FAIR TRIAL IN DEATH PENALTY CASES: A CASE STUDY ON THE NEW MILITARY COMMISSIONS IN THE USA*

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I.
CASE STUDY:
MILLITARY COMISSIONS IN THE USA

> "The USA claims to be a progressive force for human rights. Military commissions have not been used for more than half a century in the United States – a period which has seen the reinforcement of a broad framework of fair trial guarantees in international human rights law and standards and in international humanitarian law. Executive military commissions have no place in 21st century criminal justice systems".[1]

Military Commissions (MC) have existed in the United States Of America (USA) since before the beginning of the Republic with power to try persons that otherwise would not be subject to military law, for the violation of laws of war and other offences committed in territory under military occupation. They derive their authority from the USA Constitution (articles I and II).

After the events of the 11 September 2001 new issues were raised as for the tactics and means used by the USA in the so-called war against terrorism.

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*The paper now presented correspond to some parts of the Master's thesis I presented in the European Master's in Human Rights and Democratisation, academic year 2001-2002: "Fair Trial in Death Penalty Cases: a Case Study on the New Military Commissions in the USA". The research and studies for the Master's thesis were followed in collaboration with the Lund Faculty of Law and Raoul Wallenberg Institute (RWI), Sweden, and my supervisor was Prof. Dr. Ineta Ziemele, visiting Professor at RWI. I discussed the thesis in September 2002 in Padova. The original thesis comprehends an analysis of Laws and Orders creating the Military Commissions in the USA, following the events of the September 11th, as a case study on the topic of the relationship between fair trial and death penalty. In order to better analyse the Military Commissions, I included chapters on the Applicable Human Rights Standards and Humanitarian Law. What is now presented corresponds mainly to the thesis's chapters relating to the analysis of the Military Commissions themselves. This means that I do not go in detail into the applicable international law instruments and only refer to those directly applicable and to the exact extent that they are applicable. Moreover, as a result of the original thesis topic, it is evident the concern for the relationship between fair trial and death penalty that was on the origin of the choice for a case study. However, I also refer in the end some updates, in relation to developments on this topic that were made public or happened after September 2002, the date I presented the thesis. For a more detailed research on this topic, I inevitably refer to my original thesis, that can be be found at the Raoul Wallenber Institut Library.

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[1] Amnesty International, 'Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantanamo Bay', <web.amnesty.org/library/Index/engAMR510532002>, 15 April 2002.

One of this new issues is the way people suspected of international terrorism are to be tried. On the 13th November 2001 President Bush of the United States issued a Military Order dealing with Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism[2].

On 18 September 2001, the US Congress had enacted a Joint Resolution[3] to authorize the President to

> "use all necessary and appropriate force against those nations, organisations, or persons he determines, planned, authorised, committed or aided the terrorists attacks on 11th September 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the USA by such nations, organisations or persons".

which gave authority to the President to issue this Military Order.

With this authority, President Bush of the USA issued the 13th November 2001 Military Order (MO) establishing the main features of the MC and delegating authority on the Department of Defence to issue the orders and regulations necessary to carry out the MO[4]. On March 21, 2002 the Department of Defence announced the Military Commission Order No. 1 establishing the Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (MC Order No.1).

I

THE ORDER AND RELEVANT DEVELOPMENTS

[2] Military Order, 13 November 2001, in Federal Register, Part IV, 16 November 2001.
[3] Public Law 107-40, 115 Stat. (224), 18 September 2001.
[4] 'As a military function and in light of the findings in Section 1, including subsection (f) thereof, the Secretary of Defence shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.' (Military Order 13 November 2001, section 4 (b)).

According to the Military Order, the so-called MC were created with the power to try non-American citizens suspected of international terrorism and empowered to pass death sentences.

The Military Order establishes in Section (2)(a) that the 'individual subject to this order' shall be any non US citizen who:

- Is or was member of the Al Qaeda;
- Has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- Knowingly harbored those persons,

and in relation to whom the President makes a determination that it is in the interest of the USA that the individual shall be subject to the Military Order, that is, that the individual should be tried by a MC.

There is a discretionary power given to the Executive to decide who will be prosecuted (is up to the President to decide and determine who is within these categories, on a case by case basis).

The MC have the power to try people for any offences that can be tried by MC and prescribe the punishment in accordance with the penalties provided under 'applicable law', including life imprisonment or death (Sec. 4(a) MO). Any conviction shall have the concurrence of two thirds of the members of the commission (Sec. 4(6) and (7) MO).

As for the evidence admitted, the Military Order gives the power to the Presiding Officer of the MC to decide which evidence shall have probative value (Sec. 4(c) (3) MO).

There is no provision for review of the convictions and sentences by a high court; this power lies only in the hands of the executive (either the President or the Secretary of Defence) that can review the conviction or sentences and have a final decision on the matter (Sec. 4 (8) MO).

In Section 7 the Military Order allows the detention or trial of any person who is not an individual subject to this Order if so authorized by the Secretary of Defence or any military commander or other officer or agent.

Finally, an individual subject to this Military Order shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any state thereof, (ii) any court of any foreign nation, or (iii) any international tribunal (Section 7 (b)(2) MO).

However, according to some Non Governmental Organizations (NGO'S)[5] what is most striking in this Military Order of 13 November is not what is written, but what is lacking:

- Lack of recognition of the rights of detainees to be afforded access to legal counsel;
- Lack of recognition of the right for detainees to be informed of the charges against them;
- Lack of recognition of the right of detainees to be brought before a judicial authority in order to determine the lawfulness of their detention;
- No requirements the trial and other proceedings will be open and public;
- Lack of recognition of the right of accused persons to be provided with the evidence against them;
- The accused does not necessarily enjoy the presumption of innocence;
- No evidentiary standard, such as a 'proof beyond a reasonable doubt' is necessary to secure convictions;
- There is no role provided for the judiciary in any phase of process;
- No notice as to the particular offences to be covered by the Executive order. Only 'acts of international terrorism', without specifying in what the particular acts may consist are mentioned.

