial, M.C.M. Part II.

Mil. R. Evid.: Military Rules of Evidence, M.C.M. Part III.

M.C.O. No. 1: Department of Defense Military Commission Order Number 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (August 31, 2005), available online at [<http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>].

M.C.I.: Military Commission Instruction, issued by the Department of Defense General Counsel, available online at [http://www.defenselink.mil/news/Aug2004/commissions_instructions.html].

IMT: International Military Tribunal (Nuremberg), created pursuant to the London Agreement of August 8, 1945. The agreement, as well as the tribunal’s constitution (“IMT Charter”) and rules of procedure are available online at the Avalon Project at Yale University, [<http://www.yale.edu/lawweb/avalon/imt/proc/v1menu.htm>]. The Opinion and

Judgment of the IMT is available at
[<http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm>].

ICTY: International Criminal Tribunal for the former Yugoslavia, created by UN Security Council Resolution 827 (May 25, 1993). Its statute (ICTY Stat.) and procedural rules (ICTY Rule) are available at [<http://www.un.org/icty/legaldoc-e/index.htm>].

ICTR: International Criminal Tribunal for Rwanda, created by UN Security Council Resolution 955 (Nov. 8, 1994). Its statute (ICTR Stat.) and procedural rules (ICTR Rule) are available at [<http://69.94.11.53/default.htm>].

Comparison of Selected Procedural Rights in Criminal Tribunals

Comparison of Selected Procedural Rights in Criminal Tribunals.....	2
Presumption of Innocence.....	2
Right to Remain Silent.....	2
Freedom from Unreasonable Searches & Seizures.....	3
Assistance of Effective Counsel	4
Right to Indictment and Presentment.....	6
Right to Written Statement of Charges.....	6
Right to be Present at Trial	7
Prohibition against Ex Post Facto Crimes	7
Protection against Double Jeopardy.....	8
Speedy & Public Trial.....	9
Burden & Standard of Proof	10
Privilege Against Self-Incrimination	11
Right to Examine or Have Examined Adverse Witnesses.....	12
Right to Compulsory Process to Obtain Witnesses	13
Right to Trial by Impartial Judge.....	14
Right to Trial By Impartial Jury.....	14
Right to Appeal to Independent Reviewing Authority	16
Protection against Excessive Penalties	17

Comparison of Selected Procedural Rights in Criminal Tribunals

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
Presumption of Innocence	<p>If the defendant fails to enter a proper plea, a plea of not guilty will be entered. R.C.M. 910(b).</p> <p>Members of court martial must be instructed that the “accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond a reasonable doubt.” R.C.M. 920(e).</p> <p>The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restraint shall not be imposed unless prescribed by the military judge. R.C.M. 804.</p>	<p>The accused shall be presumed innocent until proven guilty. § 5(B).</p> <p>Commission members must base their vote for a finding of guilty on evidence admitted at trial. §§ 5(C); 6(F).</p> <p>The Commission must determine the voluntary and informed nature of any plea agreement submitted by the accused and approved by the Appointing Authority before admitting it as stipulation into evidence. § 6(B).</p>	<p>No written rule addressing presumption of innocence, although U.S. negotiators were able to win a concession from Soviet negotiators to the effect that the rule would apply. <i>See</i> Henry T. King, Jr., Robert <i>Jackson's Transcendent Influence Over Today's World</i>, 68 ALB. L. REV. 23, 25 (2006).</p>	<p>“The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.” ICTY Stat. art. 21(3); ICTR Stat. art. 20.</p> <p>If the accused fails to enter a plea, the court must enter a plea of not guilty on the accused’s behalf. ICTY Rule 62(a)(iv); ICTR Rule 62(a)(iii).</p> <p>Instruments of restraint may not be used during court proceedings. ICTY Rule 83; ICTR Rule 83.</p> <p>Guilty pleas may be accepted only if the trial chamber determines it is voluntary, informed, unequivocal, and supported by evidence. ICTY Rule 63 <i>bis</i>; ICTR Rule 62(B).</p>
Right to Remain Silent	<p>Coerced confessions or confessions made in custody without statutory equivalent of <i>Miranda</i> warning are not admissible as evidence. Art. 31, UCMJ, 10 U.S.C. § 831.</p> <p>The prosecutor must notify the defense of any incriminating statements made by the accused</p>	<p>Not provided. Neither the M.O. nor M.C.O. requires a warning or bars the use of statements made during military interrogation, or any coerced statement, from military commission proceedings. Art. 31(a), UCMJ (10 U.S.C. § 831) bars persons subject to it from compelling any individual</p>	<p>No right to remain silent.</p>	<p>A suspect to be questioned by the prosecutor during an investigation must be informed of his right to remain silent. ICTY Rule 42; ICTR Rule 42.</p> <p>Persons are to be informed of the right to remain silent upon their arrest. ICTY Rule 55; ICTR Rule 55.</p> <p>“No evidence shall be admissible</p>

