

CRS Report for Congress

Received through the CRS Web

Selected Procedural Safeguards in Federal, Military, and International Courts

Updated September 18, 2006

Jennifer K. Elsea
Legislative Attorney
American Law Division

Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 18 SEP 2006		2. REPORT TYPE N/A		3. DATES COVERED -	
4. TITLE AND SUBTITLE Selected Procedural Safeguards in Federal, Military, and International Courts				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Congressional Research Service The Library of Congress 101 Independence Ave SE Washington, DC 20540-7500				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release, distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT SAR	18. NUMBER OF PAGES 32	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

Selected Procedural Safeguards in Federal, Military, and International Courts

Summary

Declaring it necessary to bring to justice those responsible for the terrorist attacks on the United States of September 11, 2001, President Bush signed a Military Order (M.O.) authorizing the trial by military commission of certain non-citizens. The order directs the Secretary of Defense to establish the procedural rules for the operation of the military commissions convened pursuant to the M.O. The Department of Defense prepared regulations providing for procedures of military commissions, but these were invalidated by the Supreme Court in *Hamdan v. Rumsfeld*. The Bush Administration has proposed legislation to reinstate military commissions for the trials of suspected terrorists.

This report provides a brief overview of procedural rules applicable in selected historical and contemporary tribunals for the trials of war crimes suspects. The chart that follows compares selected procedural safeguards employed in criminal trials in federal criminal court with parallel protective measures in military general courts-martial, international military tribunals used after World War II, including the International Military Tribunal (IMT or “Nuremberg Tribunal”), and the International Criminal Courts for the former Yugoslavia (ICTY) and Rwanda (ICTR).

For comparison of the Department of Defense rules for military commissions that were struck down in *Hamdan* to recent legislative proposals, see 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*.

Contents

U.S. Courts and Military Tribunals	1
Federal Court	3
General Courts-Martial	3
Military Commissions	5
International War Crimes Tribunals	6
International Military Tribunals	7
Ad Hoc International Courts	9

List of Tables

Selected Procedural Safeguards in Federal, Military, and International Courts	11
--	----

Selected Procedural Safeguards in Federal, Military, and International Courts

Declaring it necessary to bring to justice those responsible for the terrorist attacks on the United States of September 11, 2001, President Bush signed a Military Order (M.O.) authorizing the trial by military commission of certain non-citizens.¹ The order directed the Secretary of Defense to establish the procedural rules for the operation of the military commissions convened pursuant to the M.O. The Department of Defense implemented regulations and convened commissions; however, one of the accused petitioned for *habeas corpus* in federal district court and the Supreme Court invalidated the regulations as inconsistent with the Uniform Code of Military Justice (UCMJ)² and the Geneva Conventions.³

This report provides a brief overview of procedural rules applicable in selected historical and contemporary tribunals for the trials of war crimes suspects. The chart that follows compares selected procedural safeguards employed in criminal trials in federal criminal court with parallel protective measures in military general courts-martial, international military tribunals used after World War II, including the International Military Tribunal (IMT or “Nuremberg Tribunal”), and the International Criminal Courts for the former Yugoslavia (ICTY) and Rwanda (ICTR). The chart identifies a selection of basic rights in rough order of the stage in the criminal justice process where they might become most important. The text of the chart indicates some of the procedural safeguards designed to protect these rights in different tribunals. Recognizing that fundamental fairness relies on the *system* of procedural safeguards as a whole rather than individual rules, the chart is intended only as an outline to compare some of the rules different courts and tribunals might use to safeguard certain rights.

U.S. Courts and Military Tribunals

The Constitution imposes on the government a system of restraints to provide that no unfair law is enforced and that no law is enforced unfairly. What is fundamentally fair in a given situation depends in part on the objectives of a given system of law weighed alongside the possible infringement of individual liberties that

¹ Military Order, November 13, 2001 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §1(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001).

² 10 U.S.C. § 801 *et seq.*

³ *Hamdan v. Rumsfeld*, 548 U.S. ___ (2006), *rev’g* 415 F.3d 33 (D.C. Cir. 2005). The Geneva Conventions were held to be incorporated by implication into the UCMJ. For an analysis of the decision, see CRS Report RS22466, *Hamdan v. Rumsfeld: Military Commissions in the ‘Global War on Terrorism,’* by Jennifer K. Elsea.

system might impose. In the criminal law system, some basic objectives are to discover the truth, punish the guilty proportionately with their crimes, acquit the innocent without unnecessary delay or expense, and prevent and deter further crime, thereby providing for the public order. Military justice shares these objectives in part, but also serves to enhance discipline throughout the armed forces, serving the overall objective of providing an effective national defense. The equation for international criminal law may also consider foreign policy elements as well as international law and treaty obligations.

The Fifth Amendment to the Constitution provides that “no person shall be ... deprived of life, liberty, or property, without due process of law.” Due process includes the opportunity to be heard whenever the government places any of these fundamental liberties at stake. The Constitution contains other explicit rights applicable to various stages of a criminal prosecution. Criminal proceedings provide both the opportunity to contest guilt and to challenge the government’s conduct that may have violated the rights of the accused. The system of procedural rules used to conduct a criminal hearing, therefore, serves as a safeguard against violations of constitutional rights that take place outside the courtroom.

The Bill of Rights applies to all citizens of the United States and all aliens within the United States.⁴ However, the methods of application of constitutional rights, in particular the remedies available to those whose rights might have been violated, may differ depending on the severity of the punitive measure the government seeks to take and the entity deciding the case. The jurisdiction of various entities to try a person accused of a crime could have a profound effect on the procedural rights of the accused. The type of judicial review available also varies and may be crucial to the outcome.

