

STANDARDS FOR ADVISEMENT, INVOCATION, AND WAIVER OF COUNSEL IN MILITARY INTELLIGENCE INTERROGATIONS

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Table of Contents

I.	Introduction	1
II.	The Legal Landscape: Two Unique Aspects of the Global War on Terror.....	5
A.	Terror Suspects as Unlawful Combatants Instead of Prisoners of War	5
B.	Trial by Military Commission	6
III.	Entitlement to Counsel and Rights Advisement under United States Law	11
A.	The Sixth Amendment Right to Counsel	12
B.	The Fifth Amendment Entitlement to Counsel and <i>Miranda</i> Warnings.....	13
C.	The Application of the Fifth and Sixth Amendments to Military Intelligence Interrogations.....	16
D.	Due Process and Equal Protection Concepts on Entitlement to Counsel and Rights Advisement: The Court and Congress.....	20
E.	Rights Advisement under the Uniform Code of Military Justice	24
F.	Conclusions Based on United States Law	26
G.	International Law as United States Law.....	27
1.	Customary International Law as United States Law	28
2.	Relevant Executive Orders Referencing International Law	30
3.	The Binding Effect of International Law on Military Commissions	33
IV.	Entitlement to Counsel and Rights Advisement under International Law	34
A.	Human Rights Treaties Ratified by the United States	35
1.	The Geneva Conventions.....	38
2.	The United Nations Charter.....	40
3.	The International Covenant on Civil and Political Rights.....	41
4.	The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	45
B.	Other Human Rights Treaties and Resolutions.....	47
1.	The Universal Declaration of Human Rights	48
2.	The American Convention on Human Rights.....	50
3.	The European Convention on Human Rights	52
4.	The African Charter on Human and Peoples' Rights	54
5.	The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment	56

6.	The Rome Statute of the International Criminal Court	58
C.	International Tribunal Rules of Procedure and Evidence	60
D.	International Human Rights Decisions	65
1.	The Inter-American Court of Human Rights.....	65
2.	The European Court of Human Rights.....	68
3.	The International Criminal Tribunal for the Former Yugoslavia	86
V.	Conclusions and Recommendations Regarding Entitlement to Counsel in Military Intelligence Interrogations	90
A.	Standards for Advisement, Invocation, and Waiver of Counsel in Military Intelligence Interrogations	94
B.	Proposals for a Military Commission Rule of Evidence on the Use of Admissions and Confessions.....	97
Appendix A.	A-1

*Are we supposed to read [terror suspects] the Miranda rights, hire a flamboyant defense lawyer, bring them back to the United States to create a new cable network of "Osama TV" or what have you, provide a worldwide platform from which propaganda can be developed?*¹

I. Introduction

Just a few days before Attorney General John Ashcroft, at a hearing in Washington, D.C., rhetorically questioned reading terror suspects their *Miranda* rights,² a military intelligence interrogator in Afghanistan asked the same question. He was interrogating John Walker Lindh, and the question was not rhetorical. Following the attacks on the World Trade Center and the Pentagon on September 11, 2001, the interrogator had deployed to Afghanistan in support of the Global War on Terror.³ After Taliban and Al Qaida losses in Mazar-e-Sharif, Taloqon, and Konduz, Northern Alliance forces brought several hundred captured Taliban and Al Qaida fighters to Quali-Jangi Fortress in northern Afghanistan. Many of the captured fighters were killed in an uprising at the fortress, but John Lindh

¹ DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Committee on the Judiciary, 107th Cong. (2001) (testimony of the Honorable John Ashcroft, United States Attorney General, Dec. 6, 2001) available at http://www.law.uchicago.edu/tribunals/docs/DOJ_hearing.pdf.

² See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (a suspect must be advised that he "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to questioning if he so desires."). In this context, "*Miranda* rights" refers to the rights advisement itself, without regard to the source of authority requiring it. As will be shown, there are multiple sources of authority requiring rights advisement. This thesis is inspired by a law review article addressing similar concerns in the domestic law enforcement context. See James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975 (1986).

³ The Global War on Terror includes military actions in Afghanistan and worldwide, currently under the direction of Special Operations Command (SOCOM). See *U.S. Department of Defense Speeches September 3, 2003: SOCOM Change of Command*, LEXIS 109220077 (2003) (remarks of the Honorable Donald H. Rumsfeld, United States Secretary of Defense, Sept. 2, 2003).

survived. United States forces then took custody of Lindh, treated his injuries, and questioned him about his Taliban and Al Qaida activities.

The military intelligence interrogator knew he faced a situation different from the ordinary tactical questioning of an enemy soldier captured on the battlefield. The Global War on Terror is a different kind of war, one against non-state actors, international terrorists, illegal combatants, and those who harbor them or give them aid. The interrogator knew that responses to his questions would yield information about John Lindh's participation with Taliban and Al Qaida forces. The information would be of interest to prosecutors in the United States, and the interrogator's question about *Miranda* rights raised a host of issues about the applicable standards when dealing with a captured Taliban or Al Qaida fighter.

Less than a month before John Lindh's capture, President George Bush issued an order authorizing military commissions for the trial of certain non-citizens captured in the Global War on Terror. Although not affecting Lindh's case, the order paved the way for trial of non-citizen terror suspects in a forum other than federal district court or general court-martial. The Taliban and Al-Qaida fighters with Lindh taken into United States custody could therefore face trial by military commission. Understanding this, the military intelligence interrogator knew that other detainees might also face trial for their support of terrorist organizations, activities, and efforts and that their responses to his questions also would yield information relevant to any military commission proceedings.

This thesis addresses the standards for advisement, invocation, and waiver of counsel in military intelligence interrogations in the Global War on Terror. It examines the first part of Attorney General John Ashcroft's question: Are we supposed to read terror suspects their *Miranda* rights? The question can arise in the context of military intelligence interrogations of persons detained in the Global War on Terror. These detainees⁴ may be suspected of violating international or domestic law in addition to being sources of military intelligence. Indeed, the information of value as military intelligence may also be evidence of a crime. Courts and military tribunals⁵ can expect to face significant unresolved issues concerning the admissibility and use of admissions and confessions⁶ obtained during military intelligence interrogations.⁷ An examination of these issues and the standards for advising, respecting, dishonoring, or waiving "*Miranda* rights" in military intelligence interrogations will, unfortunately, leave little opportunity to address the remaining parts of Mr. Ashcroft's question.

⁴ "Detainees" here refers to all persons, regardless of status under the law of war, held in United States custody or restraint, whether temporarily or indefinitely.

⁵ "Military tribunals" include courts-martial, military commissions, provost courts, and military courts of inquiry.

⁶ Helpful definitions are stated in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002) [hereinafter MCM], which contains the Military Rules of Evidence [hereinafter MRE]. An "admission" consists of "a self-incriminating statement falling short of an admission of guilt, even if it was intended by its maker to be exculpatory." MRE 304(c)(2). "Confession" refers to "any acknowledgement of guilt." MRE 304(c)(1).

⁷ Cf. Mark A. Godsey, *The New Frontier of Constitutional Confession Law -- The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators From Non-Americans Abroad*, 91 GEO. L.J. 851, 852-53 (2003) (discussing extent to which provisions of Bill of Rights apply to non-American interrogated by American law enforcement officials abroad as a question not yet clearly answered by United States courts).

This examination reveals that the Fifth and Sixth Amendment rights to remain silent and to have counsel do not require military intelligence interrogators to give rights advisements to non-citizen terror suspects detained overseas in the Global War on Terror. It also reveals that conventional and customary international law does not require rights advisements. Instead, a review of United States and international law applicable to military commissions demonstrates that voluntariness governs the admissibility and use of admissions and confessions obtained in military intelligence interrogations. Because rights advisements affect the voluntary nature of responses to questioning, there may be times when rights advisement in military intelligence interrogations is an appropriate practice. Finally, invocation of a right to counsel or to remain silent does not prevent a military intelligence interrogator from continuing to question a terror suspect.

This Introduction having raised the question, Part II will address the legal landscape given that military commissions may try unlawful combatants detained in the War on Terror. Part III addresses the purpose, standards, and application of the entitlement to counsel in military intelligence interrogations under domestic United States law and the domestic effect of international law. Part IV examines sources of the entitlement to counsel right advisement or warnings under international law and reviews the application of these rights under international law. Part V proposes standards for advisement, honor, dishonor, and waiver of the right to counsel and a rule of evidence for military commissions governing the admissibility and use of admissions and confessions obtained in military intelligence interrogations.

II. The Legal Landscape: Two Unique Aspects of the Global War on Terror

The question whether terror suspects should be read their "*Miranda* rights" is intimately connected to several factors, including the suspect's status, the interrogator's status, the purpose of the interrogation, the location of the interrogation, and the eventual trial and rules applicable to that forum. Two of these factors take on unique characteristics in the context of military intelligence interrogations in the Global War on Terror. The first unique aspect relates to the status of terror suspects, and the second relates to the potential use of military commissions as a forum for trial of terror suspects.

A. Terror Suspects as Unlawful Combatants Instead of Prisoners of War

Ordinarily, enemy fighters captured on the battlefield are considered prisoners of war, but the Global War on Terror raises significant status issues regarding captured terrorists. Whether terror suspects are prisoners of war is determined under the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW").⁸ The President has determined that detainees held at Guantanamo Bay, Cuba, are not entitled to prisoner of war status. A statement issued by the White House made it clear that the Taliban and Al Qaida detainees are not entitled to prisoner of war status under the Geneva Conventions, in which status they could be prosecuted in courts-martial.⁹ The President's determination effectively provides

⁸ Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]. Compare Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 118 L.N.T.S. 343.

⁹ Ari Fleischer, White House Spokesman, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002); White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), at <<http://www.whitehouse.gov/news/releases/2002/02>>.

that no doubt exists regarding any claim to status as prisoners of war, thereby obviating any need for "Article 5 tribunals" under the GPW, which are required in cases where there is doubt as to their status.¹⁰ Instead, the President's determination indicates the captured fighters are unlawful combatants subject to detention and trial and punishment by military tribunals.¹¹

B. Trial by Military Commission

The United States could prosecute certain terrorists and terror offenses against domestic and international law in United States district courts. For example, the district courts have jurisdiction over prosecutions under the Antiterrorism Act of 1990¹² or under international law where crimes against humanity are implicated.¹³ Recent criminal prosecutions, including that of John Lindh, demonstrate the availability of this forum.¹⁴

¹⁰ GPW, *supra* note 8, art. 5.

¹¹ *See Ex parte Quirin*, 317 U.S. 1, 31 (1942) ("Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.") (footnote omitted).

¹² 18 U.S.C. § 2331, *amended by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, tit. VIII, § 802(a), 115 Stat. 272, 376. *See also* 18 U.S.C. § 32 (destruction of aircraft), § 924(c) (using or carrying a firearm or destructive device during a crime of violence), § 1200 (aircraft sabotage and kidnapping), § 1203 (hostage taking), § 2332 (murder of U.S. nationals); § 2339B (supporting foreign terrorist organizations), § 46502 (aircraft piracy); 50 U.S.C. § 1705(b) (trading with the enemy).