This Presidential Military Order was regulated by the Department of Defence, on the 21st March 2002, following what was stated in Section 4[6] of the Presidential Military Order. The Department of Defence issued the Military Commission Order No. 1 dealing with the Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (MC Order No.1)[7].

This governmental regulation of the procedure of the MC took into consideration some of the criticisms that were made and provided for some of the guarantees that were lacking in the 13th November 2001 Presidential Military Order, referred above.

The guarantees introduced in the MC Order No.1 include making trials public-only with some exceptions related to national security (Chapter 5(O)); requiring proof beyond reasonable doubt for conviction (chapter 5(C)); establishing the presumption of innocence (Chapter 5(B)); providing access to a Defence attorney (chapter 4(C)); permitting the defendant to see the prosecution's evidence (Chapter 5(E)(I)) and to cross-examine witnesses (Chapter 5(G)(I)) as well as requires unanimity before the Commission can impose the death penalty (Chapter 6(F)).

However there are still some guarantees lacking and provisions that violate human rights law and as it states in Chapter 7(B) MC Order n.1:

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[5]International Commission of Jurists, 'Letter to President George Bush', http://www.icj.org/press/press01/english/bush12.htm, 6 December 2001. See also Amnesty International, 'USA: Presidential order on military tribunals threatens fundamental principles of justice',<www.amnesty.org>, 15 November 2001; Human Rights Watch, 'U.S.: New Military Commissions Threaten Rights, Credibility', < www.hrw.org>, 15 November 2001.

[6] *Supra* note no.4.

[7] DoD MCO No. 1, March 21, 2002.

'In the event of any inconsistency between the President's Military Order and this Order… the provisions of the President's Military order shall govern'.

II

ANALYSIS OF THE MILITARY ORDER

In this Chapter I will analyse the Presidential Military Order of 13th November 2001 already taking into consideration the Procedures for Trials by Military Commissions of Certain Non-United States citizens in the War Against Terrorism of the Department of Defence from 21st March 2002.

I will make this analysis in the light of international human rights and humanitarian law, showing that some international rules are binding on the USA and give raise to legal obligations to respect, protect and fulfil certain rights.

1. Status

The debate on the persons subject to this Order gains special relevance under humanitarian law as it leads to the applicability of the Geneva Conventions.

Under Humanitarian Law, if a person is entitled to Prisoner Of War (POW) status, such a person shall be tried by regular military courts, with the same procedure as the one the forces of the detaining power would be entitled to. Therefore, if one talks about combatants to whom afford POW status can be afforded, the MC would not be able to try these persons as they are special Commissions and not follow the same rules as the U.S General Courts-Martial (one basic difference being the right to appeal[8]).

In accordance to this, only unlawful combatants and civilians[9] could be under this Orders' provisions and in this case, one would also have to apply the 4th Geneva Convention and art 75 of the Additional Protocol 1 to the Geneva Conventions (at least as international customary law as the USA are not part to it) in order to ensure a fair trial.

How does this apply to the detainees from the war in Afghanistan? Taleban fighters cannot be subjected to these Commissions. In fact, if we consider Taleban as combatants to whom the status of POW is afforded, according to 3rd Geneva Conventions, art 4(1)[10] as they belonged to the armed forces of a Party to the conflict, these persons will have to be tried by the US Military Courts (art. 82 and 84 3rd Geneva Convention.)[11].

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[8] Human Rights Watch, 'A comparison between the proposed US Military Commissions and US General Courts-Martial', < www.hrw.org/press/2001/12/miltribchart1217>, December 17, 2001.

[9] The possibility of trying civilians in military courts was affirmed by the HRC in its General Comment n.13 where stated that 'While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14'.

[10]Article 4 of the 3rd Geneva Convention sets the requirements for POW status. POW are captured individuals that fall into the power of the enemy and belong to one of the categories enounced in numbers (A)(1) to (6). Additional Protocol I (PI) to the Geneva Conventions broadens this concept. According to article 44, the violation of the laws of war doesn't deprive a combatant of his status and of being considered a POW if falls in the power of the enemy as long as carry is arms openly (article 44 (2) and (3) PI) and a combatant that falls to meet these requirements shall nevertheless be afforded protection equivalent to that afforded to the POW, including the protection afforded by the 3rd Geneva Convention on the trial and punishment of any offences committed (article 44(4) PI). In any case, any doubts in relation to the status of the detainee, must be determined by a 'competent tribunal' accordingly to article 5 of the 3rd Geneva Convention. The reason to refer Protocol I in this context is exactly because this Protocol broadens the concept of POW of the 3rd Geneva Convention and that has importance for the assessment of the Taleban and Al Qaeda status. However, the USA is not part of the Additional Protocol I and unless one determines that this rule is an international customary rule, it will not be applicable to the war in Afghanistan.

[11] The lack of recognition of the Taleban by the US would not appear to deprive Taleban fighters of POW status. Article 4 A/3 includes 'Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power'

As for the Al Qaeda members, the question remains open. It seems that these MC could try them. But what if they can also be afforded POW status? It is an ongoing debate, but it seems that in some cases they could be afforded this protection. If Al Qaeda members were acting under the same command as the Taleban armed forces, they would fall within the scope of article 4 (A)(1) 3rd Geneva Convention and therefore be entitled POW status. Otherwise, they would have to fulfil the four conditions enumerated in paragraph 2 of the same article and then the POW status could be afforded.