International law also contains some basic guarantees of human rights, including rights of criminal defendants and prisoners. Treaties to which the United States is a party are expressly made a part of the law of the land by the Supremacy Clause of the Constitution,⁵ and may be codified through implementing legislation.⁶ International law is incorporated into U.S. law.⁷ The law of war, a subset of international law, applies to cases arising from armed conflicts (i.e., war crimes).⁸ It is unclear exactly how the law of war applies to the current hostilities involving non-state terrorists, and the nature of the rights due to accused terrorist/war criminals may depend in part on their status under the Geneva Conventions. The Supreme Court has ruled that Al Qaeda fighters are entitled at least to the baseline protections applicable under

⁴ *Wong Wing v. United States*, 163 U.S. 228 (1896)(aliens are entitled to due process of law).

⁵ U.S. CONST. Art. VI (“[A]ll Treaties ... shall be the Supreme Law of the Land; ...”).

⁶ *See, e.g.* 18 U.S.C. § 2441 (War Crimes Act).

⁷ *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 (1987).

⁸ For a brief explanation of the sources of the law of war, see generally CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, by Jennifer Elsea.

Common Article 3 of the Geneva Conventions,⁹ which includes protection from the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

Federal Court. The federal judiciary is established by Article III of the Constitution and consists of the Supreme Court and “inferior tribunals” established by Congress. It is a separate and co-equal branch of the federal government, independent of the executive and legislative branches, designed to be insulated from the public passions. Its function is not to make law but to interpret law and decide disputes arising under it. Federal criminal law and procedures are enacted by Congress and housed primarily in title 18 of the U.S. Code. The Supreme Court promulgates procedural rules for criminal trials at the federal district courts, subject to Congress’s approval. These rules, namely the Federal Rules of Criminal Procedure (Fed. R. Crim. P.) and the Federal Rules of Evidence (Fed. R. Evid.), incorporate procedural rights that the Constitution and various statutes demand. The chart cites relevant rules or court decisions, but makes no effort to provide an exhaustive list of authorities.

General Courts-Martial. The Constitution, in order to provide for the common defense,¹⁰ gives Congress the power to raise, support, and regulate the armed forces,¹¹ but makes the President Commander-in-Chief of the armed forces.¹² Article III does not give the judiciary any explicit role in the military, and the Supreme Court has taken the view that Congress’ power “[t]o Make Rules for the Government and Regulation of the land and naval Forces”¹³ is entirely separate from Article III.¹⁴ Therefore, courts-martial are not considered to be Article III courts and are not subject to all of the rules that apply in federal courts.¹⁵

Although military personnel are “persons” to whom the Bill of Rights applies, in the military context it might be said that discipline is as important as liberty as

⁹ *Hamdan*, slip op. at 67 (citing art. 3 § 1(d) of The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317). The identical provision is included in each of the four Geneva Conventions and applies to any “conflict not of an international character.” The majority declined to accept the President’s interpretation of Common Article 3 as inapplicable to the conflict with al Qaeda and interpreted the phrase “in contradistinction to a conflict between nations,” which the Geneva Conventions designate a “conflict of international character.”

¹⁰ U.S. CONST. Preamble.

¹¹ *Id.* art. I § 8, cls. 11-14 (War Power).

¹² *Id.* art. II § 2, cl. 1.

¹³ *Id.* art. I § 8, cl. 14.

¹⁴ See *Dynes v. Hoover*, 61 U.S. (How.) 65 (1857).

¹⁵ See WILLIAM WINTHROP, WINTHROP’S MILITARY LAW AND PRECEDENTS 48-49 (2d. ed. 1920)(describing courts-martial as *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein) (emphasis in original).

objectives of military justice. Also, the Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment, from which the Supreme Court has inferred there is no right to a civil jury in courts-martial.¹⁶ However, in part because of the different standards provided in courts-martial, their jurisdiction is limited to those persons and offenses the military has a legitimate interest in regulating.¹⁷ Courts-martial jurisdiction extends mainly to service members on active duty, prisoners of war, and persons accompanying the armed forces in time of declared war,¹⁸ as well as certain violators of the law of war.¹⁹

Congress regulates the armed forces largely through title 10 of the U.S. Code, which contains as Chapter 47 the Uniform Code of Military Justice (UCMJ) regulating the system of military courts-martial. The Supreme Court has found the procedures Congress set through the UCMJ to provide adequate procedural safeguards to satisfy constitutional requirements and the interest in maintaining a strong national defense.

Congress has delegated to the President the authority to make procedural rules for the military justice system.²⁰ The President created the Rules for Courts-Martial (R.C.M.) and the Military Rules of Evidence (Mil. R. Evid.) pursuant to that delegation.²¹ The comparison chart will cite provisions of the UCMJ and the applicable rules, as well as military appellate court opinions as applicable.

Defendants are not able to appeal their courts-martial directly to federal courts, but may seek relief in the form of a writ of habeas corpus, although review may be limited. However, Congress has provided for a separate system of reviewing convictions by court-martial, which includes a civilian appellate court. In cases in which the convening authority approves a sentence of death, or, unless the defendant waives review, approves a bad-conduct discharge, a dishonorable discharge,

¹⁶ See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Congress has, in article 32, UCMJ, provided for a pre-trial hearing that performs the same basic function as a grand jury. Court-martial panels consist of a military judge and several panel members, who function similarly to a jury.

¹⁷ For an overview of the court-martial process, see CRS Report RS21850, *Military Courts-Martial: An Overview*, by Jennifer K. Elsea.

¹⁸ See 10 U.S.C. § 802. “In time of war” refers to war declared by Congress. *United States v. Averette*, 17 USCMA 363 (1968).

¹⁹ See 10 U.S.C. § 818.

²⁰ 10 U.S.C. § 836. Article 36 authorizes the President to prescribe rules for “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.” Such rules are to “apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts” insofar as the President “considers practicable” but that “may not be contrary to or inconsistent” with the UCMJ.

²¹ The rules are set forth in the Manual for Courts-Martial (M.C.M.), established as Exec. Order No. 12473, Manual for Courts-Martial, United States, 49 Fed. Reg 17,152, (Apr. 23, 1984), as amended.

dismissal of an officer, or confinement for one year or more, the Court of Criminal Appeals for the appropriate service²² must review the case for legal error, factual sufficiency, and appropriateness of the sentence.