¹³ War Crimes Act of 1996, 18 U.S.C. § 2441 (2000) (violations of international law subject to trial in United States District Court where the defendant or the victim is a United States national or member of the United States armed forces).

¹⁴ *See, e.g.*, *United States v. McVeigh*, 9 Fed. Appx. 980 (10th Cir. 2001); *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002); *United States v. Moussaoui*, No. 01-455-A (E.D. Va. filed Dec. 11, 2001); *United States v. Noriega*, 683 F. Supp. 1373 (S.D. Fla. 1988).

Because the President's order on military commissions applies only to non-citizens, trials of United States citizens suspected of terrorist offenses will proceed in federal courts.

In some circumstances, detainees can be prosecuted in military courts-martial. Under the Uniform Code of Military Justice ("UCMJ"), courts-martial could be used to prosecute military members or prisoners of war suspected of committing terror offenses.¹⁵ Because the President determined that terror suspects detained in the Global War on Terror are unlawful combatants and not prisoners of war, courts-martial likely will be used only to prosecute United States service-members suspected of terrorist offenses or aiding the enemy.

In the United States, unlawful combatants, spies, saboteurs, and others not entitled to prisoner of war status historically have been tried in military commissions.¹⁶ The President customarily establishes military commission or tribunals by executive order.¹⁷ The President established a military commission following the September 11, 2001, terrorist attacks against the United States.¹⁸ Congress, having power to "define and punish ... Offenses against the

¹⁵ 10 U.S.C. § 802(1) (2000) [hereinafter UCMJ]. The articles of the UCMJ correspond to the 10 U.S.C. § 800 series section numbers (*e.g.*, UCMJ Art. 2(1) is 10 U.S.C. § 802(1)). The UCMJ is reprinted in the MCM. UCMJ provision for court-martial jurisdiction of prisoners of war does not deprive military commission of concurrent jurisdiction. UCMJ Art. 21.

¹⁶ See Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320, 321 (2002). See, *e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 786 (1950); Duncan v. Kahanamoku, 327 U.S. 304, 314 (1946); In re Yamashita, 327 U.S. 1, 20 (1946); Ex parte Quirin, 317 U.S. 1, 29 (1942); Ex parte Milligan, 71 U.S. 2, 20-26 (1866).

¹⁷ See, *e.g.*, Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 2, 1942) (President Roosevelt's executive order appointing a commission to try German saboteurs captured in the United States). See generally WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (2d rev. ed. 1920); WILLIAM BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 199 (1914).

¹⁸ Military Order No. 222, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order]. Cf. Appointment of a Military

Law of Nations,"¹⁹ also acted to authorize military commissions.²⁰ Congress previously authorized the President, under the UCMJ, to prescribe rules of procedure and "modes of proof" for military commissions.²¹

The UCMJ provides that the regulations prescribed by the President must, "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" so long as they are not "contrary to or inconsistent with" the UCMJ.²² In the military order, the President

Commission, 7 Fed. Reg. 5103 (July 2, 1942) (President Roosevelt's executive order appointing a commission to try German saboteurs captured in the United States).

¹⁹ U.S. CONST. art. II, § 8, cl. 10.

²⁰ Foreign Terrorist Military Tribunal Authorization Act of 2001, H.R. 3468, 107th Cong. (2001); Military Commission Procedures Act of 2002, S. 1937, 107th Cong. (2002); Military Commission Procedures Act of 2002, S. 1937, 107th Cong. (2002) (MCPA). Senator Specter stated as follows in introducing the MCPA:

We have provided that there would be no "Miranda" rights for suspects who are interrogated. I candidly concede that in abrogating "Miranda" rights, that will be a source of some contention, which can be the subject of hearings. But it is our view that we should not give al-Qaida or Taliban prisoners access to counsel before they are questioned, first, for the safety of the soldiers who are doing the questioning, and, second, because of the importance, potentially, that eliciting information would stop further terrorist attacks. Of course, we could provide no "Miranda" warnings in advance but not allow admissions to be used at trial, but it is our view, subject to hearings and further consideration, that "Miranda" rights ought not to be required.

148 CONG. REC. S733 (daily ed. Feb. 13, 2002) (statement of Sen. Specter). *See also* 147 CONG. REC. S9320 (daily ed. Sept. 12, 2001) (statement of Sen. Gramm) ("We are not going to be reading anybody their rights. No one is covered by Miranda."); 148 CONG. REC. S221 (daily ed. Jan. 19, 2002) (statement of Sen. Specter) (discussing *New York v. Quarles*, 467 U.S. 649 (1984), public danger exception to *Miranda*); 148 CONG. REC. S8489 (daily ed. Sept. 11, 2002) (statement of Sen. Bennett) (reading his letter of Sept. 22, 2001, stating that "we are truly at war ... [y]ou don't give out Miranda warnings"); 148 CONG. REC. H26 (daily ed. Jan. 23, 2002) (statement of Rep. McInnis) (discussing media and organizations wanting "Miranda rights on the battlefield").

²¹ UCMJ, *supra* note 15, art 36.

²² *Id.* art. 36. Under this authority, the President prescribes the rules of procedure and evidence in the MCM by Executive Order. *See, e.g.*, Executive Order 13,262, 67 Fed. Reg. 18,773 (Apr. 11, 2002) (prescribing the 2002 amendments to the MCM). Indeed, the MCM itself provides the following with respect to military commissions: "Subject to any applicable rule of international law or to any regulations prescribed by the

determined that the procedure applicable in United States district courts would not be practicable.²³ The President then delegated authority to establish rules under UCMJ Article 21 to the Secretary of Defense.²⁴

The Secretary of Defense promulgated instructions for the military commission.²⁵ The instructions provide for defense counsel,²⁶ the right to remain silent at trial,²⁷ and "a full and fair trial."²⁸ The instructions expressly do not preclude the admissibility of prior statements of the accused,²⁹ including those obtained in military intelligence interrogations. In fact, the Military Order provides that the Military Commission may consider any evidence of "probative value to a reasonable person."³⁰ The flexibility and inclusiveness of the rules

President or by competent authority, military commissions ... shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial." MCM, *supra* note 6, pt. I, ¶ 2(b)(2).

²³ Military Order, *supra* note 18, § 1.

²⁴ *Id.* § 4(b).

²⁵ U.S. DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (21 March 2002) [hereinafter MCO No. 1]; U.S. DEP'T OF DEFENSE, MILITARY COMMISSION INSTRUCTIONS (30 Apr. 2003) [hereinafter MCI]; Procedures for Trials by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374 (July 1, 2003) (to be codified at 32 C.F.R. pts. 10-17).

²⁶ MCO No. 1, *supra* note 25, ¶¶ 4(C), 5(D) & (I); MCI No. 4, *supra* note 25 (defense counsel) & 5 (civilian counsel).

²⁷ MCO No. 1, *supra* note 25, ¶5(F).

²⁸ *Id.* ¶ 6(A) & (B)(1), (2)

²⁹ *Id.* ¶ 5(F) ("The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.").

³⁰ 66 Fed. Reg. at 57,833, § 4(c)(3). See MCO No. 1, *supra* note 25, ¶ 6(D)(1).

of evidence contemplated by the order are designed to allow the commission to consider evidence obtained under wartime conditions.³¹

These recent developments affect critical factors impacting on the question whether terror suspects should be read their rights. First, the status determination under the President's order is that terror suspects are not prisoners of war but unlawful combatants or international criminals under the law of nations. Second, the eventual trial potentially is trial by military commission. The rules of evidence applicable to that forum currently permit the commission to consider any evidence of probative value to a reasonable person, a rule that could permit the consideration of admissions and confessions ordinarily inadmissible in the United States district courts or courts-martial. It is not the purpose of this thesis to question the correctness or wisdom of the status and trial forum determinations. Rather, this thesis addresses, given the status and forum determinations that have been made, whether terror suspects should be read "*Miranda* rights" in military intelligence interrogations.

In order to assess the impact of these developments and determine what rules or norms on the use of confessions and admissions may apply to the trial of terror suspects in military commissions, an examination of current United States and international law on the right to counsel and the privilege against incrimination or right to silence is necessary. Part III therefore reviews United States law on the use of admissions and confessions, and Part IV

³¹ See Dep't of Defense's *Implementation of the President's Military Order on Detention, Treatment, and Trial by Military Commission of Certain Non-citizens in the War on Terrorism: Hearing Before the Senate Armed Service Comm.*, 107th Cong. 68 (2001) (statements of Paul D. Wolfowitz, Deputy Secretary of Defense and William J. Haynes, General Counsel, Dep't of Defense).

reviews international law on such use. From these examinations, principles can be drawn that apply to military intelligence interrogations and trial by military commission (Part V).

III. Entitlement to Counsel and Rights Advisement under United States Law

Intuitively, we associate rights under the Constitution with government activity affecting citizens in the United States. To the extent we depart from this paradigm, the resulting diminution in rights and interests protected by the Constitution is less and less surprising. Indeed, overseas military intelligence interrogation of non-citizen terror suspects may be at the extreme end of the spectrum.

Although ultimately concluding that the Constitution does not require rights advisements and counsel in overseas military intelligence interrogations of non-citizens, an analysis of the right to counsel and the right to remain silent under United States law is important for several reasons. First, United States law on fundamental rights influences or informs international human rights law. For example, customary international law or an interpretation of conventional international law may develop around ideas expressed in United States Supreme Court decisions interpreting the Constitution, become binding in international law, and as a result constrain the United States in circumstances not covered by domestic law. Second, ideas developed in the context of particular guarantees ultimately may be considered implicit in the concept of due process of law or the concept of a fair trial. In essence, the process of incorporation into the Fourteenth Amendment due process clause of various rights and guarantees set forth in the first ten amendments to the Constitution in its

application to state government actors may similarly bind federal actors in situations where a particular guarantee does not apply. Third, the concepts underlying the particular guarantees may be expressed in statutory or regulatory provisions that apply more broadly than the particular guarantee itself. For example, a statute may require certain persons to advise suspects of rights under circumstances where a particular Constitutional guarantee does not apply. For these reasons, it is important to analyze the particular guarantees.

United States law provides for entitlement to counsel and rights advisement under two primary lines of authority deriving from the Fifth and Sixth Amendments to the United States Constitution. In addition, concepts of due process embodied in case law and statutory authority implicate an entitlement to counsel. Statutory provisions in the United States Criminal Code and the Uniform Code of Military Justice prescribe certain procedures relating to rights warnings and evidentiary use of statements. Each potentially impacts military intelligence interrogations and military commission prosecutions because of their extension of ideas underlying the Fifth and Sixth Amendments.

A. The Sixth Amendment Right to Counsel

The first line of authority derives from the explicit language of the Sixth Amendment, providing that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."³² The underlying purpose of the right to counsel under the Sixth Amendment is to balance the scales in criminal proceedings brought by the

³² U.S. CONST. amend. VI.