Although is claimed that they don't comply with the requirement of behaving accordingly to the laws and customs of war (art. 4(2)(d) of the 3rd Geneva Convention) and therefore would not qualify for POW status, it could also be argued that Additional Protocol 1 being a part of international customary law[12], the criteria will be that of article 43(1) and 44(2) of Protocol 1and they could be entitled POW protection. Even though the USA is not part to this Protocol, it is bonded by it considering its provisions as International Customary Law. However, the norm of article 44 doesn't seem to be international customary law[13].

Even if there are doubts, these doubts should be decided by a court, in accordance with article 5 of the 3rd Geneva Conventions. Until their status is determined by a competent tribunal, 'such persons shall enjoy the protection of the Convention'.

Even an individual, who is determined by a competent tribunal not to be POW, will still have the legal protection of the 4th Geneva Convention that includes some minimum rights[14].

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[12] *Supra* note no.25.

[13] In determining which rules of humanitarian law can be considered customary rules of international humanitarian law, the International Committee of the Red Cross (ICRC) affirmed that although the Protocol is not universally adopted, customary international law couldn't be determined only for the behaviour of 54 states that are not bound by it. However, if a State expressly rejects a norm, it will be more difficult to affirm that is bound by it. This provision of article 44 was expressly rejected by the USA and one can say that most likely does not represent customary international law, following the persistent objector principle as established in the Fisheries case. One can see that the state practice in relation to this article is not strong enough in a way to enable us to affirm its customary character (to afford POW status to combatants that do not comply with those requirements is not universally accepted). Moreover, the *opinio iuris* is not well established as one can see in the discussions on the adoption of this article. Despite further considerations on the customary character of other norms of Protocol I, article 44 broadening the concept of POW doesn't seem to qualify as international customary law. The same conclusion reached the Report of the Swedish International Humanitarian Law Committee that affirms the view of which are the customary rules under Protocol 1 and although refers various articles of this Protocol, article 44(2) is not referred. In fact, only the rule of POW status for regular combatants is affirmed. However, the ICRC is presently preparing a study on customary rules of international humanitarian law and it will be interesting to wait for its conclusions under Protocol I.

[14] Article 4 of the 4th Geneva Conventions defines protected persons as 'those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or an occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'. This is very important as individuals to whom one cannot afford POW status but that fall under the definition of this article shall be considered protected persons and will qualify for the protection of the 4th Geneva Convention. The protected persons under the 4th Geneva Convention are entitled to the protection of articles 71 to 76 of this Convention. These guarantees include the right to a regular trial (art. 71), the right to be informed of the charges against them and be brought to trial as rapidly as possible (art. 71), the right of choosing own counsel that will be free to visit the accused and will be provided with all the necessary facilities to prepare the Defence (art. 72), the right of appeal

The USA already recognized the application of the principles of the Geneva Conventions to the Taleban Guantanamo detainees (although not to the members of Al Qaeda)[15]. However, applying the Geneva Conventions requires more than professing belief in its principles. There is an obligation of undertaking a process involving individual determination of the status of the detainees.

As Amnesty International affirmed[16]:

> "Substantial doubt about the status of the detainees plainly exists, in the form of opinion from bodies other than the US administration – including the ICRC, the UN High Commissioner for Human Rights, the international humanitarian law experts surveyed by the War Crimes Project, and the International Commission of Jurists. The US Government should respect this expert opinion and demonstrate that it does indeed "strongly support" the Geneva Conventions, as its officials have stated. It should ask a competent, independent and impartial court, affording all the necessary guarantees for a fair trial recognized in Article 14 of the International Covenant on Civil and Political Rights, Article 75 of the First Additional Protocol and other international law and standards, to make individual determinations of the status of each detainee."

Until that moment, they shall be considered as POW and be treated as such.

The Crimes of War Project released the findings of a survey it had conducted among leading world experts in international humanitarian law. It reported that:[17]

> "Most of the experts surveyed by the Crimes of War Project believe that the Taliban should be granted POW status, citing Article 4 of the Third Geneva Convention, which defines prisoners of war as 'members of armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces'. Although there was disagreement about the legal status of Al Qaeda who have been captured, most agreed that the Administration had not taken necessary steps under international law to determine their status."

2. Discrimination

The Order is, in first instance, discriminatory[18], by giving foreigners a lower level of protection than that afforded to US citizens. Only foreigners are subject to this Order even if they are accused of less serious crimes than US citizens, these ones tried in civilian courts

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'provided for by the laws applied by the court' (art.73), the right to petition or pardon in case of death sentence (art. 75).

[15] White House Fact Sheet, 'Status of detainees at Guantanamo', <www.whitehouse.org>, 7 February 2002.

[16] Amnesty International, *supra* note no.1.

[17] Crimes of War Project, 'Terrorism and the Laws of War', <www.crimesofwar.org>, February 21, 2002.

[18] Amnesty International, supra note no.1; B. Olshansky, 'American Justice on trial: who looses in the case of Military Tribunals?, <www.asil.org>, p.2.

where the guarantees of due process are stronger. This issue has been stressed by the USA Administration: every time that the question is asked about the possibility of an American citizen being tried by military commissions, it is expressly said that they will not permit that to happen.

The difference between these courts is recognised in Section 1(f) of the 13th November 2001 Presidential Military Order:

> "Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with Section 836 of Title 10, United States Code, *that it is not practical to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts*".

It seems as if President Bush's administration is saying that foreigners and suspected terrorists do not deserve the protections of due process.