The Court of Appeals for the Armed Forces (CAAF) exercises appellate jurisdiction over the services' Courts of Criminal Appeals, with respect to issues of law. The CAAF is an Article I court composed of five civilian judges appointed for 15-year terms by the President with the advice and consent of the Senate. Its jurisdiction is established in Article 67 of the UCMJ (10 U.S.C. § 867), and is discretionary except in death penalty cases.

Military Commissions. The Constitution empowers the Congress to declare war and “make rules concerning captures on land and water,”²³ to define and punish violations of the “Law of Nations,”²⁴ and to make regulations to govern the armed forces.²⁵ The power of the President to convene military commissions flows from his authority as Commander in Chief of the Armed Forces and his responsibility to execute the laws of the nation.²⁶ Under the Articles of War and subsequent statute,²⁷ the President has at least implicit authority to convene military commissions to try offenses against the law of war.²⁸ There is, therefore, somewhat of a distinction between the authority and objectives behind convening military courts-martial and commissions.²⁹ Rather than serving the internally directed purpose of maintaining discipline and order of the troops, the military commission is externally directed at the enemy as a means of waging successful war by punishing and deterring offenses against the law of war.

Jurisdiction of military commissions is limited to time of war and to trying offenses recognized under the law of war or as designated by statute.³⁰ While case

²² There are four such courts — the Army Court of Criminal Appeals, the Navy-Marine Corps Court of Criminal Appeals, the Air Force Court of Criminal Appeals, and the Coast Guard Court of Criminal Appeals. These courts are established by the Judge Advocate General of the respective service. 10 U.S.C. § 866.

²³ U.S. CONST. art. I, § 8, cl. 11.

²⁴ *Id.* art. I, § 8, cl. 10.

²⁵ *Id.* art. I, § 8, cl. 14.

²⁶ *Id.* art. II.

²⁷ The Articles of War were re-enacted at 10 U.S.C. § 801 *et seq.* as part of the UCMJ. Although there is no case law interpreting the UCMJ as authorizing military commissions, the relevant sections of the UCMJ, which recognize the concurrent jurisdiction of military commissions to deal with “offenders or offenses designated by statute or the law of war,” are essentially identical to the corresponding language in the Articles of War. See 10 U.S.C. § 821.

²⁸ *Ex parte Quirin*, 317 U.S. 1 (1942).

²⁹ See WINTHROP, *supra* note 15, at 831 (describing distinction between courts-martial and military tribunals).

³⁰ 10 U.S.C. § 821. Statutory offenses for which military commissions may be convened (continued...)

law suggests that military commissions could try U.S. citizens as enemy belligerents,³¹ the Military Order of November 13, 2001 limits their jurisdiction to non-citizens.

As non-Article III courts, military commissions are not subject to the same constitutional requirements that are applied in Article III courts.³² Congress has delegated to the President the authority to set the rules of procedure and evidence for military tribunals, applying “the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district court” insofar as he considers it practicable.³³ The rules “may not be contrary to or inconsistent with the UCMJ”³⁴ and must be uniform insofar as practicable with courts-martial.³⁵

The United States first used military commissions to try enemy belligerents accused of war crimes during the occupation of Mexico in 1847, and made heavy use of them in the Civil War.³⁶ However, prior to the President’s Military Order, no military commissions had been convened since the aftermath of World War II. Because of the lack of standards of procedure used by military commissions, it is difficult to draw a meaningful comparison with the other types of tribunals. For a comparison of the Department of Defense rules for military commissions that were struck down in *Hamdan* to recent legislative proposals, see 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*.

International War Crimes Tribunals

Prior to the twentieth century, war crimes were generally tried, if tried at all, by belligerent States in their own national courts or special military tribunals. After World War I, the Allies appointed a 15-member commission to inquire into the legal liability of those responsible for the war and the numerous breaches of the law of war that it occasioned. It recommended the establishment of an international military

³⁰ (...continued)

are limited to aiding the enemy, 10 U.S.C. § 904, and spying, 10 U.S.C. § 906.

³¹ See *Ex parte Quirin*, 317 U.S. 1 (1942).

³² See *Ex parte Quirin*, 317 U.S. at 38; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (noting a servicemember “surrenders his right to be tried by the civil courts”).

³³ 10 U.S.C. § 836. The Supreme Court has held that the President’s discretion to determine whether the application of procedural rules that apply in federal courts is not without limitation. *Hamdan v. Rumsfeld*, 548 U.S. __ (2006).

³⁴ *Id.*

³⁵ *Id.*

³⁶ For more information about the history of military commissions in the United States, see CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, by Jennifer K. Elsea; CRS Report RL32458, *Military Tribunals: Historical Patterns and Lessons*, by Louis Fisher; CRS Report RL31340: *Military Tribunals: The Quirin Precedent*, by Louis Fisher.

tribunal to prosecute those accused of war crimes and crimes against humanity. After Germany refused to comply with the locally unpopular provision of the peace treaty requiring it to turn over accused war criminals to the Allied forces for trial, a compromise was reached in which Germany agreed to prosecute those persons in its national courts.³⁷ Of 901 cases referred to the German Supreme Court for trial at Leipzig, only 13 were convicted.³⁸ Because German nationalism appeared to have hindered the earnest prosecution of war criminals, the results were largely seen as a failure.³⁹

International Military Tribunals. In the aftermath of World War II, the Allies applied lessons learned at Leipzig and formed special international tribunals for the European and Asian theaters. In an agreement concluded in London on August 8, 1945, the United States, France, Great Britain and the Soviet Union together established the International Military Tribunal (IMT) at Nuremberg for the trial of war criminals.⁴⁰ The four occupying powers also established Control Council Law No. 10, authorizing military tribunals at the national level to try the less high-profile war crimes and crimes against humanity.⁴¹

The evidentiary rules used at Nuremberg and adopted by the Tokyo tribunals were designed to be non-technical, allowing the expeditious admission of “all evidence [the Tribunal] deems to have probative value.”⁴² This evidence included hearsay, coerced confessions, and the findings of prior mass trials.⁴³ It has also been argued that the tribunals violated the principles of legality by establishing *ex post facto* crimes and dispensing victor’s justice.⁴⁴ However, while the historical consensus seems to have accepted that the Nuremberg Trials were conducted fairly,⁴⁵ some observers argue that the malleability of the rules of procedure and evidence could and did have some unjust results, in particular as they were applied by the

³⁷ See *id.* at 46.