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
	<p>that are relevant to the case prior to the arraignment. Motions to suppress such statements must be made prior to pleading. Mil. R. Evid. 304.</p> <p>Interrogations conducted by foreign officials do not require warnings or presence of counsel unless the interrogation is instigated or conducted by U.S. military personnel. Mil. R. Evid. 305.</p>	<p>to make a confession, but there does not appear to be a remedy in case of violation. No person subject to the UCMJ may compel any person to give evidence before any military tribunal if the evidence is not material to the issue and may tend to degrade him. 10 U.S.C. § 831.</p>		<p>if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.” ICTY Rule 95; ICTR Rule 95.</p>
Freedom from Unreasonable Searches & Seizures	<p>“Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused ...” unless certain exceptions apply. Mil. R. Evid. 311.</p> <p>“Authorization to search” may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the law of war. It must be based on probable cause. Mil. R. Evid. 315.</p> <p>Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 <i>et seq.</i> Mil. R. Evid. 317.</p>	<p>Not provided; no exclusionary rule appears to be available. However, monitored conversations between the detainee and defense counsel may not be communicated to persons involved in prosecuting the accused or used at trial. M.C.O. No. 3.</p> <p>No provisions for determining probable cause or issuance of search warrants are included.</p> <p>Insofar as searches and seizures take place outside of the United States against non-U.S. persons, the Fourth Amendment may not apply. United States v. Verdugo Urquidez, 494 U.S. 259 (1990).</p>	Not provided.	<p>“No evidence shall be admissible if ... its admission is antithetical to, and would seriously damage, the integrity of the proceedings.” ICTY Rule 95; ICTR Rule 95.</p>

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
	A search conducted by foreign officials is unlawful only if the accused is subject to “gross and brutal treatment.” Mil. R. Evid. 311(c).			
Assistance of Effective Counsel	The defendant has a right to military counsel at government expense. The defendant may choose counsel, if that attorney is reasonably available, and may hire a civilian attorney in addition to military counsel. Art 38, UCMJ, 10 U.S.C. § 838. Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the defendant. Art. 27, UCMJ, 10 U.S.C. § 827. The attorney-client privilege is honored. Mil. R. Evid. 502.	M.C.O. 1 provides that the accused must be represented “at all relevant times” (presumably, once charges are approved until findings are final — but not for individuals who are detained but not charged) by detailed defense counsel. § 4(C)(4). The accused is assigned a military judge advocate to serve as counsel, but may request to replace or augment the detailed counsel with a specific officer, if that person is available. § 4(C)(3)(a). The accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has a SECRET clearance (or higher, if necessary for a particular case), and agrees to comply with all applicable rules. The civilian attorney does not replace the detailed counsel, and is not guaranteed access to classified evidence or closed hearings.	“Each defendant has the right to conduct his own defense or to have the assistance of counsel,” and was required to be told of that right. Only one counsel was permitted to appear at the trial for any defendant, unless the IMT granted special permission. The IMT was to designate counsel for any defendant who failed to apply for particular counsel or if the counsel requested was not available, unless the defendant elected in writing to conduct his own defense. IMT Rule 2.	Prior to being charged, “[i]f questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.” ICTY Stat. art. 18; ICTR Stat. art. 17. The accused has the right “to communicate with counsel of his own choosing ... and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” ICTY Stat. art. 21; ICTR Stat.