Government against individuals.³³ Because the adversarial system is based on the premise that justice and truth are best determined through a contest on the facts and the law, counsel promote these ends by ensuring that procedures are followed and that rights are protected.³⁴

Under current Supreme Court interpretation, the right to counsel under the Sixth Amendment is triggered by the deliberate elicitation of statements from the accused after the initiation of criminal proceedings.³⁵ "Deliberate elicitation" includes surreptitious interrogations using unknown government agents.³⁶ "Initiation of proceedings" can "include formal charge, preliminary hearing, indictment, information, or arraignment."³⁷ Both elements of the trigger recognize that, after the government takes the role of adversary against an individual, counsel is necessary to eliminate the risks to justice posed by adversarial inequality.³⁸

B. The Fifth Amendment Entitlement to Counsel and *Miranda* Warnings

³³ See Tomkovicz, *supra* note 2, at 981.

³⁴ *Id.*

³⁵ See *United States v. Henry*, 447 U.S. 264, 272 (1980); *Brewer v. Williams*, 430 U.S. 387, 405 (1977); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964).

³⁶ See *United States v. Henry*, 447 U.S. 264, 270-72 (1980).

³⁷ *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). Prior to the Court's decisions in *Miranda v. Arizona*, the Court held that the Sixth Amendment, as incorporated under the due process clause of the Fourteenth Amendment, required the government to honor requests for counsel where the requestor was the focus of the investigation, had been taken into custody, interrogated, denied counsel when requested, and unwarned of his right to remain silent. *Escobedo v. Illinois*, 378 U.S. 478, 489-90 (1964). The decision represents an application of the right to counsel under the Sixth Amendment to custodial interrogation prior to initiation of proceedings. This line of reasoning remains largely undeveloped. *But see United States v. Lilla*, 534 F. Supp. 1247, 1280 (N.D.N.Y. 1982); *United States v. Miller*, 432 F. Supp. 382, 386-87 (E.D.N.Y. 1977), *aff'd sub nom. United States v. Fernandez*, 573 F.2d 1297 (2d. Cir. 1978).

³⁸ See Tomkovicz, *supra* note 2, at 987-88.

The second line of authority derives implicitly from the Fifth Amendment guarantee that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."³⁹ Although the Fifth Amendment does not refer to counsel, the Supreme Court in *Miranda v. Arizona*⁴⁰ concluded that protecting the right against self-incrimination required the government to advise suspects of the entitlement to counsel and to provide counsel when requested. The reasoning behind the requirement is that rights warnings and counsel are necessary to prevent the government from forcing incriminating statements from individuals through its power to apprehend and question suspects in a police-dominated setting and then use those statements against them at trial.⁴¹ Concern over such government over-reaching is deeply rooted in Anglo-American legal theory based on the laws of nature and natural rights.⁴²

As a principle implicit in the concept of due process, the privilege against self-incrimination is incorporated in rights protected by the Fourteenth Amendment Due Process Clause.⁴³ Thus, state government actors are bound by decisions under the Fifth Amendment Due Process Clause to the same extent as federal government actors. To the extent that the Fourteenth Amendment Due Process Clause reaches government action not actually covered

³⁹ U.S. CONST. amend. V.

⁴⁰ 384 U.S. 436, 471-73 (1966). The Court recently concluded that *Miranda* announced a constitutional rule and not merely a prophylactic standard for police conduct to safeguard the privilege against compelled self-incrimination. See *Dickerson v. United States*, 530 U.S. 428, 431, 438-44 (2000).

⁴¹ See Tomkovicz, *supra* note 2, at 989.

⁴² See *Bram v. United States*, 168 U.S. 532, 543-45 (1897); LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 327, 386 (1968); WILLIAM HUDSON, *A TREATISE OF THE COURT OF THE STAR CHAMBER* 169 (The Legal Classics Library 1986) (1792).

⁴³ See *Malloy v. Hogan*, 378 U.S. 1, 6-11 (1964).

by the Fifth Amendment, the Fourteenth Amendment operates to guarantee the privilege against self-incrimination and its implied right to counsel. As can be seen later in this analysis, linkage between a particular guarantee and broadly-worded guarantees of due process and fair hearings can impact international law. To the extent that the United States Supreme Court recognizes that particular guarantees are implicit in the concept of due process, international tribunals may also conclude that the concept of a fair hearing guaranteed in a particular treaty or convention requires the same particularized guarantees.

Entitlement to counsel under the Fifth Amendment is triggered by custodial interrogation of a suspect. "Custody" is any formal arrest or any similar or equivalent restraint on freedom of movement, determined from the objective circumstances of the interrogation.⁴⁴ "Interrogation" is any express questioning or its functional equivalent, including "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."⁴⁵ Taken together, custodial interrogation creating the compulsion to make a statement, as in the case of police-dominated questioning, triggers the requirement for rights advisement regarding counsel.⁴⁶

⁴⁴ See *Stansbury v. California*, 511 U.S. 318, 322-23 (1994); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (custody to be determined under an objective standard from the perspective of a "reasonable suspect"); *California v. Beheler*, 463 U.S. 1121, 1123 (1983) (custody is formal arrest or a restraint on freedom of movement of the degree associated with formal arrest).

⁴⁵ *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980). This is an objective test from the perspective of a reasonable interrogator.

⁴⁶ See Tomkovicz, *supra* note 2, at 991-92.

C. The Application of the Fifth and Sixth Amendments to Military Intelligence Interrogations

Before considering the application of the Fifth and Sixth Amendments to military intelligence interrogations, analysis of how the two guarantees operate together in a domestic criminal case shows how limited their application may be to military intelligence interrogations. The use of undercover agents illustrates the different applications of the Fifth and Sixth amendment provisions.

Consider the case of a suspect in jail after arrest, questioned by an undercover agent. The suspect is in custody, and the government is deliberately eliciting information from the suspect, but the custody and interrogation do not combine to compel self-incriminating responses under such circumstances.⁴⁷ Because no criminal proceedings have been initiated, the Sixth Amendment is not implicated.⁴⁸ If criminal charges are brought against the suspect, then questioning by an undercover agent would violate the Sixth Amendment, regardless of whether the suspect is in custody.⁴⁹

Military intelligence interrogations of terror suspects ordinarily will occur prior to the initiation of criminal proceedings. Thus, the Sixth Amendment usually is not implicated in such interrogations. The Fifth Amendment also may not be implicated if a military

⁴⁷ See, e.g., *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) (“The essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate.”).

⁴⁸ But see *Escobedo v. Illinois*, 378 U.S. 478, 489-90 (1964) (discussed *supra* note 37).

⁴⁹ See, e.g., *United States v. Henry*, 447 U.S. 264, 273-75 (1980).

intelligence questioning is considered to be more like an undercover agent questioning than a law-enforcement interrogation. The point is that custody and questioning by a government agent is not sufficient to trigger the Fifth Amendment: the custody and interrogation must combine to compel self-incriminating responses.

The Supreme Court has not considered the application of the Fifth and Sixth Amendments to military intelligence interrogations. The Court has held that Internal Revenue Service agents are subject to the requirements of the Fifth Amendment under *Miranda*.⁵⁰ It also has held that court-appointed psychiatrist examinations conducted without benefit of counsel after the initiation of proceedings violate the Sixth Amendment right to counsel.⁵¹ In both cases, the questioning took place in connection with law enforcement duties and proceedings. The application of the Fifth and Sixth Amendments to military intelligence interrogations thus remains unsettled.

The issue of the application of the Fifth Amendment to military intelligence interrogations was presented in the prosecution of John Lindh but was not decided as a result of his plea of guilty.⁵² In the case, Lindh argued that *Miranda* applies to the United States military intelligence interrogation of a United States citizen detained overseas.⁵³ The

⁵⁰ See *Mathis v. United States*, 391 U.S. 1, 4 (1968).

⁵¹ See *Estelle v. Smith*, 451 U.S. 454, 466-69 (1981).

⁵² See *generally* *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002).

⁵³ Defendant's Memorandum of Points and Authorities in Support of Motion to Suppress Statements for Violation of His Fifth Amendment Rights (*Miranda* and *Edwards*) at 7, *Lindh* (Crim. No. 02-37A) (citing *United States v. Bin Laden*, 132 F. Supp. 2d 168, 187 (S.D.N.Y. 2001); *United States v. McLaren*, 38 M.J. 112, 115 (C.M.A. 1993), *cert. denied*, 510 U.S. 1112 (1994); *United States v. Tempia*, 16 C.M.A. 629 (1967); *Commonwealth v. McGrath*, 495 A.2d 517, 522 (Pa. 1985).

government responded that *Miranda* was never intended to govern the conduct of military operations overseas, including military intelligence interrogations.⁵⁴ The government offered various objections to the application of the right to counsel to military intelligence interrogations.

First, the government argued that *Miranda*'s exclusionary rule was designed to regulate the conduct of domestic law enforcement personnel. Second, similar to the rule in the Fourth Amendment search and seizure context, the provisions of the Fifth Amendment were not intended to limit or burden military actions abroad. Third, because the provisions do not limit the use of statements obtained by foreign police, they should not limit the use of statements obtained by military intelligence interrogators. Fourth, because overriding concerns about public safety permits the police to question a suspect about the location of a weapon without reading him *Miranda* warnings,⁵⁵ similar concerns in the context of national defense should permit military intelligence interrogators to question suspects freely.⁵⁶

The government's arguments raise questions about the extra-territorial application of the Fifth Amendment. There are two bright line rules that can be discerned on this point from federal court decisions. On the one hand, the protections of the United States

⁵⁴ Government's Opposition to Defendant's Motion to Suppress Statements for Violation of His Fifth Amendment Rights (*Miranda* and *Edwards*) at 6-17, *Lindh* (Crim. No. 02-37A) (analogy to Fourth Amendment, citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990); *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring); *Johnson v. Eisentrager*, 339 U.S. 763, 778-79 (1950); *United States v. Best*, 76 F. Supp. 857, 864 (D. Mass. 1948).

⁵⁵ See *New York v. Quarles*, 467 U.S. 649, 653-56 (1984).

⁵⁶ See 148 CONG. REC. S221 (daily ed. Jan. 19, 2002) (statement of Sen. Specter) (discussing *New York v. Quarles*, 467 U.S. 649 (1984), public danger exception to *Miranda* in context of intelligence interrogation).