³⁸ See *id.* at 49.

³⁹ See *id.* at 51-52.

⁴⁰ See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter “London Charter”], available at [<http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>]. The Rules of Procedure (IMT Rules) are available at [<http://www.yale.edu/lawweb/avalon/imt/proc/imtrules.htm>].

⁴¹ Approximately 185 people were indicted. Thirty people were sentenced to death, one hundred twenty were given prison sentences, and thirty-five were acquitted.

⁴² See Evan J. Wallach, *The Procedural And Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide An Outline For International Legal Procedure?*, 37 COLUM. J. TRANSNAT’L L. 851, 860 (1999).

⁴³ See *id.* at 871-72.

⁴⁴ See KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 20 (2001).

⁴⁵ See, Wallach, *supra* note 42, at 852 (citing VIRGINIA MORRIS & MICHAEL SCHARF, 1 AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 9-10 (1995)).

national military tribunals.⁴⁶ The Tokyo tribunal decisions were subject to criticism by dissenters on the Supreme Court in the *Yamashita* case.⁴⁷ Some argue that procedural safeguards considered sufficient for the World War II tribunals would not likely meet today's standards of justice.⁴⁸

Nuremberg. The jurisdiction of the Nuremberg Tribunal was based on universally applicable international law regulating armed conflict, and its authority was based on the combined sovereignty of the Allies and Germany's unconditional surrender.⁴⁹ The Tribunal rejected the defendants' contention that the tribunal violated fundamental legal principles by trying them for conduct that was not prohibited by criminal law at the time it was committed.⁵⁰ The Nuremberg Tribunal also adopted the doctrine of individual responsibility for war crimes, rejecting the idea that state sovereignty could protect those responsible from punishment for their misdeeds.

Twenty-four Nazi leaders were indicted and tried as war criminals by the International Military Tribunal (IMT). The indictments contained four counts: (1) crimes against the peace, (2) crimes against humanity, (3) war crimes, and (4) a common plan or conspiracy to commit the aforementioned acts. Nineteen of the defendants were found guilty, three were acquitted, one committed suicide before the sentence, and one was physically and mentally unfit for trial. Sentences ranged from

⁴⁶ See *id.* at 869; Application of Homma, 327 U.S. 759, 760 (1946) (Murphy, J. dissenting). But see Jonathan A. Bush, *Lex Americana: Constitutional Due Process and the Nuremberg Defendants*, 45 ST. LOUIS U. L.J. 515, 526 (2001) (arguing that in many ways, "the new [Tokyo and Nuremberg] tribunals' charters gave defendants many rights that went beyond anything allowed in the American system" at the time of the trials).

⁴⁷ Justice Murphy wrote:

[The rules], as will be noted, permit[] reception of documents, reports, affidavits, depositions, diaries, letters, copies of documents or other secondary evidence of their contents, hearsay, opinion evidence and conclusions, in fact of anything which in the commission's opinion "would be of assistance in proving or disproving the charge," without any of the usual modes of authentication. A more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made. So far as the admissibility and probative value of evidence was concerned, the directive made the commission a law unto itself.

In re Yamashita, 327 U.S. at 49 (Murphy, J. dissenting).

⁴⁸ See Wallach, *supra* note 42.

⁴⁹ See Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 238 (1997).

⁵⁰ See KITTICHAISAREE, *supra* note 44, at 18 (citing the judgment of the tribunal in the context of "crimes against peace" to the effect that justice required, rather than prohibited, the punishment of those responsible for unprovoked attacks against neighboring states "in defiance of treaties and assurances").

death by hanging (twelve), life imprisonment (three), and imprisonment for ten to twenty years (four).

Tokyo. The International Military Tribunal for the Far East (IMTFE) in Tokyo was established by a Special Proclamation of General Douglas MacArthur as the Supreme Commander in the Far East for the Allied Powers.⁵¹ Many provisions of the IMTFE were adapted from the London Agreement. The Tokyo tribunal tried only the most serious crimes, crimes against peace. General MacArthur appointed eleven judges, one from each of the victorious Allied nations who signed the instrument of surrender and one each from India and the Philippines, to sit on the tribunal. General MacArthur also appointed the prosecutor. Of the twenty-five people indicted for crimes against peace, all were convicted, with seven executed, sixteen given life imprisonment, and two others serving lesser terms. Some 300,000 Japanese nationals were tried for conventional war crimes (primarily prisoner abuse) and crimes against humanity in national military tribunals.

Ad Hoc International Courts. The U.N. Security Council (UNSC), acting under its Chapter VII authority of the U.N. Charter, established two ad hoc criminal courts, the International Criminal Tribunal for the former Yugoslavia (ICTY)⁵² and the International Criminal Tribunal for Rwanda (ICTR).⁵³ Both tribunals are still operating, and employ virtually identical procedural rules. Their jurisdiction is coexistent with that of national courts, but they also may assert primacy over national courts to prevent trials of the same individuals in more than one forum. Their jurisprudence may provide important precedent for the interpretation of Common Article 3.

Yugoslavia. Based in the Hague, Netherlands, the ICTY has jurisdiction to try crimes conducted within the territory of the former Yugoslavia, including the crime of “ethnic cleansing,” whether committed in the context of an international war or a war of non-international character. It tries violations of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity when committed in the context of an armed conflict. It is composed of sixteen permanent independent judges, who are elected by the UN General Assembly from a list of nominations provided by the Security Council. It has an Appeals Chamber consisting of seven judges, five of whom sit on a panel in any given case.