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
		<p>§ 4(C)(3)(b). Defense Counsel may present evidence at trial and cross-examine witnesses for the prosecution.</p> <p>§ 5(I). The Appointing Authority must order such resources be provided to the defense as he deems necessary for a “full and fair trial.”</p> <p>§ 5(H). Communications between defense counsel and the accused are subject to monitoring by the government. (Although information obtained through such monitoring may not be used as evidence against the accused, M.C.I. No. 3, the monitoring could arguably have a chilling effect on attorney-client conversations, possibly hampering the ability of defense counsel to provide effective representation.)</p>		<p>art. 20. All communications between lawyer and client are privileged, and disclosure cannot be ordered unless the client or has waived the privilege by voluntarily disclosing the content of the communication to a third party. ICTY Rule 97; ICTR Rule 97. Qualifications for counsel and assignment of counsel to indigent defendants are set forth in ICTY Rules 44-45 and ICTR Rules 44-45.</p>

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

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
			lodged with the Indictment....” IMT Rule 2.	At the ICTR, the registrar is required to prepare certified copies of the indictment in a language the accused understands, but there does not appear to be a requirement that the accused be furnished with a written copy. ICTR Rule 47.
Right to be Present at Trial	The presence of the accused is required during arraignment, at the plea, and at every stage of the court-martial unless the accused waives the right by voluntarily absenting him or herself from the proceedings after the arraignment or by persisting in conduct that justifies the trial judge in ordering the removal of the accused from the proceedings. R.C.M. 801.	The accused may be present at every stage of trial before the Commission unless the Presiding Officer excludes the accused because of disruptive conduct or for security reasons, or “any other reason necessary for the conduct of a full and fair trial.” §§ 4(A)(5)(a); 5(K); 6B(3).	Not provided. “The Tribunal shall have the right to take proceedings against a person charged ... in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.” IMT Charter art. 12. (Martin Bormann, who was never located and was rumored to be dead, was convicted in absentia and sentenced to death.)	The accused has the right “to be tried in his presence.” ICTY Stat. art. 21; ICTR Stat. art. 20.
Prohibition against Ex Post Facto Crimes	Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes. U.S. v. Gorki, 47 M.J. 370 (1997).	Not provided, but may be implicit in restrictions on jurisdiction over offenses. <i>See</i> § 3(B). M.C.I. No. 2 § 3(A) provides that “no offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.”	Not provided. Article 6 of the IMT Charter provided for jurisdiction to try not only war crimes, but also “crimes against peace” and “crimes against humanity,” which had never before been defined as international crimes. The IMT rejected defenses based on the <i>ex post facto</i> nature of the charges, remarking that the rule against	Jurisdiction is limited to specified crimes. ICTY Stat. arts. 2-5 (grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity). ICTR jurisdiction is limited to genocide, crimes against humanity, and violations of

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

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
	<p>possible to charge the individual for another crime arising from the same conduct.</p> <p><i>See</i> 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.</p>	<p>by any other court or tribunal may be tried by a military commission under the M.O.</p> <p>The M.O. reserves for the President the authority to direct the Secretary of Defense to transfer an individual subject to the M.O. to another governmental authority, which is not precluded by the order from prosecuting the individual. This subsection could be read to authorize prosecution by federal authorities after the individual was subject to trial by military commission, although a federal court would likely dismiss such a case on double jeopardy grounds.</p> <p>M.O. § 7(e).</p>		<p>not diligently prosecuted.</p> <p>ICTY Stat. art. 10; ICTR Stat. art. 9.</p> <p>“When...criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal, a Trial Chamber shall...issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council.”</p> <p>ICTY Rule 13; ICTR Rule 13.</p> <p>However, the prosecution can seek to appeal an acquittal, including based on the discovery a new fact that was unknown at the time of the proceedings but that could have been decisive.</p> <p>ICTY Stat. art. 26.; ICTR Stat. art. 25.</p>
Speedy & Public Trial	<p>In general, accused must be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever date is earliest.</p> <p>R.C.M. 707(a).</p> <p>The right to a public trial applies in courts-martial but is not absolute.</p> <p>R.C.M. 806.</p>	<p>The Commission is required to proceed expeditiously, “preventing any unnecessary interference or delay.”</p> <p>§ 6(B)(2).</p> <p>Failure to meet a specified deadline does not create a right to relief.</p> <p>§ 10.</p> <p>The rules do not prohibit</p>	<p>The IMT was to ensure expeditious proceedings, although this principle was not framed in terms of the rights of the accused. The IMT was to “take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,” and to</p>	<p>The accused has the right “to be tried without undue delay.”</p> <p>ICTY Stat. art. 21; ICTR Stat. art. 20.</p> <p>Proceedings are to be public unless otherwise provided.</p> <p>ICTY Rule 78; ICTR Rule 78.</p> <p>“The press and the public [may] be excluded from all or part of the proceedings for reasons of:</p>