Constitution apply to United States citizens abroad when interrogated by United States law enforcement officials.⁵⁷ On the other hand, interrogations conducted by foreign officers are not covered by *Miranda*'s exclusionary rule.⁵⁸ Instead, the admissibility of confessions obtained by foreign officers is determined on the basis of voluntariness.⁵⁹

Lower federal courts recently have held that *Miranda* applies to interrogations of foreign nationals conducted overseas by United States government law enforcement agents.⁶⁰ When considering the extraterritorial application of entitlement to counsel, courts have characterized entitlement to counsel as a "trial right of criminal defendants."⁶¹ The Fifth and Sixth Amendments protect individuals from the use of compelled self-incriminating statements at trial⁶² and from the use of statements obtained by government questioning after

⁵⁷ See *Reid v. Covert*, 354 U.S. 1, 6 (1957); *Cranford v. Rodriguez*, 512 F.2d 860 (10th Cir. 1975) (*Miranda* applies to U.S. government agent interrogation of American citizen abroad); *United States v. Dopf*, 434 F.2d 205 (5th Cir. 1970)(same).

⁵⁸ See, e.g., *United States v. Wolf*, 813 F.2d 970, 972 n.3, 974 (9th Cir. 1987); *United States v. Martindale*, 790 F.2d 1129, 1131 (4th Cir. 1986); *United States v. Bagaric*, 706 F.2d 42, 69 (2d Cir. 1983); *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980); *Kilday v. United States*, 481 F.2d 655, 656 (5th Cir. 1973); *United States v. Mundt*, 508 F.2d 904, 906 (10th Cir. 1974); *United States v. Welch*, 455 F.2d 211, 213 (2d Cir. 1972); *Brulay v. United States*, 383 F.2d 345, 348 (9th Cir. 1967); *United States v. Hensel*, 509 F. Supp. 1364, 1375 (D. Me. 1981).

⁵⁹ See *Martindale*, 790 F.2d at 1132; *United States v. Chavarria*, 443 F.2d 904, 905 (9th Cir. 1971). It is important to note here that the Fourteenth Amendment Due Process Clause provided the default guarantee on the use of confessions where the particular guarantees of the Fifth Amendment did not apply.

⁶⁰ See *United States v. Yunis*, 859 F.2d 953, 955-56 (D.C. Cir. 1988); *United States v. Bin Laden*, 132 F. Supp. 2d 168, 185 (S.D.N.Y. 2001).

⁶¹ *Chavez v. Martinez*, 583 U.S. 760, 123 S. Ct. 1994, 2001-04 (2003) (privilege against self-incrimination will not support Section 1983 civil rights claim where statement obtained by coercive custodial interrogation was not used at trial of witness); *Withrow v. Williams*, 507 U.S. 680, 692 (1993); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (in context of Fourth Amendment's application overseas). Cf. Godsey, *supra* note 7, at 873-75 (discussing constitutional rights that attach at trial and reach back to apply to pretrial investigative activity).

⁶² See *Bram*, 268 U.S. at 565 (Fifth Amendment privilege against self-incrimination prohibits the use at trial of a confession coerced by federal officer during pretrial interrogation). Cf. Godsey, *supra* note 7, at 855

the initiation of proceedings. This “relation back” effect means that entitlement to counsel provisions can be implicated in a government law enforcement agent’s deliberate elicitation of an incriminating statement from a person who is suspected of an offense, regardless of where the questioning takes place. On the other hand, where the government does not use the statements against the suspect as evidence of guilt in a criminal proceeding, the right to counsel is not denied in any meaningful sense.⁶³ Although all of these rationales can be drawn from Fifth Amendment jurisprudence, *Miranda* is not the only rule potentially applicable to the use of military intelligence interrogations.⁶⁴

D. Due Process and Equal Protection Concepts on Entitlement to Counsel and Rights Advisement: The Court and Congress

Although the Fifth and Sixth Amendments provide the primary bases for current application of entitlement to counsel and protection of the privilege against self-incrimination, the Supreme Court also recognizes that the Due Process and Equal Protection clauses in the Fifth and Fourteenth Amendments require entitlement to counsel in certain

(discussing Fifth Amendment privilege against compulsory self-incrimination as a default rule on inadmissibility of confessions compelled by police coercion where *Miranda* does not apply). Godsey concludes that the Fifth Amendment rule against use of compelled confessions is the only constitutional limitation on the interrogation of non-Americans abroad. *Id.*

⁶³ Cf. *United States v. Balsys*, 524 U.S. 666, (1998) (privilege against self-incrimination could not be invoked for fear of foreign prosecution; alien properly ordered in deportation proceedings to testify about involvement in Nazi war crimes); *New York v. Quarles*, 467 U.S. 649, 654-57 (1984) (police arresting suspect seen shortly before arrest with a gun asked where the gun was; police question about imminent danger to public safety outweighed considerations of law enforcement interrogation); *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (privilege against self-incrimination does not prevent government from compelling immunized witnesses to testify); *Harris v. New York*, 401 U.S. 222, 225 (1971) (statements obtained in violation of *Miranda* can be used to impeach the defendant who made the statements).

⁶⁴ Cf. Godsey, *supra* note 7, at 855 (discussing other constitutional limitations on interrogations abroad in the event that *Miranda* does not apply).

contexts.⁶⁵ For example, in probation and parole revocation proceedings, even where the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel are not implicated, the Court has found that the due process clause of the Fourteenth Amendment implies a right to counsel.⁶⁶ In criminal appeals, where the right to counsel is not provided under the Sixth Amendment, and the appellant is indigent, the Court has held that the equal protection clause of the Fourteenth Amendment requires entitlement to counsel.⁶⁷ Furthermore, government use of "egregious" tactics to frustrate reliance on counsel may rise to the level of a due process violation.⁶⁸ Finally, due process concepts may protect the right to counsel under circumstances not covered by current Fifth and Sixth Amendment application or limit the use of admissions and confessions to those that are voluntary.⁶⁹

Under due process concepts, admissibility of statements obtained during interrogations is determined on the basis of whether the suspect made the statements voluntarily.⁷⁰ Courts consider whether the statements were obtained by any threats or

⁶⁵ U.S. Const. amend. V (due process clause) & XIV (due process and equal protection clauses). See *Dickerson v. United States*, 530 U.S. 428, 433-35 (2000).

⁶⁶ See *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

⁶⁷ See *Douglas v. California*, 372 U.S. 353, 357-58 (1963) ("where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor") (emphasis in original).

⁶⁸ See *Moran v. Burbine*, 475 U.S. 412, 432-34 (majority opinion) & 462-65 (Stevens, J., dissenting) (1986).

⁶⁹ But see *Godsey*, *supra* note 7, at 855-56 (concluding that due process involuntary confession rule does not protect non-Americans interrogated abroad and that only the Fifth Amendment privilege against self-incrimination protects non-Americans interrogated abroad from compelled confessions, raising the distinction between "involuntary" and "compelled" confessions).

⁷⁰ *Arizona v. Fulminante*, 499 U.S. 279, 310-311 (1991); *Colorado v. Connelly*, 479 U.S. 157 (1986); *Haynes v. Washington*, 373 U.S. 503 (1963); *Ashcroft v. Tennessee*, 322 U.S. 143 (1944). Cf. *Godsey*, *supra* note 7, at

violence, by any promises, or by any improper influence, in light of the totality of the circumstances.⁷¹ The totality of the circumstances includes the physical and mental condition of the suspect, the conditions of the detainment and interrogation facilities, and the extent to which the suspect was advised of any rights.

The Fifth and Fourteenth Amendment Due Process Clause voluntariness doctrine appears to be the default protection that applies to the use of admissions and confessions obtained in overseas military intelligence interrogations of non-citizen terror suspects.⁷² Even so, this baseline protection is tenuous. Commentary indicates that the Fourteenth Amendment voluntariness doctrine may not apply to United States government law enforcement agent questioning of non-citizens abroad, and the applicability of the Fifth and Fourteenth Amendment to military commission proceedings conducted overseas is unclear. One other source of the voluntariness doctrine – a federal statutory provision – may reach military commission proceedings and the use of statements obtained from non-citizens abroad.

The baseline considerations of the due process voluntariness doctrine are embodied in statutory authority in Title 18, United States Code, Section 3501.⁷³ Under the terms of the

855 (discussing due process involuntary confession rule as a default rule in situations where *Miranda* does not apply).

⁷¹ See *Dickerson v. United States*, 530 U.S. 428, 433-34 (2000)

⁷² See *Martindale*, 790 F.2d at 1132 (where Fifth Amendment did not apply to foreign agent's interrogation of admissions, due process voluntariness doctrine governed admissibility of statement); *Chavarria*, 443 F.2d at 905 (same).

⁷³ 18 U.S.C. § 3501 (1994). The statute provides as follows:

statute, the required voluntariness inquiry is not limited to United States district court proceedings in the United States.⁷⁴ It applies to "any criminal prosecution brought by the United States."⁷⁵ That is, the statute appears to govern territorial court, military court-martial, military commission, or provost court and occupation judicial proceedings outside the United States so long as the criminal proceeding is brought by or in the name of the United States. It does not limit its application to law enforcement interrogations. Under the statute, the trial judge must determine voluntariness of any statement obtained by taking into consideration "whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him," "had been advised prior to questioning of his right to the assistance of counsel," and "was without the assistance of counsel when questioned and when giving such confession."⁷⁶ Section 3501

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

⁷⁴ See *Government of Virgin Islands v. Gereau*, 502 F.2d 914, 922-23 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) (Section 3501 applies to criminal proceedings in the Virgin Islands territorial courts).

⁷⁵ 18 U.S.C. § 3501(a).

⁷⁶ 18 U.S.C. § 3501(b).

neither provides for entitlement to counsel nor requires warnings or advisement of rights or entitlement to counsel. Rather, the statute recognizes that these matters affect the voluntariness, and thus admissibility, of any admission or confession.

By recognizing that warnings impact the voluntary nature of any confession, the statute and its underlying due process jurisprudence govern any situation where a confession made to military intelligence interrogators is later used against a terror suspect in any criminal prosecution brought by the United States. Factors ordinarily impacting entitlement to counsel or rights advisement, such as the suspect's status, the interrogator's status, the purpose of the interrogation, the place of interrogation, and the eventual trial, all come within the voluntariness doctrine.

E. Rights Advisement under the Uniform Code of Military Justice

Before proceeding to conclusions that can be drawn from United States law, one other matter requires consideration. The UCMJ establishes another constraint protecting the right against compulsory self-incrimination based on the military status of the interrogator. Article 31(a) of the UCMJ provides that "[n]o person subject to [the UCMJ] may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."⁷⁷ Although military courts have interpreted Article 31 to protect only members of the Armed Forces,⁷⁸ the terms of Article 31 do not limit the persons protected by it. Although

⁷⁷ UCMJ, *supra* note 15, art. 31.

⁷⁸ *See* United States v. Villines, 13 M.J. 46, 47 n.3 (C.M.A. 1982).

military courts have interpreted Article 31 to require warnings only from commanders, military police, and others "acting in an official law enforcement or disciplinary capacity,"⁷⁹ its terms do not limit the persons subject to the UCMJ who must provide rights warnings.