The Prosecutor, an independent organ of the court appointed by the UN Security Council on the recommendation of the UN Secretary-General, investigates and prosecutes those responsible for covered offenses. When the Prosecutor finds that

⁵¹ Charter of the International Military Tribunal For The Far East, Apr. 26, 1946 (“IMTFE Charter”), T.I.A.S. No. 1589, *available at* [<http://www.yale.edu/lawweb/avalon/imtfec.htm>].

⁵² UN Doc. S/Res/808 (1993; UN Doc. S/Res/827 (1993). Its statute (ICTY Stat.) and procedural rules (ICTY Rule) are available at [<http://www.un.org/icty/legaldoc-e/index.htm>]. For more information, see CRS Report RL30864, *Yugoslavia War Crimes Tribunal: Current Issues for Congress*, by Julie Kim.

⁵³ UN Doc. S/Res/955 (1994). Its statute (ICTR Stat.) and procedural rules (ICTR Rule) are available at [<http://69.94.11.53/default.htm>].

sufficient evidence exists to try an individual, he issues an indictment, subject to the approval of a judge from the Trial Chamber.

Rwanda. The ICTR, based in Arusha, Tanzania, was established by the UN Security Council in response to genocide and other systematic, widespread, and flagrant violations of humanitarian law applicable in the context of a non-international armed conflict, that is, Common Article 3 of the Geneva Conventions and Additional Protocol II, genocide, and crimes against humanity. Its structure and composition are similar to those of the ICTY. As of June 2006, the ICTR has tried 28 accused, convicting 25 and acquitting three.⁵⁴ Twenty-seven defendants are undergoing trial, and another fourteen await trial.⁵⁵

⁵⁴ See [<http://69.94.11.53/ENGLISH/factsheets/achievements.htm>].

⁵⁵ See [<http://69.94.11.53/ENGLISH/factsheets/detainee.htm>]. More information is available at the ICTY website, [<http://www.un.org/icty/>].

Selected Procedural Safeguards in Federal, Military, and International Courts

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
Presumption of Innocence “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453 (1895).	If the defendant fails to enter a proper plea, a plea of not guilty will be entered. Fed. R. Crim. P. 11(a). Defendant is entitled to jury instructions explaining that guilt must be proved on the evidence beyond a reasonable doubt. Taylor v. Kentucky, 436 U.S. 478 (1978). Defendant is entitled to appear in court without unnecessary physical restraints or other indicia of guilt, such as appearing in prison uniform, that may be prejudicial to jury. See Holbrook v. Flynn, 475 U.S. 560 (1986).	If the defendant fails to enter a proper plea, a plea of not guilty will be entered. R.C.M. 910(b). Members of court martial must be instructed that the “accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond a reasonable doubt.” R.C.M. 920(e). The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restraint shall not be imposed unless prescribed by the military judge. R.C.M. 804.	No written rule addressing presumption of innocence, although U.S. negotiators were able to win a concession from Soviet negotiators to the effect that the rule would apply. See Henry T. King, Jr., <i>Robert Jackson’s Transcendent Influence Over Today’s World</i>, 68 ALB. L. REV. 23, 25 (2006).	“The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.” ICTY Stat. art. 21(3); ICTR Stat. art. 20. If the accused fails to enter a plea, the court must enter a plea of not guilty on the accused’s behalf. ICTY Rule 62(a)(iv); ICTR Rule 62(a)(iii). Instruments of restraint may not be used during court proceedings. ICTY Rule 83; ICTR Rule 83. Guilty pleas may be accepted only if the trial chamber

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
				determines it is voluntary, informed, unequivocal, and supported by evidence. ICTY Rule 63 <i>bis</i> ; ICTR Rule 62(B).
Right to Remain Silent “No person...shall be compelled in any criminal case to be a witness against himself” Amendment V.	Incriminating statements made by defendant under duress or without prior <i>Miranda</i> warning are inadmissible as evidence of guilt in a criminal trial. <i>Miranda v. Arizona</i>, 384 U.S. 436 (1966). Before a jury is allowed to hear evidence of a defendant’s confession, the court must determine that it was voluntarily given. 18 U.S.C. § 3501.	Coerced confessions or confessions made without statutory equivalent of <i>Miranda</i> warning are not admissible as evidence. Art. 31, UCMJ, 10 U.S.C. § 831. The prosecutor must notify the defense of any incriminating statements made by the accused 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.	No right to remain silent. The Tokyo rules specifically provided that “all purported admissions or statements of the accused are admissible.” IMTFE Charter art 13.	A suspect to be questioned by the prosecutor during an investigation must be informed of his right to remain silent. ICTY Rule 42; ICTR Rule 42. Persons are to be informed of the right to remain silent upon their arrest. ICTY Rule 55; ICTR Rule 55. “No evidence shall be admissible 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.

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
Freedom from Unreasonable Searches & Seizures “The right of the people to be secure ... against unreasonable searches and seizures, shall not be violated; no Warrants shall issue, but upon probable cause...” Amendment IV.	Evidence, including derivative evidence, gained through unreasonable searches and seizures may be excluded in court. <i>Boyd v. United States</i>, 116 U.S. 616 (1886); <i>Nardone v. United States</i>, 308 U.S. 338 (1938); Fed. R. Crim. P. 41. A search warrant issued by a magistrate on a showing of probable cause is generally required for law enforcement agents to conduct a search of an area where the subject has a reasonable expectation of privacy, including searches and seizures of telephone or other communications and emissions of heat and other phenomena detectable with means other than human senses. <i>Katz v. United States</i>, 389 U.S. 347 (1967).	“Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused ...” unless certain exceptions apply. Mil. R. Evid. 311. “Authorization to search” may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the law of war. It must be based on probable cause. Mil. R. Evid. 315. Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 <i>et seq.</i>	Not provided.	“No evidence shall be admissible if ... its admission is antithetical to, and would seriously damage, the integrity of the proceedings.” ICTY Rule 95; ICTR Rule 95.