This discrimination will include legal permanent residents of the USA and people who may be entitled to citizenship but have not yet been officially granted that status (an example would be people that applied for political asylum whose request has not yet been decided)[19].

This difference between citizens and non-citizens is rather surprising in a country like the USA where the principle that not only citizens benefit from the constitutional guarantees has always been affirmed[20].

The difference in treatment can be said to be discriminatory, as there is no reasonable and objective criteria[21] for that, violating article 26 of the International Covenant on Civil and Political Rights (ICCPR) that prohibits discrimination on the basis of national origin and article 14 ICCPR that recognizes the right for everyone to be equal before courts and tribunals and is a basic principle for the protection of human rights:

"Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights".[22]

This discriminatory treatment is also against the Convention on the Elimination of all Forms of Racial Discrimination[23] (art. 1 and 5), Principle 5 of the Body of Principles for the

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[19] B. Olshansky, *Ibid,* p. 2.

[20] Just recently, in *Zadvydas* v. *Davis* (121 S. Ct. 2491, 2500 (2001)) the Supreme Court affirmed that 'due process clause applies to all persons within the United States, including aliens, whether their presence is lawfull, unlawfull, temporary, or permanent'.

[21] Human Rights Committee, General Comment no 18, 1989, admits that not any differentiation of treatment is discrimination, depending on being reasonable and objective and if the aim is to achieve a purposed permitted under the Covenant.

[22] Human Rights Committee, *Ibid.*

[23] UN General Assembly Resolution No.2106 A (XX), 21 December 1965.

Protection of all Persons under Any Form of Detention or Imprisonment[24] and Rule 6/1 of the Standard Minimum Rules for the Treatment of Prisoners. Although these last two documents don't have a legally binding character, help to show the way United Nations regards the issue of discrimination and enforce the idea that the prohibition against discrimination should be binding on all States as part of customary international law.

Also art. 75(1) of the Additional Protocol 1 to the Geneva Conventions, which USA did not ratify but that is seen as customary international law[25] provides:

> 'Persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour... national or social origin...'.

The USA issued an Understanding related to article 26 and with the prohibition of discrimination where it declares:

> "That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based `solely' on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status".[26]

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[24] UN General Assembly Resolution No. 43/173, 9 December 1988.

[25] In assessing the notion of international customary rule (formed by state practice and *opinio iuris*), I base myself in the definition of the International Court of Justice (ICJ) in the Nicaragua case, where the Court ruled that: 'The Court does not consider that for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of States conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of recognition of a new rule' (ICJ, *Nicaragua* vs. *USA*, 1986). In determining which rules of humanitarian law can be considered customary rules of international humanitarian law, the International Committee of the Red Cross (ICRC) affirmed that although the Protocol is not universally adopted, customary international law couldn't be determined only for the behaviour of 54 states that are not bound by it. Article 75 of Additional Protocol 1 is considered as being part of customary international law, taking into consideration the state practice and *opinio iuris*. In fact, the ICRC said in its commentary to this article that article 75 is regarded as elaboration of fair trial provision of common article 3 and the customary nature of this one is well established. Also the Report of the Swedish International Humanitarian Law Committee and in a study of the Protocol I for the US Joint Chiefs of Staff (Theodoron Meron, *Human Rights and Humanitarian Norms as customary law*, Oxford, Clarendon Press, 1989, p. 64), article 75 is recognised as part of customary international law.

[26] United Nations Treaty Collection, Chapter IV.3 <www.unhchr.ch/html/menu3/b/treaty5_asp>.

Does this mean that this article doesn't bind the USA if it can argue that the Military Order pursues a 'legitimate governmental objective', the war against terrorism?

I would argue that this Understanding does not allow the USA to disregard its obligations under article 26 of ICCPR because the prohibition of discrimination is part of customary international law. Therefore, the USA will always be bound by this obligation of non-discrimination.

The Human Rights Committee (HRC) welcomed the fact that the US government assured that that the Understanding 'is constituted by the Government as not permitting distinctions that would not be legitimate under the Covenant'[27]. It seems like this would apply to the case in question.

Concerning the differentiation between citizens and non-citizens, article 2(1) ICCPR demands from all States Parties to ensure the enjoyment of human rights for everyone within their territories and subject to their jurisdiction. The main rule is that citizens and non-citizens should enjoy most of the civil rights contained in the Covenant without any distinction[28].

3. Lack of independence of the judiciary and the executive

Moreover, the MC lack independence from the Executive, a violation of one of the Basic Principles of the UN Basic Principles on the Independence of the Judiciary States[29]. The Executive will have the power to (according to the MC Order No.1)[30]:

- Name whom the military commissions will try (Chapter 3(A));
- Appoint military officers to be members of the commissions, and to remove them (Chapter 4 (A) (1));
- Determine how large the "jury" of commissioners will be in any particular trial (Chapter 4 (A) (2));
- Designate which member will serve as "judge" to preside over the proceedings (Chapter 4 (A) (4))
- Appoint the Chief Prosecutor, a judge advocate (lawyer) of the US armed forces (Chapter 4 (A) (4));
- Appoint the Chief Defence Counsel, a judge advocate of the US armed forces (Chapter 4 (C) (1));

[27] UN Doc. CCPR/C/79/Add, / April 1995.
[28] A. Eide, 'Citizenship and international human rights law', in *Citizenship and the State in the Midle East*, 2000, p. 104.
[29] General Assembly Resolutions No. 40/32, 29 November 1985 and No. 40/146, 13 December 1985.
[30] Amnesty International, *supra* note no. 1.