Article 31(b) provides that "[n]o person subject to [the UCMJ] may interrogate, or request any statement from an accused or a person suspected of an offense without first advising him"⁸⁰ of various matters. These matters include the nature of the accusation and "advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial."⁸¹ Although the statute speaks in terms of evidence "in a trial by court-martial," that phrase appears to modify only the preceding clause dealing with admissibility. That is, the provisions of Article 31(b) constrain interrogators subject to the UCMJ regardless of the eventual trial of the individual. Article 31(b) does not require any advisement regarding entitlement to counsel.

Article 31(d) provides an exclusionary rule for trials by court-martial. By its terms, "[n]o statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against

⁷⁹ See *United States v. Good*, 32 M.J. 105, 109 (C.M.A. 1991); *United States v. Loukas*, 29 M.J. 385, 389 (C.M.A. 1990) (aircraft crew chief's questioning of a crew member about drug use); *United States v. Duga*, 10 M.J. 206, 211 (C.M.A. 1981). Under limited circumstances, civilians not subject to the UCMJ are required to read service members their Article 31(b) rights where the investigation "merges" with a military investigation, *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1991), or where the civilian investigator is an "instrument" of the military. *United States v. Quillen*, 27 M.J. 312 (C.M.A. 1988).

⁸⁰ UCMJ, *supra* note 15, art. 31(b).

⁸¹ *Id.*

him in a trial by court-martial."⁸² Because the UCMJ distinguishes between the term "court-martial" and other military commissions or tribunals,⁸³ the exclusionary rule in Article 31 does not apply to military commissions unless prescribed by the President.⁸⁴

The significance of Article 31 to this analysis is that it could be interpreted to protect persons other than military members, could be interpreted to apply to military intelligence interrogations, requires warnings regardless of ultimate trial forum, and could be applied as an exclusionary rule in military commission proceedings. As a statutory expression of rights advisement requirements, Article 31 is another example of a statute or regulation that may apply more broadly than its underlying constitutional sources.

F. Conclusions Based on United States Law

Several conclusions can be drawn from United States law on the use of admissions and confessions obtained during United States military intelligence interrogations. First, current Fifth Amendment jurisprudence does not require rights advisement of terror suspects subjected to military intelligence interrogations conducted during military operations overseas, but the issue is unsettled, having been raised but not decided in a recent case. Second, the Sixth Amendment does not require rights advisement in such cases until the initiation of proceedings, but the pre-initiation Sixth Amendment jurisprudence existing prior

⁸² *Id.* art. 31(d).

⁸³ *See, e.g.*, 10 U.S.C. § 821 (distinguishing between courts-martial and other military tribunals in discussing jurisdiction of courts-martial).

⁸⁴ *See* MCM, *supra* note 6, pt. I, ¶ 2(b)(2).

to *Miranda* remains undeveloped.⁸⁵ Third, although Article 31 of the UCMJ does not require rights advisement in military intelligence interrogations and imposes its exclusionary rule only in courts-martial, its literal terms would require rights advisement of terror suspects in military intelligence interrogations. Finally, due process jurisprudence and Section 3501 require inquiry into the voluntary nature of any admission or confession offered as evidence in any criminal prosecution brought by the United States. Such criminal prosecutions would include trials by military commission and would include inquiry into whether rights advisements were given in determining the voluntary nature of any statements.

G. International Law as United States Law

Before analyzing the right to counsel under international law, the relationship between international law and United States law requires examination. The pre-eminent statement on the effect of conventional or treaty-based law on domestic law is the Supremacy Clause of the United States Constitution.⁸⁶ Under the Supremacy Clause, the "supreme Law of the Land" includes conventional international law (treaties and other international agreements) ratified by the United States. Although each treaty must be examined as to its effect,⁸⁷ conventional international law ratified by the United States is as binding as federal law. International law also may attach itself to the United States as customary international

⁸⁵ See *supra* note 37.

⁸⁶ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ...").

⁸⁷ See *infra* text accompanying notes 144 through 189.

law or in its expression in executive orders binding on federal agencies. Each of these modes of attachment requires examination.

1. Customary International Law as United States Law

The pre-eminent rule on the effect of customary international law as domestic law is the Supreme Court's statement that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."⁸⁸ In ascertaining customary law, the courts look for "a general and consistent practice of states followed by them from a sense of legal obligations."⁸⁹ State practice in this context need not be universal but need only "reflect wide acceptance among the states particularly involved in the relevant activity."⁹⁰

In determining whether a sense of legal obligations ("*opinio juris sive necessitatis*") requires a state to follow a customary practice, courts will examine whether "states feel legally free to disregard"⁹¹ it or whether "they believe that it is required by international law

⁸⁸ *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1) (1987) ("rules of international law" include those "accepted as such by the international community of states ... in the form of customary law").

⁸⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987). *See, e.g.,* *Buell v. Mitchell*, 274 F.3d 337, 372-74 (6th Cir. 2001) (examining lawfulness of death penalty under customary international law).

⁹⁰ *Id.* § 102, cmt. b.

⁹¹ *Id.* § 102, cmt. c.

[and] not merely ... a good idea, or politically useful, or otherwise desirable.”⁹² Once a practice is determined to be customary international law, the courts will further examine whether the sense of legal obligation permits exceptions or variances. Customary norms of international law permitting variance (“*jus dispositivum*”) allow departures from those norms based on legally sufficient reasons. Customary norms “permitting no derogation”⁹³ under any circumstances are peremptory norms (“*jus cogens*”).

Accordingly, analysis of the right to counsel under international law requires an examination of not only treaties ratified by the United States but also the general and consistent practices of the international community as expressed in treaties or conventions not ratified by the United States,⁹⁴ resolutions of international organizations,⁹⁵ and the decisions and procedural rules of international tribunals.⁹⁶ This examination will demonstrate the extent to which entitlement to counsel is customary international law, requires procedural protection through rights advisements or exclusionary rules, or may be subject to derogation in certain circumstances. Before proceeding to that examination, two

⁹² *Buell*, 274 F.3d at 372.

⁹³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. k & cmt. n.6 (1987).

⁹⁴ *See id.* § 102, cmt. i & cmt. n.5..

⁹⁵ *See id.* § 102, cmt. g & § 103, cmt. c.

⁹⁶ *See id.* § 102, cmt. n. 1 (stating that judicial decisions “are not sources in the same sense since they are not ways in which law is made or accepted, but opinion-evidence as to whether some rule has in fact become or been accepted as international law) & § 103(2) (substantial weight is accorded to judgments and opinions of international judicial tribunals as evidence that a rule has become international law). In the past, rules of fair procedure relating to the administration of justice have been drawn from general principles common to the major legal systems of the world, *id.* § 102(4) & cmt. 1, but the recent advent of numerous international tribunal rules of procedure obviates the need to rely on comparative analysis to find solid evidence of customary international law regarding criminal procedure.

particular evidences of state practice of the United States, in the form of executive orders, require analysis.⁹⁷

2. *Relevant Executive Orders Referencing International Law*

Executive Orders derive their authority from statutory delegations to facilitate the execution of the Acts of Congress or from express or implied constitutional powers of the President.⁹⁸ Under the Constitution, the "executive Power"⁹⁹ is vested in the President. The oath required by the Constitution reflects that the President must "faithfully execute the Office of President of the United States" and "preserve, protect and defend the Constitution of the United States."¹⁰⁰ By its terms, the Constitution, laws made in pursuance of it, and treaties are the "supreme Law of the Land."¹⁰¹ The President "shall be Commander in Chief" of the armed forces¹⁰² and "have Power, by and with the Advice and Consent of the Senate, to make Treaties."¹⁰³ As recognized in Thomas Jefferson's observation, "[t]he transaction of

⁹⁷ See *id.* § 102(2) & cmt. b (the "practice of states" includes "public measures and other governmental acts and official statements of policy," whether unilateral or not).

⁹⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-87 (1952); SENATE SPECIAL COMM. ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, 93RD CONG., REPORT ON EXECUTIVE ORDERS IN TIMES OF WAR AND NATIONAL EMERGENCY 6-7 (Comm. Print 1974).

⁹⁹ U.S. CONST. art. II, § 1, cl. 1.

¹⁰⁰ *Id.* art. II, § 1, cl. 8. The Supreme Court has recognized that the oath, like the other provisions of Article II, creates a fundamental duty of the President. *United States v. United States District Court*, 407 U.S. 297, 310 (1972).

¹⁰¹ U.S. CONST. art. VI, cl. 2.

¹⁰² *Id.* art. II, § 2, cl. 1.

¹⁰³ *Id.* art. II, § 2, cl. 2.

business with foreign nations is executive altogether."¹⁰⁴ Finally, the President "shall take Care that the Laws be faithfully executed."¹⁰⁵ "Laws" here can be understood to refer to the Constitution, Acts of Congress, and treaties.¹⁰⁶ Under this provision, the President can "supervise and guide" subordinates in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."¹⁰⁷

When properly based on the President's express or implied authority under both the Constitution and federal statutes, executive orders have the force and effect of law.¹⁰⁸ That is, the order is binding on federal agencies and would properly support adverse administrative actions, such as removal from office, even if not binding as a punitive criminal law. The executive orders under consideration here implement the President's authority in the areas of foreign relations, command in military affairs, and faithful execution of the laws,

¹⁰⁴ Thomas Jefferson, in HAROLD J. LASKI, *THE AMERICAN PRESIDENCY* 168, 182 (1940).

¹⁰⁵ U.S. CONST. art. II, § 3.

¹⁰⁶ The President's authority is not limited by the express terms of these sources of law. See *In re Neagle*, 135 U.S. 1, 64 (1890) ("Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?") (emphasis added).

¹⁰⁷ *Myers v. United States*, 272 U.S. 52, 135 (1926).

¹⁰⁸ See *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring) (Presidential authority is at its maximum in this first classification of executive power, the other two classifications arising when the President relies only on his own inherent power in the absence of Congressional expression or when the President acts contrary to express or implied will of Congress, where Presidential authority "is at its lowest ebb."). In this context, executive orders binding on federal agencies properly are distinguished from presidential proclamations that purport to create rights or apply generally to the populace, such as an order governing occupied territories. See, e.g., Presidential Proclamation, Jan. 1, 1863 (Emancipation Proclamation) (reprinted in PETER M. SHANE AND HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER* 907 (1988)).

including the Constitution, treaties, and statutory powers under the UCMJ. Under Justice Jackson's three classifications of executive authority in *Youngstown*, the President's power is at its maximum.¹⁰⁹

The effect of two executive orders linking international law to the proceedings of military commissions requires analysis. The first executive order requiring analysis as to its effect is President Reagan's order establishing the MCM.¹¹⁰ The Preamble to the MCM provides that "[s]ubject to any applicable rule of international law or any regulations prescribed by the President or by competent authority, military commissions ... shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial."¹¹¹ The statement evinces an acknowledgement that applicable rules of international law either bind or guide military commissions in determining the appropriate principles of law and rules of procedure and evidence and that, in cases where the commission's own rules conflict with rules of international law, the latter prevail.