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
	Evidence resulting from overseas searches of American property by foreign officials is admissible unless foreign police conduct shocks judicial conscience or participation by U.S. agents is so substantial as to render the action that of the United States. <i>United States v. Barona</i> , 56 F.3d 1087 (9 th Cir. 1995).	Mil. R. Evid. 317. 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 “In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.”	Defendants in criminal cases have the right to representation by an attorney at all stages of prosecution. The defendant may hire an attorney or, if indigent, have counsel appointed at the government’s expense. If two or more co-defendants are represented by one attorney, the court must inquire as to whether a conflict	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	“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	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

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
Amendment VI.	of interest exists. Fed. R. Crim. P. 44. Conversations between attorneys and clients are privileged. Fed. R. Evid. 501. Procedures for ensuring adequate representation of defendants are outlined at 18 U.S.C. §§ 3005 (capital cases) and 3006A.	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.	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. The IMTFE Charter provided that “[e]ach accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. ... If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.”	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. art. 20. All communications between lawyer and client are privileged, and disclosure

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
			IMTFE Charter art. 9(c).	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.
Right to Indictment and Presentment “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except	Where the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be tried except on the accusation of a grand jury. <i>Ex parte</i> Wilson, 114 U.S. 417 (1885); Fed. R. Crim. P. 7. Jurors must be selected from a fair cross section of the	The right to indictment by grand jury is explicitly excluded in “cases arising in the land or naval forces.” Amendment V. Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry and deciding how to dispose of the offense. R.C.M. 303-06.	“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 lodged with the Indictment....” IMT Rule 2. The Tokyo Tribunal required the same documents to be provided not less than 14 days	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

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger” Amendment V.	community; otherwise, an accused can challenge the indictment. 28 U.S.C. §§ 1861 <i>et seq.</i> Once an indictment is given, its scope may not be increased. <i>Ex parte Bain</i>, 121 U.S. 1 (1887). (Amendments to an indictment must undergo further grand jury process.)		before trial. IMTFE Rule 1.	with which the suspect is charged. ICTY Stat. arts. 18-19 and ICTY Rule 47; ICTR Stat. arts. 17-18; ICTR Rule 47. A person against whom an indictment has been confirmed is to be taken into custody and immediately informed of the charges in a language he understands. ICTY Stat. arts. 20-21 and Rule 47; ICTR Stat. arts. 19-20 and ICTR Rule 47. The prosecutor may amend the indictment as prescribed in ICTY Rule 50 or ICTR Rule 50.
Right to Written Statement of Charges	Defendant is entitled to be informed of the nature of the charge with sufficiently reasonable certainty to allow	Charges and specifications must be signed under oath and made known to the accused as soon as practicable. Art. 30,	See above.	An arrested person must be completely informed of charges, which may be satisfied by presentation to the accused

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
“In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation; ...” Amendment VI.	for preparation of defense. <i>Cook v. United States</i>, 138 U.S. 157 (1891).	UCMJ, 10 U.S.C. § 830.		of a copy of the written charges, translated, if necessary. ICTY Rule 59 <i>bis</i>. 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 Confrontation Clause of Amendment VI guarantees the accused’s right to be present in the courtroom at every	The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial. <i>Crosby v. United States</i>, 506 U.S. 255, 262 (1993); Fed. R. Crim. P. 43.	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	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.	The accused has the right “to be tried in his presence.” ICTY Stat. art. 21; ICTR Stat. art. 20. <i>In absentia</i> trials are permitted only in cases of exceptional contempt of court, where the accused voluntarily absents himself from the proceeding.

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
stage of his trial. Illinois v. Allen, 397 U.S. 337 (1970).	When defendant knowingly absents himself from court during trial, court may “proceed with trial in like manner and with like effect as if he were present.” Diaz v. United States, 223 U.S. 442, 455 (1912).	ordering the removal of the accused from the proceedings. R.C.M. 801.	(Martin Bormann, who was never located and was rumored to be dead, was convicted in absentia and sentenced to death.) The Tokyo rules provided that “Any accused or any other person may be excluded from open session of the Tribunal for failure to observe and respect the directives or dignity of the Tribunal.” IMTFE Rule 3.	<i>Prosecutor v. Blaskic</i>, Case No. IT-95-14-AR 108 <i>bis</i>, Decision on Subpoena, ICTY App. Ch. ¶ 59 (1997).
Prohibition against Ex Post Facto Crimes “No ... ex post facto law shall be passed.” Art. I, § 9, cl. 3.	Congress may not pass a law punishing conduct that was not a crime when perpetrated, increasing the possible sentence for a crime, or reducing the government’s evidentiary burden. <i>Calder v. Bull</i>, 3 Dall. (3 U.S.) 386 (1798); <i>Ex Parte Garland</i>, 4 Wall (71 U.S.) 1867.	Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes. <i>U.S. v. Gorki</i>, 47 M.J. 370 (1997).	Not provided. Article 6 of the IMT Charter provided for jurisdiction to try not only war crimes, but also “crimes against peace” and “crimes against humanity,” which had never before been defined as international crimes. The IMT rejected defenses based on the ex post facto nature of the	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

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
			charges, remarking that the rule against 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. The statute for the Tokyo Tribunal provided it jurisdiction over the specific violations “whether or not in violation of the domestic law of the country where perpetrated.” IMTFE Charter art. 5.	genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. ICTR Stat. arts. 1-4.