- Revoke the eligibility of any official to appear before the commissions (Chapter 4 (A) (3));
- Approve the charges prepared by the prosecution (Chapter 4 (B) (2) (a));
- Approve plea agreements (Chapter 6 (A) (4));
- Vet the level of investigative or other resources to be made available to the Defence (Chapter 5(H));
- Decide which parts of the proceedings should be held *in camera*, (Chapter 6 (B)(3)) and decide whether open proceedings may include attendance by the public and accredited media;
- Pick the panel of three military officers (or civilians temporarily appointed as military officers) who would review the trial record (Chapter 6 (H) (4));
- Make the final decision in any case, including in death penalty cases whether a condemned defendant will live or die (Chapter 6 (H) (6));
- Amend the operating procedures of the commissions at any time, within the scope of the Military Order of 13 November 2001.

Under article 14 ICCPR (requiring the trials to be conducted by a competent, independent and impartial tribunal established in accordance with law), the powers the Executive will have under this Order are in clear violation of that article. The demand to have a competent, independent and impartial court established by law is an absolute right. How can one ensure the impartiality of the members of the MC (an executive body set up by a Presidential order) with these powers in their hands?

In its General Comment number 13, the HRC said, in relation to military tribunals, that:

> "While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14."[31]

The Executive is thus the prosecutor and judge.

4. Lower standard of evidence

Also, a lower standard for evidence is admissible[32], including hearsay testimony and use of secret evidence and anonymous witnesses. Even worse, it doesn't exclude statements extracted under torture or other coercive method, which is especially troubling as the MC have the power to pass death sentences.

The MC Order No.1 says that the defendant shall not be required to testify during trial (Chapter 5, F) in what seems to be a provision in accordance with article 14(3)(g) International Covenant on Civil and Political Rights (ICCPR) but 'doesn't preclude the

[31] Human Rights Committee, General Comment No.13, April 13, 1984, paragraph 4.
[32] Amnesty International, *supra* note no.1.

admission of evidence of prior statements of the Accused'. If one bears in mind that most of the times coercive methods may be used in order to obtain these statements, the lack of prohibition of using those methods gains new significance. The methods by which prior statements of the Accused are obtained do not expressly exclude the use of torture and the fact that these previous statements are not prohibited and can be used as evidence makes their danger even more relevant.

Under the ICCPR, according to the General Comment number 20:

> "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[33]

With this lower standard of evidence the danger of miscarriage of justice with the possibility of passing death sentence, with no right to appeal to an independent and impartial court, is even greater. It must also be kept in mind that in a country like the USA, the judicial system is somehow influenced by the racial bias and the arbitrary nature of death penalty system.

5. Right of Appeal

On the issue of appeal there is no right of review to an independent and impartial court (chapter 6(H) MC Order No.1) but only a possible review of the sentence by a 3-member panel of military officers appointed by the Secretary of Defence. This panel will be able to review the trial and make a recommendation that will be seen by the Secretary of Defence and the President will make the final decision.

The fact that the Order doesn't provide for a right of review to an independent and impartial tribunal is in clear violation of article 14(5) ICCPR, a provision applicable to all courts and tribunals. According to this article, everyone convicted of a crime shall have the right to have the sentence reviewed by a higher tribunal according to law. However, the Order only provides for the power of the President to appoint civilians as temporary military officers to be judges on a review panel in lieu of an appeals court. In the end, the President will have final review of the cases (amounting to a violation of separation of powers between the judiciary and executive).

The right of *habeas corpus*is not provided as well. In accordance with this Order, there is no right of *habeas corpus*[34], or other right to seek a determination concerning the legality of the

[33] Human Rights Committee, General Comment No. 20, 3 April, 1992.
[34] B. Olshansky, *supra* note 18, p.4*;* Amnesty International, *supra* note no.1*;* Lawyers Committee for Human Rights, Ibid; Human Rights Watch, *Ibid.*

detention. There seems to be a contradiction introduced by a statement of the President's counsel, Alberto R. Gonzalez saying:[35]

> 'The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court'.

It seems that, as the Department of Defence did not change these rules, allowing for an appeal on a federal court, there is a disagreement in the Administration on this issue. Either that or Mr. Gonzalez recognizes that, whatever the Order says, such remedy cannot be constitutionally denied by the President.

This is not only against the US constitutional law but also international human rights law, as article 9 ICCPR provides that anyone who is detained has the right to have the lawfulness of the detention determined by a court. Even in times of national emergency the right to challenge the lawfulness of the detention cannot be suspended[36].

The situation is even more serious taken together with the fact that the MC can pass death sentences.

In the event that the MC tries people who ought to be afforded POW status, it can be argued in first instance to be in violation of articles 82 and 102 of the 3rd Geneva Convention. In this case then, the Order would not only violate provisions of International Human Rights Law but also International Humanitarian Law as it would be against the 3rd Geneva Convention requirements for the trial of POW.

In fact, that would violate the standards of Article 106, which gives prisoners of war the right to appeal in the same manner as the members of the armed forces of the State that is trying him. Under the Uniform Code of Military Justice, applicable to courts-martial of US soldiers, convicted defendants have the right to seek review by the Civilian Court of Appeals for the Armed forces and by the US Supreme Court. The same or comparable independent, judicial appellate court, with final authority, must be available for those tried by MC.

Also, there are violations of article 84 and 105 that provide for 'essential guarantees of independence and impartiality' that are lacking (as I showed in the analysis of the Order in the light of the right to a fair trial previously) and article 87 the right not to be 'sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.' This last right, of course, sets an important limit on the use of the death penalty.

6. Legality of detention

[35] A. R. Gonzalez, 'Martial Justice, Full and Fair,' *The New York Times*, November 30 2001.
[36] Human Rights Committee, General Comment No. 29, August 31, 2001.