The second executive order requiring analysis is President Clinton's executive order making the international human rights obligations contained in the International Covenant on Civil and Political Rights and the Convention Against Torture applicable to all executive departments and agencies.¹¹² The order provides that agencies "shall perform [their]

¹⁰⁹ *Id.*

¹¹⁰ Executive Order 12,473 (Jul. 13, 1984), *reprinted in* MCM, *supra* note 6, at app. A25.

¹¹¹ MCM, *supra* note 6, pt. I, ¶ 2(b)(2) (emphasis added).

¹¹² Implementation of Human Rights Treaties, Exec. Order No. 13,107, 61 Fed. Reg. 68,991 (Dec. 15, 1998).

functions so as to respect and implement those obligations fully."¹¹³ Although the order does not "create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees"¹¹⁴ and "does not impose any justiciable obligations on the executive branch,"¹¹⁵ the order represents a lawful directive.¹¹⁶ Its formulation as an Executive Order makes it no less binding on the President's subordinate executive officers. Its effect is comparable to that of similar executive orders promoting civil rights in government-related activities, fair employment practices, and anti-discrimination in contracting.¹¹⁷

3. *The Binding Effect of International Law on Military Commissions*

¹¹³ *Id.* § 2(a).

¹¹⁴ *Id.* § 6(a).

¹¹⁵ *Id.* § 6(b).

¹¹⁶ See *infra* text accompanying notes 98 through 109. The formulation of the executive order in not creating private rights or justiciable obligations is not surprising in light of the separation of powers. Congress and the President expressed in reservations and understandings to the ICCPR that it does not create private rights of action. See 138 CONG. REC. S4783 (1992). The basic formula applicable to most treaties -- that their provisions are not self-executing and require further legislation to create rights and obligations enforceable against the government -- applies equally to international human rights treaties to which the United States is a party. The reasoning behind both the basic formula of the United States' view of treaty obligations and the order's disclaimer of any justiciable effect lies in the idea that foreign relations is primarily an executive function, cf. LASKI, *supra* note 104, at 168, 182 (1940) (quoting Thomas Jefferson's statement that "[t]he transaction of business with foreign powers ... is executive altogether") and that treaties are contracts between sovereigns. The requirement for further Congressional action to make treaty obligations internally effective complements the legislature's preeminent role in domestic lawmaking and eases the advice and consent role of the Senate and enhances the President's authority and ability to negotiate treaties. Cf. *id.*, at 179. By not subjecting the terms of treaties to judicial interpretation through dispute resolution and assertions of right, the judicial department is kept out of the business of foreign relations.

¹¹⁷ See generally L. Harold Levinson, *Presidential Self-Regulation Through Rulemaking: Comparative Comments on Structuring the Chief Executive's Constitutional Powers*, 9 VAND. J. TRANSNAT'L L. 695, 710-12 (1976); Joel L. Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROB., Spring 1976, at 1.

Taken together, these principles combine to make international law, through the executive orders, binding on Article II actors, including military commission members. Because the effect of the two executive orders requires that the Department of Defense to be guided by applicable rules of international law in prescribing military commission rules of evidence and to respect and implement international human rights obligations, an examination of those international human rights obligations relating to entitlement to counsel is necessary. It also is necessary when considering the possibility that confessions obtained from foreign nationals by United States military interrogators may be used in international or national courts and tribunals where international or domestic obligations regarding entitlement to counsel are binding. Finally, it is necessary because standards for advisement, invocation, and waiver of counsel in military intelligence interrogations can be drawn from applicable rules of both United States and international law.

IV. Entitlement to Counsel and Rights Advisement under International Law

In addition to United States domestic law, international law provides a number of principles that will apply to intelligence interrogations. These principles of international law on the right to counsel and the right to remain silent can be drawn from conventional international law or treaties ratified by the United States,¹¹⁸ from customary international law as evidenced by human right treaties and resolutions not ratified by the United States,¹¹⁹ and

¹¹⁸ See *infra* text accompanying notes 121 through 189.

¹¹⁹ See *infra* text accompanying notes 192 through 261.

from the rules and decisions of international tribunals.¹²⁰ Numerous international human rights treaties ratified by the United States establish standards for the protection of the rights of the accused. A brief overview shows that the right to counsel and privilege against compelled self-incrimination are central to the effectiveness of these rights.

A. Human Rights Treaties Ratified by the United States

Human rights and international humanitarian law treaties ratified by the United States include the Geneva Conventions,¹²¹ the United Nations Charter,¹²² the Refugee Protocol,¹²³ the Covenant on Civil and Political Rights,¹²⁴ the Convention on Genocide,¹²⁵ and the Convention against Torture.¹²⁶ The effect of these treaties turns on whether they are considered executory or self-executing and whether they are extra-territorial in application.

An executory¹²⁷ treaty is one that "requires implementing legislation before it takes effect as domestic law"¹²⁸ and "will not be given effect as law in the absence of necessary

¹²⁰ See *infra* text accompanying notes 262 through 283.

¹²¹ See *infra* text accompanying notes 144 through 157.

¹²² See *infra* text accompanying notes 158 through 162.

¹²³ See *infra* text accompanying notes 136 through 141.

¹²⁴ See *infra* text accompanying notes 163 through 180.

¹²⁵ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.S.T.S. 277. See Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (2000).

¹²⁶ See *infra* text accompanying notes 144 through 189.

¹²⁷ Sometimes referred to as "non-self-executing" treaties, here the word "execute" is used in adjective form.

authority."¹²⁹ A self-executing treaty "takes effect as domestic law immediately upon ratification."¹³⁰ The courts approach treaties cautiously as contracts between independent nations that are not presumed to create private rights enforceable in domestic courts.¹³¹ For example, the United States Court of Appeals for the Fifth Circuit recently determined that the Vienna Convention on Consular Relations¹³² was executory.¹³³ The court considered whether a provision requiring that detained foreign nationals be advised the right to consult their consular officials required suppression of incriminating statements made prior to advisement of that right.¹³⁴ After reviewing the treaty language and considering the State Department's position that the Convention does not create individual rights, the court concluded that the Convention does not give foreign nationals a judicially enforceable right to consult with a consular official.¹³⁵

The courts likewise will not presume that a treaty has extra-territorial effect. For example, the United States ratified the United Nations Protocol Relating to the Status of

¹²⁸ 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 6.6, at 514 (2d ed. 1992) (defining "executory" treaties).

¹²⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987).

¹³⁰ ROTUNDA & NOWAK, *supra* note 128, § 6.6, at 514.

¹³¹ See *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc); *United States v. Zabenah*, 837 F.2d 1249, 1261 (5th Cir. 1988); *Goldstar v. United States*, 967 F.2d 965, 968 (4th Cir. 1992).

¹³² Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

¹³³ See *Jimenez-Nava*, 243 F.3d at 198.

¹³⁴ See *Jimenez-Nava*, 243 F.3d at 195-98.

¹³⁵ *Jimenez-Nava*, 243 F.3d at 198. See also *United States v. Lombero-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (en banc).

Refugees in 1968.¹³⁶ Congress executed the treaty by adopting the Refugee Act of 1980.¹³⁷ This legislation defined "refugee" consistent with the Protocol and allowed refugees to apply for asylum consistent with the Protocol's prohibition on expulsion or return of refugees. In executing the treaty, Congress expressed no intent in favor of extra-territorial application. Consistent with the United States view that the treaties have no extra-territorial application without express provision in the treaty or in the executing legislation, the President issued executive orders¹³⁸ authorizing the forced repatriation of aliens interdicted beyond United States territory.¹³⁹ The executive orders specifically stated that Article 33 of the United Nations Protocol, forbidding forced repatriation, does not apply outside the territory of the United States and thus allows forced repatriation of refugees interdicted at sea.¹⁴⁰ The Supreme Court upheld this construct.¹⁴¹

In contrast, where Congress executes a treaty and expresses no intent regarding a particular domestic application, the treaty and its executing legislation will be interpreted in a manner similar to any other domestic legislation. For example, the United States Court of Appeal for the Third Circuit recently held that the human rights obligations of the

¹³⁶ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

¹³⁷ Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 107, § 203(e), amending 8 U.S.C. § 1253(h) (2000).

¹³⁸ Exec. Order No. 12,807, 57 Fed. Reg. 23133 (1992); Exec. Order No. 12324, 3 C.F.R. 181 (1981-83 Comp.).

¹³⁹ Defined in these circumstances as beyond the territorial sea of the United States. *See* Exec. Order No. 12,807, § 2(d), 57 Fed. Reg. 23133 (1992).

¹⁴⁰ *See* Exec. Order No. 12,807, ¶ 2, 57 Fed. Reg. 23133 (1992).

¹⁴¹ *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 174-187 (1998).

Convention Against Torture¹⁴² were executed by Congress and that, lacking any explicit statement of Congress' intent to deprive the court of habeas jurisdiction, a petitioner could seek habeas relief to review claims under the Convention Against Torture.¹⁴³

The Geneva Conventions, the United Nations Charter, the Covenant on Civil and Political Rights, and the Convention against Torture address human rights relevant to military intelligence interrogations. An examination of each is necessary to assess its potential impact on interrogations.

1. *The Geneva Conventions.*

The Geneva Convention Relative to the Treatment of Prisoners of War protects due process rights,¹⁴⁴ including the right to counsel¹⁴⁵ and the right not to be forced into a confession.¹⁴⁶ The provisions relating to combatant immunity have been held to be self-executory, binding in federal court, and an adequate basis for a motion to dismiss an

¹⁴² See *infra* text accompanying notes 183 through 189.

¹⁴³ See *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 215-22 (3rd Cir. 2003).

¹⁴⁴ GPW, *supra* note 8, art. 84 (trial offer "essential guarantees of independence and impartiality as generally recognized" and the procedures provided for in Article 105).

¹⁴⁵ *Id.* art. 99 ("No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.") & art. 105.

¹⁴⁶ *Id.* art 99 ("No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.") & art. 105. See also Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GPC], art. 72.

indictment for actions in combat.¹⁴⁷ Although a familiar provision requires prisoners of war only to state their name, rank, and serial number,¹⁴⁸ the Geneva Conventions do not expressly protect the right to remain silent when interrogated about other matters.¹⁴⁹ These baseline judicial requirements of the GPW are augmented by a provision essentially incorporating the procedure applicable to trials of military members of the detaining force.¹⁵⁰ Prisoners of war and other detainees properly are subject to military intelligence interrogations.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides for "a regular trial"¹⁵¹ including the right to counsel.¹⁵² No right to remain silent is provided, but no physical or moral coercion may be used to obtain information.¹⁵³ The courts consider the Convention to be not self-executing, creating no private rights of action in domestic courts.¹⁵⁴ The baseline judicial requirements are expressed in Common Article Three: it calls for a "regularly constituted court" and the "judicial guarantees ...

¹⁴⁷ See *United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002). See also *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1990).

¹⁴⁸ GPW, *supra* note 8, art. 17 ("surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information").

¹⁴⁹ Cf. *id.* art 17 ("No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."). Article 17 also provides that prisoners of war shall be questioned in a language they understand.