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
	<p>The military trial judge may exclude the public from portions of a proceeding for the purpose of protecting classified information if the prosecution demonstrates an overriding need to do so and the closure is no broader than necessary.</p> <p>United States v. Grunden, 2 M.J. 116 (CMA 1977).</p>	<p>detention without charge, or require charges to be brought within a specific time period.</p> <p>Proceedings “should be open to the maximum extent possible,” but the Appointing Authority has broad discretion to close hearings, and may exclude the public or accredited press from open proceedings.</p> <p>§ 6(B)(3).</p>	<p>“deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.”</p> <p>IMT Charter art. 18.</p> <p>The IMT was to rule in open court upon all questions arising during the trial, although it could deliberate certain matters in closed proceedings.</p> <p>IMT Rule 8.</p> <p>Provision was made for the publication of all proceedings in multiple languages.</p> <p>IMT Charter art. 25.</p>	<p>(i) public order or morality;</p> <p>(ii) safety, security or non-disclosure of the identity of a victim or witness...; or</p> <p>(iii) the protection of the interests of justice.”</p> <p>ICTY Rule 79; ICTY Rule 79.</p>
Burden & Standard of Proof	<p>Members of court martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt must be resolved in favor of the defendant.</p> <p>R.C.M. 920(e).</p>	<p>Commission members may vote for a finding of guilty only if convinced beyond a reasonable doubt, based on evidence admitted at trial, that the accused is guilty.</p> <p>§§ 5(C); 6(F).</p> <p>The burden of proof of guilt is on the prosecution, § 5(C); however, M.C.I. No. 2 states that element of wrongfulness of an offense is to be inferred absent evidence to the contrary.</p> <p>M.C.I. No. 2 § 4(B).</p>	<p>The IMT could “admit any evidence which it deem[ed] to be of probative value.”</p> <p>IMT Charter art. 19.</p> <p>Guilty verdicts and sentences required a majority vote, that is, three out of four votes.</p> <p>IMT Charter art. 4.</p>	<p>“A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.”</p> <p>ICTY Rule 87; ICTR Rule 87.</p> <p>“A Chamber may admit any relevant evidence which it deems to have probative value,” and “... shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.”</p> <p>ICTY Rule 89; ICTR Rule 89.</p>

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
				<p>At the ICTY, “A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.” ICTY Rule 90.</p> <p>At the ICTR, “Witnesses shall ... be heard directly by the Chambers unless [it] has ordered that the witness be heard by means of a deposition as provided for in Rule 71.” ICTR Rule 90.</p>
Privilege Against Self-Incrimination	<p>No person subject to the UCMJ may compel any person to answer incriminating questions. Art. 31(a) UCMJ, 10 U.S.C. § 831(a).</p> <p>Defendant may not be compelled to give testimony that is immaterial or potentially degrading. Art. 31(c), UCMJ, 10 U.S.C. § 831(c).</p> <p>No adverse inference is to be drawn from a defendant’s refusal to answer any questions or testify at court-martial. Mil. R. Evid. 301(f).</p> <p>Witnesses may not be compelled to give testimony that may be incriminating unless granted immunity for that testimony by a general court-martial convening</p>	<p>The accused is not required to testify, and the commission may draw no adverse inference from, a refusal to testify. § 5(F).</p> <p>However, there is no rule against the use of coerced statements as evidence, except for statements resulting from torture.</p> <p>There is no specific provision for immunity of witnesses to prevent their testimony from being used against them in any subsequent legal proceeding; however, under 18 U.S.C. §§ 6001 <i>et seq.</i>, a witness required by a military tribunal to give incriminating testimony is immune from prosecution in any criminal case, other than for perjury, giving false statements,</p>	Not provided.	<p>The accused may not be compelled to testify against himself or to confess guilt. ICTY Stat. art. 21; ICTR Stat. art. 20.</p> <p>“A witness may object to making any statement which might tend to incriminate the witness. The Chamber may ...compel the witness to answer the question [but such testimony] shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony.” ICTY Rule 90; ICTR Rule 90.</p>