The Military Order also allows for the indefinite detention without trial:

> "It is the policy of the United States that the Secretary of Defence shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with Section 3, and, if the individual is to be tried, that such individual is tried only in accordance with Section 4".[37]

Under articles 9(3) and 14(3) (c) ICCPR, criminal proceedings must be started and completed within a reasonable time. Indefinite detention without trial seems a clear violation of these articles. Although the 3rd Geneva Convention allows the detention until the end of hostilities, the end of the conflict in Afghanistan, the Secretary of Defence seems to allow this detention until the end of the so called war against terrorism:

> "I think that the way I would characterize the end of the conflict is when we feel that there are no effective global terrorist networks functioning in the world that these people would be likely to go back to and begin again their terrorist activities".[38]

The possibility of indefinite detention is against human rights law and the requirement of effective judicial review of detention.

In order to prevent the possibility of indefinite detention without trial in violation of the fundamental right to liberty (art. 9 ICCPR), the Order should make clear that the detained person will have the right to have charges filed against him within a reasonable time following the detention and the trial by the commission shall not be delayed unnecessarily.

Moreover, the reasons to arrest a person under this Order are very broad as they include the President having a 'reason to believe' that the individual took part in acts of 'international terrorism'. By not defining what international terrorism is, the Order constitutes a violation of article 9 ICCPR that prohibits arbitrary arrest and detention. The same applies to the authorization of MC for the violations of laws of war and 'other applicable crimes', that will allow the Executive to try persons for virtually any criminal offence.

7. Legal Assistance

As for the legal assistance, the Department of Defence's guidelines seem to afford some insurance (Chapter 4(c) MC Order No.1) but still, if the defendant chooses to opt for a civil lawyer it will be at his own expenses and the lawyer will not have full access to all the information considered classified. Even if the defendant makes this choice, a US military lawyer, will still represent the defendant.

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[37] Section 2 (b) of the 13th November 2001 Military Order.
[38] US Department of Defence, News Briefing, <www.defenselink.mil>, 28 March 2002.

The legal assistance provided for in the Order and the fact that the defendant cannot really opt for a civil lawyer (only at his own expenses and without full access to all the information) is in violation of article 14(3) ICCPR that establishes the right of defence through legal representation of ones choice.

The fact that at all relevant times the defendant shall be represented in any case by his military lawyer could be interpreted as meaning that the defendants that retained civil lawyers and have to use in any case their military counsel, will not have the possibility of confidential communications with their attorney of choice, which would violate article 14(3)(b) ICCPR on the right to communicate with counsel of own choosing[39].

The military lawyer is therefore an imposition and the defendant is left no choice, or a limited choice, being a clear violation of his rights.

8. State of Emergency

It has been argued by President Bush Administration that a state of emergency is present, which would allow for a derogation of some rights under international law (art. 4 ICCPR).

The Order of 13th November, section 1 b) says that:

> "In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defence in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, it proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks)."

However, it remains unclear if the Government considers itself under a state of emergency within the meaning of article 4 ICCPR. No notification to the UN Secretary-General has been made and it would have to be proved that the situation of emergency threatens the life of the nation. Also, any measure would have to be strictly required by the exigencies of the emergency situation.

And even in this situation, the HRC has stated in its General Comment number 29:

> "Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the

[39] Amnesty International, *supra* note no.1.

> Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant".[40]

9. Fair Trial

Fair trial guarantees are one of the basic principles within the jurisprudence of nations of the world and the reason is to protect accused individuals in any circumstance and ensure that they have access to a fair hearing.

A brief comment on the question of the location of these MC. It has been said that a probable site will be the USA Naval Station at Guantanamo Bay, Cuba. This would have the effect of shield the MC from the jurisdiction of the USA courts and would afford the military the most control and prevent the federal courts from intervening in death penalty cases[41].

However, the ICCPR will always be applicable as article 2(1) states that 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction enjoys the rights recognized in the present Covenant without discrimination of any kind'. This means that States have to respect rights of all individuals subject to their jurisdiction and comply with the ICCPR obligations in relation to these individuals.

Article 130 of the 3rd Geneva Convention makes clear that depriving POW of the rights of fair and regular trial, as result from the Convention constitutes a war crime.

As for the persons not afforded POW status, the trial would always had to meet the common article 3 Geneva Conventions, article 75 Additional Protocol I and 4th Geneva Convention.

[40] Human Rights Committee, General Comment No. 29, *supra* note 36.
[41] New York Times, 'Rumsfeld gives details of rules for military war tribunals', 21 March, 2002.

The Military Order doesn't provide for a regular trial (article 71 of 4th Geneva Convention), the right of choosing own counsel (article 72 of 4th Geneva Convention) is somehow limited by the fact that the choice for a civil lawyer will be at the defendant own expenses, the right of appeal (article 73 of 4th Geneva Convention) to a court is non-existent.

If the individuals don't benefit from the protection of these articles, article 75 will apply and then, all the guarantees of the right to a fair trial will be applicable[42]. This article contains all the guarantees of a fair and public hearing as determined in international human rights instruments. In this case, the Military Order while violating article 14 ICCPR also violates article 75 that demands an 'impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure'.

Common Article 3 of the Geneva Conventions, which constitutes part of international customary law[43], also demands in any case a regularly constituted court where all the judicial guarantees are afforded.