¹⁵⁰ *Id.* art 102 ("A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.).

¹⁵¹ GPC, *supra* note 146, art. 71.

¹⁵² *Id.* art. 72.

¹⁵³ *Id.* art. 31.

¹⁵⁴ See *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978).

recognized as indispensable by civilized peoples."¹⁵⁵ The International Court of Justice has ruled that Common Article Three serves as "a minimum yardstick of protection"¹⁵⁶ in all conflicts. The International Criminal Tribunal for the Former Yugoslavia also considers these baseline requirements as "elementary considerations of humanity."¹⁵⁷

The Geneva Conventions therefore appear to protect the right to counsel only upon the initiation of criminal proceedings and to not protect the right to remain silent or the privilege against self-incrimination, particularly in military intelligence interrogations contemplated by the Conventions. Instead, the Conventions provide that no physical or moral coercion can be used to obtain information or to force a confession. The Conventions essentially incorporate by reference detaining force rules of procedure for prisoners of war and indispensable judicial guarantees for other protected persons, creating the situation where developing due process norms can be incorporated by judicial interpretation.

2. *The United Nations Charter*

The United Nations Charter establishes human rights as a matter of international concern. The preamble reaffirms faith in fundamental human rights, and several articles

¹⁵⁵ GPC, *supra* note 146, art. 3; GPW, *supra* note 8, art. 3.

¹⁵⁶ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

¹⁵⁷ Prosecutor v. Dusko Tadic, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-94-1-AR72 (Oct. 2, 1995). See also JEAN S. PICTET, COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 14 (1958).

promote and encourage respect for human rights.¹⁵⁸ A California court of appeals found these Charter provisions to be self-executing,¹⁵⁹ but on appeal the California Supreme Court reversed that decision.¹⁶⁰ The United States Supreme Court has recognized the "general and hortatory language" of the Charter.¹⁶¹ The effectiveness of the Charter's human rights affirmations is further limited by the provision that nothing in the Charter authorizes the United Nations to intervene in domestic matters.¹⁶² At the same time, the United States view is that the Charter's humanitarian obligations do not extend beyond United States territory. Accordingly, the Charter itself provides no definitive norms on the right to counsel and the right to remain silent.

3. *The International Covenant on Civil and Political Rights*

The United Nations promulgated the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992.¹⁶³ Congress has not executed the treaty through legislation, but the President through executive order requires federal agencies to respect and implement it.¹⁶⁴ Federal courts have held that the treaty is not self-executing,

¹⁵⁸ See, e.g., U.N. CHARTER art. 1(3), 55, & 56. See 59 Stat. 1033 (1945).

¹⁵⁹ See *Fujii v. State*, 217 P.2d 481 (Cal. Ct. App. 2d Dist. 1950).

¹⁶⁰ See *Fujii v. State*, 38 Cal.2d 718, 242 P.2d 481 (1952).

¹⁶¹ See *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73 (1955).

¹⁶² U.N. CHARTER art. 2(7) ("Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state").

¹⁶³ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. 102-23, 999 U.N.T.S. 171 [hereinafter ICCPR] See also 102d Cong., 138 CONG. REC. S4783 (1992).

¹⁶⁴ See *supra* text accompanying notes 112 through 109.

is not binding on federal courts,¹⁶⁵ and is not extra-territorial in effect.¹⁶⁶ These courts did not explicitly consider the impact of the President's executive order. The treaty requires state parties to provide effective internal remedies for the violation of rights or freedoms by their own government agents.¹⁶⁷ This includes the right to have competent judicial or administrative authorities determine rights and remedies.¹⁶⁸ The treaty protects against torture and cruel, inhuman or degrading treatment or punishment.¹⁶⁹ The treaty provides for the "right to liberty and security of person."¹⁷⁰ It prohibits "arbitrary arrest or detention" permitting deprivation of liberty only "on such grounds and in accordance with such procedures as are established by law."¹⁷¹ The treaty recognizes the right to be informed of the reasons for arrest and any charges and provides for prompt judicial review and release or trial within a reasonable time.

While in custody, detainees are to "be treated with humanity and with respect for the inherent dignity of the human person."¹⁷² In Article 14, the treaty provides for due process

¹⁶⁵ See *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), *cert. denied*, 537 U.S. 1173 (2003); *Buell v. Mitchell*, 274 F.3d 337, 371 (6th Cir. 2001); *Beazley v. Johnson*, 242 F.3d 248, 263 (5th Cir.), *cert. denied*, 533 U.S. 969 (2001).

¹⁶⁶ See *United States v. Duarte-Acero*, 132 F. Supp. 2d 1036, 1040-41 (S.D. Fla. 2001).

¹⁶⁷ ICCPR, *supra* note 163, art. 2(3)(a)

¹⁶⁸ *Id.* art. 2(3)(b).

¹⁶⁹ *Id.* art. 7.

¹⁷⁰ *Id.* art. 9(1).

¹⁷¹ *Id.* art. 9(1).

¹⁷² *Id.* art. 10(1).

rights by ensuring "a fair and public hearing"¹⁷³ before a competent tribunal. With regard to counsel, Article 14 of the ICCPR allows a person "to communicate with counsel of his own choosing."¹⁷⁴ Article 14 also recognizes the right to counsel at trial and to be informed of the right to counsel.¹⁷⁵ Finally, the article recognizes the right "[n]ot to be compelled to testify against himself, or to confess guilt."¹⁷⁶

The United Nations Human Rights Committee recognizes that the trial of civilians by special military courts is permissible under the ICCPR.¹⁷⁷ The Committee also has stated that combating terrorism does not excuse a nation from protecting fundamental rights under the ICCPR.¹⁷⁸ Only a state of emergency that threatens the life of the nation justifies suspension of specified rights under the ICCPR, while all others remain effective.¹⁷⁹ Upon reviewing the President's military ordering established military commissions, the American Bar Association Task Force on Terrorism and the Law recommended that military

¹⁷³ *Id.* art. 14(1).

¹⁷⁴ *Id.* art. 14(3)(b).

¹⁷⁵ *Id.* art. 14(3)(d).

¹⁷⁶ *Id.* art. 14(3)(g).

¹⁷⁷ United Nations Human Rights Committee, General Comment 13/21, para. 4 (Apr. 12, 1984) *reprinted in* MANFRED NOVAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 858 (1993).

¹⁷⁸ The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency, U.N. Doc. E/CN.4/Sub.2/1997/19, para. 111 (1997). *See also* U.N. Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev. 1/Add. 11 (2001), available at <<http://www.unhchr.ch/tbs/doc.nsf>>.

¹⁷⁹ ICCPR, *supra* note 163, art. 4 (rights not subject to derogation or suspension during times of emergency include the right to life and freedom from torture, slavery, imprisonment merely for breach of contract, ex post facto crimes and punishments, and loss of status as a person before the law).

commissions conform to the requirements of Article 14 of the ICCPR in the trial of terror suspects.¹⁸⁰

The significance of the ICCPR to this examination lies in the structure of Article 14. Its structure is similar to that of Article 6 of the European Convention on Human Rights, which has been interpreted and applied by the European Court of Human Rights in numerous cases.¹⁸¹ Article 14 of the ICCPR, by guaranteeing the right to a fair hearing and then delineating the procedural requirements necessary for a fair hearing, focuses the analysis of underlying infringements of procedural requirements on its impact on the fairness of the trial. This similarity to Article 6 of the European Convention gives significance to the interpretation and application of European Convention's protection of the right to counsel.

Even without reference to the persuasive effect of interpretations and applications of the right to counsel under other conventions, the ICCPR clearly protects the right to counsel upon initiation of proceedings. Like the Bill of Rights, the ICCPR has no explicit requirement for rights advisement upon arrest, detention, or interrogation but protects the privilege against compelled self-incrimination. In short, the ICCPR expresses all the fundamental rights necessary to support application of United States precedent in international law. Because of Article 14's focus on a fair hearing, the ICCPR could be interpreted or applied judicially to require advisement of entitlement to counsel and the right to remain silent upon arrest or interrogation or to require exclusion of involuntary or

¹⁸⁰ ABA Task Force on Terrorism and the Law, *Report and Recommendation on Military Commissions* 16 (Jan. 4, 2002).

¹⁸¹ See *infra* text accompanying notes 306 through 394.

unadvised admissions or confessions from evidence at trial depending on the impact on the fairness of the trial.

4. *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

From the very beginning of the United States, torture by state officials has been recognized as a violation of the "law of nations" as delineated by the Alien Tort Statute, which is part of the Judiciary Act of 1789.¹⁸² This pre-existing prohibition was expressed again by the United States in its 1988 ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁸³ That same year, Congress adopted implementing legislation.¹⁸⁴ In addition, the President, through executive order, requires federal agencies to respect and implement the Convention.¹⁸⁵ United States courts primarily have applied the Convention in reviewing immigration proceedings.¹⁸⁶

¹⁸² Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), *codified at* 28 U.S.C. § 1350 (2000); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-84 (2d Cir. 1980).

¹⁸³ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. EXEC. DOC. 100-201, 465 U.N.T.S. 85 [hereinafter *Convention Against Torture*]. Congress implemented the Convention Against Torture by the Foreign Affairs Reform and Restructuring Act of 1988, Pub. L. 105-277, Div. G, Title XXII, § 2242, 112 Stat. 2681-822 (1988), *codified as note to* 8 U.S.C.A. § 1231. *See also* 136 CONG. REC. 36,198 (1990). Regulations further implement the Convention. *See* Regulations Concerning the Convention Against Torture, 64 FED. REG. 8478, *codified at* 8 C.F.R. § 208.16.

¹⁸⁴ Foreign Affairs Reform and Restructuring Act of 1988, Pub. L. 105-277, Div. G, Title XXII, § 2242, 112 Stat. 2681-822 (1988), *codified as note to* 8 U.S.C.A. § 1231.

¹⁸⁵ *See supra* text accompanying notes 112 through 109.

¹⁸⁶ *See Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003); *Mansour v. Immigration & Naturalization Serv.*, 230 F.3d 902 (7th Cir. 2000).

The significance of the Convention Against Torture in this examination is not its unsurprising condemnation of official torture. It lies instead in the fact that, in addition to prohibiting official torture, the Convention also recognizes certain fundamental rights of persons detained or arrested for torture crimes. The Convention Against Torture provides that persons prosecuted for committing torture "shall be guaranteed fair treatment at all stages of the proceedings."¹⁸⁷ The Convention essentially incorporates by reference the rules of evidence and decisional rules for serious offenses under the law of the state prosecuting the case.¹⁸⁸ The Convention also establishes an exclusionary rule, providing that State parties "shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings" unless the case is the prosecution of the torturer who caused the statement to be made.¹⁸⁹

Accordingly, the Convention Against Torture provides the clearest expression of an exclusionary rule for admissions or confessions obtained as a result of torture, a rule that applies to military commissions by reason of the President's executive orders. Similar to the ICCPR, the Convention Against Torture provisions for "fair treatment" and incorporation of domestic rules of evidence create the potential for judicial interpretation and application of the Convention to require advisement of entitlement to counsel or the right to remain silent upon arrest or interrogation under developing concepts of due process.