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
	authority, as authorized by the Attorney General, if required. 18 U.S.C. § 6002; R.C.M. 704.	or otherwise failing to comply with the order. 18 U.S.C. §§6002; 6004.		
Right to Examine or Have Examined Adverse Witnesses	Hearsay rules apply as in federal court. Mil. R. Evid. 801 <i>et seq.</i> In capital cases, sworn depositions may not be used in lieu of witness, unless court-martial is treated as non-capital or it is introduced by the defense. Art. 49, UCMJ, 10 U.S.C. § 849.	Defense Counsel may cross-examine the prosecution’s witnesses who appear before the Commission. § 5(I). However, the Commission may also permit witnesses to testify by telephone or other means not requiring the presence of the witness at trial, in which case cross-examination may be impossible. § 6(D)(2). In the case of closed proceedings or classified evidence, only the detailed defense counsel may be permitted to participate. Hearsay evidence is admissible as long as the Commission determines it would have probative value to a reasonable person. § 6(D)(1). The Commission may consider testimony from prior trials as well as sworn and unsworn written statements, apparently without regard to the availability of the declarant, in apparent contradiction with 10 U.S.C.	Defendants had the right “to present evidence at the Trial in support of [their] defense, and to cross-examine any witness called by the Prosecution.” IMT Charter art. 16(d). Hearsay was not strictly prohibited. The judges were empowered to inquire into the nature of evidence and determine its reliability. IMT Charter art. 20.	The accused has the right “to examine, or have examined, the witnesses against him...” ICTY Stat. art. 21; ICTR Stat. art. 20. Hearsay evidence may be admissible. “A Chamber may admit any relevant evidence which it deems to have probative value. ... A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.” ICTY Rule 89. “A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.” ICTY Rule 92 <i>bis</i> . Unsworn written testimony and transcripts are admissible only under certain circumstances, including where the declarant is unavailable but there are

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

	General Courts-Martial	M.C.O. No. 1	Nuremberg IMT	ICTY/ICTR
Right to Trial by Impartial Judge	<p>A qualified military judge is detailed to preside over the court-martial. The convening authority may not prepare or review any report concerning the performance or effectiveness of the military judge.</p> <p>Art. 26, UCMJ, 10 U.S.C. § 826.</p> <p>Article 37, UCMJ, prohibits unlawful influence of courts-martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority.</p> <p>Art. 37, UCMJ, 10 U.S.C. § 837.</p>	<p>The Presiding Officer is appointed directly by the Appointing Authority, which decides all interlocutory issues. There do not appear to be any special procedural safeguards to ensure impartiality, but challenges for cause have been permitted.</p> <p>§ 4(A)(4).</p> <p>The presiding judge, who decides issues of admissibility of evidence, also votes as part of the commission on the finding of guilt or innocence.</p> <p>Article 37, UCMJ, provides that no person subject to the UCMJ “may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.”</p> <p>10 U.S.C. § 837.</p> <p>M.C.I. No. 9 clarifies that Art. 37 applies with respect to members of the review panel.</p> <p>MCI No. 9 § 4(F).</p>	<p>Each state party to the London Agreement establishing the IMT nominated one judge, whom they could replace “for reasons of health or for other good reasons,” except that no replacement was permitted to take place during a trial, other than by an alternate.</p> <p>IMT Charter art. 3.</p>	<p>The judges are to be “persons of high moral character, impartiality and integrity....”</p> <p>ICTY Stat. art. 13; ICTR Stat. art. 12.</p> <p>“A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality.”</p> <p>ICTY Rule 15; ICTR Rule 15.</p>
Right to Trial	<p>A military accused has no Sixth Amendment right to a trial by</p>	<p>Military tribunals probably do not require a jury trial.</p>	<p>There was no provision for a jury trial.</p>	<p>The ICTY follows the civil law tradition of employing a panel of</p>

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

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

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

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

Source: Congressional Research Service