10. Death Sentence

The use of death sentence, although not prohibited through international human rights instruments is against the trend towards abolition (seen in relevant human rights instruments such as the Second Optional Protocol to the ICCR, the Second Protocol to the American Convention of Human Rights, the Sixth and the Thirteenth Protocol to the European Convention on Human Rights and the Jurisprudence of International Bodies as the Human Rights Committee and the European Court of human Rights). When the danger of

[42] Individuals failing to qualify as POW or as protected persons still benefit from the protection of article 75 Additional Protocol I. This article is considered as being part of customary international law. The individuals not benefiting of the protection of these Conventions, shall be entitled to the protection of article 75 Protocol I to the extent its provisions are customary law that include inter alia, the right to be tried before an impartial and regularly constituted court, the right to have all necessary means of Defence, to be presumed innocent, freedom from self incrimination, right to be advised of remedies available, principle of *non bis in idem*. These provisions follow and develop the guarantees already applicable in general terms to civilians under articles 71 to 75 and 132 of the 4th Geneva Convention, although the guarantees are explained in a greater detail. In fact, article 75 contains all the guarantees of a fair trial as provided under the general principles of international law and jurisprudence, as well as by article 14 ICCPR, article 5 and 6 of ECHR and article 7 and 8 of ACHR.

[43] In the Nicaragua case (see supra note no.35) the Court affirmed that common article 3 to the Geneva Conventions contains rules to be applied in a non international conflict but that those rules constitute a minimum yardstick to be applicable also in international armed conflict (in addition to more elaborated rules which are also to apply to international conflicts). These rules are, according to the ICJ, elementary considerations of humanity, and applicable as international customary law to any conflict independently of a State being or not part to the Geneva Conventions or having presented some reservation to the jurisdiction of the ICJ. Thus, in any conflict of any character, there are always minimum rules that will always apply even if there exist other more elaborated rules governing the same situation. These rules state that everyone taking no active part in a conflict (including member of the armed force who have laid down their arms and hors de combat) shall be treated humanly and that are acts always forbidden such as violence to life, cruel treatment, torture, taking of hostages, outrages upon personal dignity and the 'passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples'. Therefore, in any armed conflict these principles (or at least the due process guarantee) will always be applicable.

miscarriage of justice is present due to the lack of guarantees afforded by these MC, this question is even more problematic. As the HRC concluded in *Reid* vs. *Jamaica*[44]:

> "The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6, the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the Defence, and the right to review of conviction and sentence by a higher tribunal".

In the event that these MC will try someone according to the procedures so far publicised and death sentence is imposed on someone, then clearly there will be not only a violation of article 14 ICCPR on the right to a fair trial as also a violation of article 6 ICCPR on the right to life.

12. Jurisdiction

In addition, the fact that the Order is open ended as to the personal jurisdiction and the offences that can be tried[45] undermines the requirement of the necessity of a jurisdiction defined by law.

The offences that can be tried by these MC are, according to Section 3 (B) of the Military Order, the violations of laws of war and other offences.

As Human Rights Watch (HRW) published in a letter sent to the US Secretary of Defence on the 14th December 2001, this open end about 'other applicable crimes' is problematic and allows people to be tried for almost any offence, well beyond the violation of laws of war for which military commissions have historically been used. HRW urged the Secretary of Defence to clarify this jurisdiction. This has not yet been done.

Moreover, the broaden formulation of 'violations of the laws of war' and 'other applicable laws by military tribunals'[46] could be used by the Executive to permit the use of

> "(…)military commissions to try people accused of committing state and federal crimes that have no relationship whatsoever to any terrorist activity.

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[44] Human Rights Committee, *Reid* vs. *Jamaica*, Communication No. 355/1989, U.N. Doc. CCPR/C/51/D/355/1989 (1994).

[45] Human Rights Watch, supra note no.15; B. Olshansky, *supra* note18, p. 3.

[46] Military Order 13 November, 2001, Military Order, section1(e). In the Procedures developed by the Department of Defence, the jurisdiction over offences is said to include the violations of 'laws of war' and 'all other offences triable by military commissions'(Chapter 3 (B) MC Order No.1) which retains the same broad formulation.

> The Order thus appears to permit governmental prosecutions for common crimes in which our civilian criminal justice system with all of its constitutional guarantees are completely bypassed. No justification is given for this exemption of state and federal common criminal cases from our criminal justice system".[47]

As for the personal jurisdiction, different issues can be raised. In an effort to include in the personal jurisdiction members of Al Qaeda, the Order ends up reaching a much broader group of people[48]. For instants, people that harboured other persons subject to the Order (not a military-like terrorist act) may be tried. Moreover, as the Order doesn't define what international terrorism[49] consists in, it leaves the determination of the type of conduct that will be held to violate law and subject an individual to prosecution by MC up to the President.

12. Credibility

There is an issue about the credibility of these MC. They seem to have called even more attention to the way the USA deals with suspected terrorists and have been widely criticized. Taking into consideration the reputation of the USA in Europe, where it is criticized for violating human rights and the imposition of death penalty, the MC do not enforce the USA judiciary system reputation.

MC's pose a problem of cooperation[50]. In order to work and function well they will depend upon the cooperation of other countries. An example is the issue of extradition. It is likely to be very difficult for any European country to allow extradition to the USA of suspects if they were to face these commissions and death penalty. According to the Spanish Judge Balatasar Garzon concerning the possible extradition of 8 suspects of the 11th September attacks that were arrested in Spain[51]:

'No country in Europe could extradite detainees to the United States if there were any chance they would be put before these military tribunals.'

This undermines the objective of the Order as suspects arrested in European countries will unlikely be extradited to the USA.