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
Protection against Double Jeopardy “... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ...” Amendment V. Subject to “dual sovereign” doctrine, that is, federal and state courts may prosecute an individual for the same conduct without violating the clause.	Jeopardy attaches once the jury is sworn or where there is no jury, when the first evidence is presented. If the trial is terminated after jeopardy has attached, a second trial may be barred in a court under the same sovereign, particularly where it is prosecutorial conduct that brings about the termination of the trial. <i>Illinois v. Somerville</i>, 410 U.S. 458 (1973).	Double jeopardy clause applies. <i>See Wade v. Hunter</i>, 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. <i>United States v. Stokes</i>, 12 M.J. 229 (C.M.A. 1982). Once military authorities have turned service member over to civil authorities for trial,	Not provided. Jurisdiction was concurrent with national courts, but the IMT could only try serious crimes not limited to a specific geographical location.	“No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal...” A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the ad hoc tribunal, but only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
		military may have waived jurisdiction for that crime, although it may be possible to charge the individual for another crime arising from the same conduct. <i>See</i> 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.		responsibility, or the case was not diligently prosecuted. ICTY Stat. art. 10; ICTR Stat. art. 9. “When...criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal, a Trial Chamber shall...issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the ICTY President may report the matter to the Security Council.” ICTY Rule 13; ICTR Rule 13. However, the prosecution can seek to appeal an acquittal, including based on the

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
				discovery a new fact that was unknown at the time of the proceedings but that could have been decisive. ICTY Stat. art. 26.; ICTR Stat. art. 25.
Speedy & Public Trial “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,” Amendment VI.	Trial is to commence within seventy days of indictment or original appearance before court. 18 U.S.C. § 3161. Closure of the courtroom during trial proceedings is justified only if 1) the proponent of closure advances an overriding interest likely to be prejudiced; 2) the closure is no broader than necessary; 3) the trial court considers reasonable alternatives to closure; and 4) the trial court makes findings adequate to support closure. <i>See Waller v. Georgia</i>, 467 U.S. 39, 48	In general, accused must be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever date is earliest. R.C.M. 707(a). The right to a public trial applies in courts-martial but is not absolute. R.C.M. 806. The 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	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 “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	The accused has the right “to be tried without undue delay.” ICTY Stat. art. 21; ICTR Stat. art. 20. Proceedings are to be public unless otherwise provided. ICTY Rule 78; ICTR Rule 78. “The press and the public [may] be excluded from all or part of the proceedings for reasons of: (i) public order or morality; (ii) safety, security or non-disclosure of the identity of a victim or witness...; or (iii) the protection of the interests of justice.”

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
	(1984).	no broader than necessary. United States v. Grunden, 2 M.J. 116 (CMA 1977).	of the charges.” IMT Charter art. 18; IMTFE Charter art. 12. The IMT was to rule in open court upon all questions arising during the trial, although it could deliberate certain matters in closed proceedings. IMT Rule 8. The IMTFE rules permitted the tribunal, “when necessary, [to] order the closing or clearing of the court and take any other steps which to the Tribunal seem just.” IMTFE Rule 5. Provision was made for the publication of all proceedings in multiple languages. IMT Charter art. 25. At the Tokyo Tribunal, “[s]o much of the record and of the proceedings may be translated	ICTY Rule 79; ICTY Rule 79.

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
			into Japanese as the Tribunal considers desirable in the interest of justice and for the information of the public.” IMTFE Rule 6.	
Burden & Standard of Proof Due Process requires the prosecution to prove the defendant guilty of each element of a crime beyond a reasonable doubt. <i>In re Winship</i>, 397 U.S. 358 (1970).	Defendant is entitled to jury instructions clarifying that the prosecution has the burden of presenting evidence sufficient to prove guilt beyond a reasonable doubt. <i>Cool v. United States</i>, 409 U.S. 100 (1978).	Members of court martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt must be resolved in favor of the defendant. R.C.M. 920(e).	The IMT could “admit any evidence which it deem[ed] to be of probative value.” IMT Charter art. 19; IMTFE Rule 13. Guilty verdicts and sentences required a majority vote, that is, three out of four votes. IMT Charter art. 4.	“A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.” ICTY Rule 87; ICTR Rule 87. “A Chamber may admit any relevant evidence which it deems to have probative value,” and “... shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.” ICTY Rule

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
				89; ICTR Rule 89. At the ICTY, “A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.” ICTY Rule 90. At the ICTR, “Witnesses shall ... be heard directly by the Chambers unless [it] has ordered that the witness be heard by means of a deposition as provided for in Rule 71.” ICTR Rule 90.
Privilege Against Self-Incrimination “No person ... shall be compelled in any criminal case to be a witness against	Defendant may not be compelled to testify. Jury may not be instructed that guilt may be inferred from the defendant’s refusal to testify. Griffin v. California, 380 U.S. 609 (1965).	No person subject to the UCMJ may compel any person to answer incriminating questions. Art. 31(a) UCMJ, 10 U.S.C. § 831(a). Defendant may not be	Not provided.	The accused may not to be compelled to testify against himself or to confess guilt. ICTY Stat. art. 21; ICTR Stat. art. 20. “A witness may object to

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
himself...” Amendment V.	Witnesses may not be compelled to give testimony that may be incriminating unless given immunity for that testimony. 18 U.S.C. § 6002.	compelled to give testimony that is immaterial or potentially degrading. Art. 31(c), UCMJ, 10 U.S.C. § 831(c). No adverse inference is to be drawn from a defendant’s refusal to answer any questions or testify at court-martial. Mil. R. Evid. 301(f). Witnesses may not be compelled to give testimony that may be incriminating unless granted immunity for that testimony by a general court-martial convening authority, as authorized by the Attorney General, if required. 18 U.S.C. § 6002; R.C.M. 704.		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.

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
Right to Examine or Have Examined Adverse Witnesses “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him;” Amendment VI.	Rules of Evidence prohibit generally the introduction at trial of statements made out of court to prove the truth of the matter stated unless the declarant is available for cross-examination at trial (hearsay rule). Fed. R. Evid. 801 <i>et seq.</i> The government is required to disclose to defendant any relevant evidence in its possession or that may become known through due diligence. Fed. R. Crim. P. 16.	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.	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), IMTFE Charter art. 15. Hearsay was not strictly prohibited. The judges were empowered to inquire into the nature of evidence and determine its reliability. IMT Charter art. 20; IMTFE Charter art. 15 (tribunal to determine “admissibility” and “relevance” of evidence). “A document [was admissible before the Tokyo Tribunal], regardless of its security classification and without proof of its issuance or signature, which appears to the	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

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
			Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.” IMTFE Charter art. 13.	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 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.