Also the legitimacy of these judgements will likely be ineffective, specially in countries that the USA as declared as 'harbouring terrorists', it would be difficult to convince them that the verdicts are just when so many judicial guarantees are missing. The USA will have no more

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[47] B. Olshansky, *supra* note19, p.3.
[48] B.Olshansky, *Ibid*, p.2.
[49] Even if the definition of international terrorism could be the one used under the Anti-Terrorism and Effective Death Penalty Act (use of any force or violence to achieve a political aim), almost any conduct could be said to be terrorism.
[50] A. Neier, 'The Military Tribunals on Trial', *The New York Review of Books*, February 14, 2002.
[51] S. Dillon and D. G. McNeil Jr., 'Spain Sets Hurdle for Extraditions', *The New York Times*, November 24, 2001.

credibility to criticise the use of military tribunals in countries like Peru, Cuba and Turkey if they themselves follow the same path.

Other possibilities should have been considered, such as prosecution in US civilian courts, the establishment of an international ad hoc court or trial in the court of another country. Another possibility would be for these MC to adhere as close as possible to the rules governing general courts martial under the Uniform Code of Military Justice and the Rules for Court-Martial[52].

What is the reason to use MC when the ordinary courts seem to be working and available to try suspects of terrorism? In the USA itself, those suspected of involvement in the bombing of US embassies in Tanzania and Kenya in 1998 were tried in ordinary courts and the same is happening to Zacarias Moussaoui (with oral arguments now scheduled for 3 December 2003), a French national arrested in USA prior to the attacks of the 11th September.

Amnesty International has alerted for the fact that[53]:

> "The prospect of the USA carrying out executions after unfair trials by these executive bodies threatens to deepen the divide between the USA and the international community on this fundamental human rights issue. There is an ever-growing body of evidence of the arbitrary, discriminatory and error-prone nature of the USA's ordinary death penalty system, with many death sentences overturned on appeal on the basis of issues such as inadequate legal representation and prosecutorial misconduct. Since 1976, more than 90 prisoners have been released from death rows around the country after evidence of their actual innocence emerged".

According to Amnesty International still:

> "The potential for irrevocable miscarriages of justice in the case of death sentences handed down by military commissions admitting lower standards of evidence and lacking genuine independence from the executive or right of appeal, can only be even greater.
> The USA's continuing resort to the death penalty, and now its insistence on trying selected foreign nationals by military commission, will undermine international law enforcement cooperation and deter many countries from extraditing suspects to the United States".[54]

[52] Pub. L. No. 81-506, 1950.
[53] Amnesty International, *supra* note no.1.
[54] Amnesty International, *Ibid.*

III

CONCLUSIONS♦

The Military Order of President Bush taken together with the Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against terrorism of the Department of Defence doesn't afford essential fair trial guarantees. Under international human rights law and humanitarian law, the right to a fair trial is one of the most fundamental rights in order to ensure the fairness of the judicial proceedings. That is the reason why even under humanitarian law special attention is paid to this individual right while the main feature of this branch of law has to do with the behavior of states in an armed conflict.

In not ensuring fair trial guarantees to the defendants tried under these MC, the Military Order not only violates applicable human rights standards but also relevant humanitarian law. Even if humanitarian law doesn't add much in itself to the already recognized fair trial guarantees under human rights law, the fact that they have a role to play in humanitarian law shows how important these guarantees are. The Geneva Conventions have, in any case, a role in the treatment of detainees.

♦ Since the discussion of my thesis in Padova in September 2002 there have been some developments as the Department of Defense issued the following orders and instructions: Military Commission Order No. 2, Designation of Deputy Secretary of Defense as Appointing Authority; Military Commission Instruction No. 1, Military Commission Instructions; Military Commission Instruction No. 2, Crimes and Elements for Trial by Military Commission; Military Commission Instruction No. 3, Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors; Military Commission Instruction No. 4, Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel; Military Commission Instruction No. 5, Qualification of Civilian Defense Counsel; Military Commission Instruction No. 6, Reporting Relationships for Military Commission Personnel; Military Commission Instruction No. 7, Sentencing; Military Commission Instruction No. 8, Administrative Procedures. The main NGO's have opposed these Instructions insofar as they fail to guarantee the basic rights to people brought before them and did not take into consideration most of the critics here presented. As Human Rights states, 'the U.S. government is moving closer to convening the military commissions authorized by President Bush in November 2001 to try suspected terrorists. Despite President Bush's oft-repeated insistence that the war on terror is a war to affirm and protect basic human rights, the rules for the proposed commissions fall far short of international due process standards.If the proposed commissions try terrorist suspects under the existing military orders and instructions, the trials will undermine the basic rights of defendants to a fair trial; yield verdicts - possibly including death sentences - of questionable legitimacy; and deliver a message worldwide that the fight against terrorism need not respect the rule of law'(Human Rights Watch, 'Human Rights Watch Briefing Paper on U.S. Military Commisions', <www. hrw.org/backgrounder/usa/military-commissions.htm>, 25 June 2003). Although there were some improvements in the guarantee of due process safeguards (the presumption of innocence, the presentation of evidence and cross examination of witnesses), they still lack some guarantees as the deprivation of defendants of a trial by an independent court, the improper subjection of criminal suspects to military justice, the trial of prisoners of war in a manner that violates the 1949 Geneva Conventions; the lower due process standards for non-citizens, the restriction of the right to choose one's defense counsel and the deprivation of the defense counsel of the means to prepare an effective defense. One should continue paying attention to these rules as they are not yet definitive and so far some of the arguments of the critics of these MC have been taken into consideration.

As for the risk of the MC passing death sentences, they will have to comply with the Geneva Conventions and international human rights law. Moreover, the imposition of capital punishment upon conclusion of a trial that did not fulfill the guarantees of fair trial will amount to a violation of the right to life.