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
				Tadic, Case No.IT-94-1-T, Decision on Defense Motion on Hearsay, 5 August 1996, ¶¶ 7-19.
Right to Compulsory Process to Obtain Witnesses “In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor,” Amendment VI.	Defendants have the right to subpoena witnesses to testify in their defense. The court may punish witnesses who fail to appear. Fed. R. Crim. Pro. Rule 17.	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 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; IMTFE Charter art. 9.	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.
Right to Trial by Impartial Judge “The Judicial	The independence of the judiciary from the other branches was established to ensure trials are decided	A qualified military judge is detailed to preside over the court-martial. The convening authority may not prepare or	Each state party to the London Agreement establishing the IMT nominated one judge, whom they could replace “for	The judges are to be “persons of high moral character, impartiality and integrity....” ICTY Stat. art. 13; ICTR Stat.

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
Power of the United States, shall be vested in one supreme Court, and in ... inferior courts The Judges ... shall hold their Offices during good Behaviour, and shall receive ... a Compensation, which shall not be diminished during their Continuance in Office.” Article III § 1.	impartially, without the “potential domination by other branches of government.” United States v. Will, 449 U.S. 200, 217-18 (1980). Judges with a pecuniary interest in the outcome of a case or other conflicts of interest are disqualified and must recuse themselves. 28 U.S.C. § 455.	review any report concerning the performance or effectiveness of the military judge. Art. 26, UCMJ, 10 U.S.C. § 826. Article 37, UCMJ, prohibits unlawful influence of courts-martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority. Art. 37, UCMJ, 10 U.S.C. § 837.	reasons of health or for other good reasons,” except that no replacement was permitted to take place during a trial, other than by an alternate. IMT Charter art. 3.	art. 12. “A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality.” ICTY Rule 15; ICTR Rule 15.
Right to Trial By Impartial Jury “The Trial of all Crimes, except in	The pool from which juries are drawn must represent a fair cross section of the community. Taylor v. Louisiana, 419 U.S. 522	A military accused has no Sixth Amendment right to a trial by petit jury. <i>Ex Parte Quirin</i>, 317 U.S. 1, 39-40 (1942) (<i>dicta</i>).	There was no provision for a jury trial.	The ICTY and ICTR follow the civil law tradition of employing a panel of judges to decide questions of both fact and law. There is no provision for trial

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
Cases of Impeachment, shall be by Jury;” Art III § 2 cl. 3. “In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the state” Amendment VI.	(1975). There must further be measures to ensure individual jurors selected are not biased (i.e., the <i>voir dire</i> process). <i>Lewis v. United States</i>, 146 U.S. 370 (1892); <i>see</i> Fed. R. Crim. P. 24 (peremptory challenges). The trial must be conducted in a manner designed to avoid exposure of the jury to prejudicial material or undue influence. If the locality of the trial has been so saturated with publicity about a case that it is impossible to assure jurors will not be affected by prejudice, the defendant is entitled to a change of venue. <i>Irvin v. Dowd</i>, 366 U.S. 717 (1961).	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		by jury.

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
		U.S. 234 (1960).		
Right to Appeal to Independent Reviewing Authority “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it” Article I § 9 cl. 2.	Originally, the writ of <i>habeas corpus</i> permitted collateral attack upon a prisoner’s conviction only if the sentencing court lacked subject matter jurisdiction. It later evolved into an avenue for the challenge of federal and state convictions on other due process grounds, to determine whether a prisoner’s detention is “contrary to the Constitution or laws or treaties of the United States.” 28 U.S.C. §§ 2241 <i>et seq.</i>	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 more narrow than in challenges of federal or state convictions. <i>Burns v. Wilson</i> , 346 U.S. 137 (1953). However, Congress created a civilian court, the Court of Appeals for the Armed Forces, to review military cases.	None. “The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.” IMT Charter art. 26. The Control Council for Germany was empowered to reduce or otherwise alter the sentences, but could not increase its severity. IMT Charter art. 29. General MacArthur had similar authority with respect to decisions of the IMTFE. IMTFE Charter art. 17.	The ICTY Statute creates an Appeals Chamber, which may hear appeals from convicted persons or from the prosecutor on the grounds of “an error on a question of law invalidating the decision,” or “an error of fact which has occasioned a miscarriage of justice.” ICTY Stat. art. 25; ICTY Stat. art. 24.
Protection against Excessive Penalties	The death penalty is not <i>per se</i> unconstitutional, but its	Death may only be adjudged for certain crimes where the	Penalties included “death or such other punishment as shall	Penalties are limited to imprisonment; there is no death

Constitutional Safeguards	Federal Court	General Courts-Martial	Nuremberg/Tokyo	ICTY/ICTR
“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Amendment VIII.	discriminatory and arbitrary imposition may be, and the death penalty may not be automatic. <i>See</i> Gregg v. Georgia, 428 U.S. 153 (1976); 18 U.S.C. § 3592 (mitigating /aggravating circumstances). When the death penalty may be imposed, the defendant shall be provided a list of potential jurors and witnesses, unless the court finds that such action might jeopardize the life or safety of any person. 18 U.S.C. § 3432. A special hearing is held to determine whether the death sentence is warranted. 18 U.S.C. § 3593.	defendant is found guilty by unanimous vote of court-martial members present at the time of the vote. Prior to arraignment, the trial counsel must give the defense written notice of aggravating factors the prosecution intends to prove. R.C.M. 1004. A conviction of spying during time of war under article 106, UCMJ, carries a mandatory death penalty. 10 U.S.C. § 906.	be determined by [the IMT] to be just.” IMT Charter art. 27; IMTFE Charter art. 16. The IMT at Nuremberg could also order the convicted person to deliver any stolen property to the Control Council for Germany. IMT Charter art. 28.	penalty. The ICTY may also order the return of any property and proceeds acquired by criminal conduct to their rightful owners. ICTY Stat. art. 24; ICTR Stat. art. 23. Sentences are to be imposed consistently with the general practice regarding prison sentences in the courts of the former Yugoslavia or Rwanda, taking into account such factors as the gravity of the offence and the individual circumstances of the convicted person. ICTY Stat. art. 24; ICTR Stat. art. 23.