¹⁸⁷ Convention Against Torture, *supra* note 183, art. 7(3).

¹⁸⁸ *Id.* art. 7(2).

¹⁸⁹ *Id.* art. 15. Commentary in the Reservations and Understandings document notes that the rule "applies only to the statement itself and not to so-called 'fruits' of the statement." It notes that the "fruit-of-the-poisonous-tree" doctrine "is a feature of U.S. Constitutional law but is not applied in international practice." 136 CONG. REC. S17,491-92.

A review of existing United States treaty obligations demonstrates that international law protects the right to counsel at least at the initiation of criminal proceedings and requires the exclusion from evidence of any admissions or confessions obtained as a result of torture. The right not to be compelled to testify or confess guilt under the ICCPR applies at least at the initiation of criminal proceedings. Finally, these provisions, when taken together with those for "fair" proceedings, may be judicially interpreted and applied to require rights advisements or warnings and exclusion of involuntary statements under developing concepts of due process.

On the other hand, no specific provisions require rights advisements or indicate any application to military intelligence interrogations. The "fair" trial provisions potentially can be interpreted and applied to military intelligence interrogations to exclude involuntary statements from evidence at trial. As under domestic law, voluntariness would be determined under the totality of the circumstances, including whether any rights warnings were given or any coercive tactics were used. In this light, the treaty obligations do not differ substantially from the requirements imposed by United States law under the Due Process clause and Section 3501, the federal statute codifying the voluntariness doctrine.

B. Other Human Rights Treaties and Resolutions

In addition to conventional international law or treaty obligations on human rights, fundamental human rights obligations may derive from customary international law. Such principles find their expression not only in the instruments ratified by the United States but

also in human rights treaties and instruments not ratified by the United States and the governing resolutions, rules, and rulings of international organizations and tribunals. Each of these sources of law demonstrates the practice of states¹⁹⁰ or constitutes evidence of customary international law.¹⁹¹ Accordingly, an examination of these matters is necessary to determine the entitlement to counsel under customary international law.

1. The Universal Declaration of Human Rights

The United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948.¹⁹² As a General Assembly resolution, the Declaration does not have the force and effect of law, although it embodies much of what is now regarded as customary international human rights law.¹⁹³ In language much like the Declaration of Independence, it recognizes "the inherent dignity" and "the equal and inalienable rights" of all people.¹⁹⁴ The Declaration purports to be "a common standard of achievement for all peoples and all nations" with a view "to secure their universal and effective recognition and observance, both

¹⁹⁰ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. b & n.2 (1987).

¹⁹¹ See *id.* § 103(2).

¹⁹² Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, Supp. No. 16, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

¹⁹³ See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) (Universal Declaration "is a powerful and authoritative statement of the customary international law of human rights."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 883-84 (2d Cir. 1980) (Declaration's prohibition of official torture reflects that torture is a violation of customary international law).

¹⁹⁴ Universal Declaration, *supra* note 192 (preamble).

among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."¹⁹⁵

The Universal Declaration provides that "[e]veryone has the right to life, liberty and security of person."¹⁹⁶ It also provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹⁹⁷ The Declaration includes an equal protection clause¹⁹⁸ and recognizes "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."¹⁹⁹ The Declaration provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile."²⁰⁰ The concept of due process is further embodied in provisions for "a fair and public hearing"²⁰¹ and "all the guarantees necessary" for defense.²⁰² Concepts related to protection from unreasonable searches and seizures are also embodied in the Declaration.²⁰³

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* art. 3.

¹⁹⁷ *Id.* art. 5.

¹⁹⁸ *Id.* art. 7.

¹⁹⁹ *Id.* art. 8.

²⁰⁰ *Id.* art. 9.

²⁰¹ *Id.* art. 10.

²⁰² *Id.* art. 11(1).

²⁰³ *See id.* art. 12.

The Universal Declaration thus goes no farther than the recognition of basic due process and freedom from coercion. Even so, these provisions can be interpreted to embrace the right to counsel, the privilege against self-incrimination, and the exclusion of involuntary admissions and confessions, although the Declaration's express terms do not include these concepts and provide only persuasive authority on international norms. As will be seen in an examination of international tribunal decisions, the concept of due process in international law can be broadly read to include these rights.

2. *The American Convention on Human Rights*

Several regional conventions address human rights. For example, the Organization of American States (OAS) promulgated the American Convention on Human Rights.²⁰⁴ The United States signed but never ratified this treaty.²⁰⁵ The United States ratified only the OAS Charter.²⁰⁶ Federal courts have held that the Charter and the American Declaration of the Rights and Duties of Man²⁰⁷ adopted by the OAS prior to United States ratification of the

²⁰⁴ American Convention on Human Rights (Pact of San Jose, Costa Rica), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

²⁰⁵ See S. TREATY DOC. NO. 95-2, Executive F, 9 I.L.M. 673 (1970). See generally *Ullonoa Flores v. South Peru Copper Corp.*, 343 F.3d 140, 164 (2d Cir. 2003).

²⁰⁶ Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, as amended by Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607 [hereinafter OAS Charter].

²⁰⁷ *Declaration of the Ninth International Conference of American States*, May 2, 1948, 6 NINTH CONFERENCE OF AMERICAN STATES, ACTS AND DOCUMENTS 289 (1953).

Charter create no privately enforceable rights.²⁰⁸ The relevance of the American Convention, therefore, lies in its evidence of customary international law.

The American Convention on Human Rights prohibits torture and cruel, inhuman, or degrading punishment or treatment.²⁰⁹ It provides that no one shall be deprived of physical liberty "except for the reasons and under the conditions established beforehand" by the constitutions and laws of the state parties and prohibits arbitrary arrest or imprisonment.²¹⁰ The American Convention requires detainees to be informed of the reasons for detention and to be promptly notified of any charges.²¹¹ The Convention requires judicial review and release or trial within a reasonable time. Even the threat of deprivation of liberty is subject to review by the required judicial mechanisms, sought by either the interested party or another person in his behalf.²¹² The Convention recognizes the right to defend personally or through legal counsel of choice or provided by the state.²¹³ The Convention recognizes "the right not to be compelled to be a witness against himself or to plead guilty."²¹⁴ Finally, the Convention provides that "[a] confession of guilt by the accused shall be valid only if it is

²⁰⁸ See *Garza v. Lappin*, 253 F.3d 918, 924-26 (7th Cir. 2001).

²⁰⁹ American Convention, *supra* note 204, art. 5(2).

²¹⁰ *Id.* art. 7(2) & (3).

²¹¹ *Id.* art. 7(4).

²¹² *Id.* art. 7(6).

²¹³ *Id.* art. 8(2)(d) & (e).

²¹⁴ *Id.* art. 8(2)(g).

made without coercion of any kind."²¹⁵ The Convention contains an equal protection clause²¹⁶ and provides for judicial redress of any deprivation of rights.²¹⁷

In sum, the American Convention recognizes a right to due process, a right to counsel at least from the initiation of criminal proceedings, a privilege against self-incrimination or right to silence at trial, and a provision that a confession is valid only if made without coercion of any kind. Taken together, these provisions could be interpreted and applied to require rights advisements or warnings upon interrogation or arrest and, at a minimum, to require inquiry into the voluntary nature of any admission or confession prior to use in evidence. As will be seen in a review of international tribunal decisions applying such provisions, the right to counsel at the interview stage can be drawn from them. On the other hand, the American Convention makes no express provision for rights advisements or warnings or right to counsel upon interrogation or arrest.

3. *The European Convention on Human Rights*

The Council of Europe adopted a Convention for the Protection of Human Rights and Fundamental Freedoms in 1950.²¹⁸ While the United States is not a council member or state party to this convention, United States courts have referred to the European Convention in

²¹⁵ *Id.* art. 8(3).

²¹⁶ *Id.* art. 24.

²¹⁷ *Id.* art. 29.

²¹⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

determining international norms.²¹⁹ The European Convention provides that "[n]o one shall be subject to torture or to inhuman or degrading treatment or punishment."²²⁰ The right to liberty and security of person is subject only to lawful detention and arrest.²²¹ Upon arrest or detention, the person must "be brought promptly before a judge" or other judicial officer who can decide the lawfulness of the detention and order release.²²² Victims of unlawful arrest or detention have an enforceable right to compensation.²²³ Due process is protected by the right to "a fair and public hearing" to determine both civil rights and criminal charges.²²⁴

The European Convention provides for counsel as part of the minimum rights of persons charged with a criminal offense.²²⁵ The provision permits defense in person or through counsel of choice at ones own expense or, if unable to afford it, counsel provided freely "when the interests of justice so require."²²⁶ The Convention provides a right to an effective remedy for violations of the Convention through national authorities²²⁷ and through

²¹⁹ See *Hilao v. Estate of Marcos*, 103 F.3d 789, 794-95 (9th Cir. 1996); *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 113 (5th Cir. 1988); *Maria v. McElroy*, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999); *Hawa Abdi Jama v. Immigration & Naturalization Serv.*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass. 1995).

²²⁰ *Id.* art. 3.

²²¹ *Id.* art. 5(1).

²²² *Id.* art. 5(3) & (4).

²²³ *Id.* art. 5(5).

²²⁴ *Id.* art. 6(1).

²²⁵ *Id.* art. 6(3).

²²⁶ *Id.* art. 6(3)(c).

²²⁷ *Id.* art. 13.

a permanent European Court of Human Rights set up by the Convention.²²⁸ The Convention gives the Court the authority to adopt its own rules²²⁹ and to exercise jurisdiction over "all matters concerning the interpretation and application of the Convention" and any subsequent protocols.²³⁰

In contrast to the American Convention, the European Convention recognizes no privilege against self-incrimination or right to silence. Instead, the European Convention protects the right to a fair hearing and the right to counsel. Consistent with the other international instruments reviewed, the European Convention prohibits torture and inhuman or degrading treatment or punishment. Taken together, these provisions potentially can be interpreted and applied to require rights advisements or warnings and the exclusion of involuntary admissions and confessions. Indeed, as a review of decisions applying the European Convention will show, these provisions have been interpreted to protect the privilege against self-incrimination and the right to silence.

4. *The African Charter on Human and Peoples' Rights*

The Organization of African Unity adopted the African Charter on Human and Peoples' Rights in 1970.²³¹ United States courts have viewed the African Charter as

²²⁸ *Id.* art. 19.

²²⁹ *Id.* art. 26(d).

²³⁰ *Id.* art. 32(1).

²³¹ African Charter on Human and Peoples' Rights, June 27, 1981, Doc. OAU/CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58 (1982) [hereinafter African Charter].

persuasive on international norms in a manner similar to the European Convention.²³² The Charter includes equal protection clauses²³³ and prohibitions on "torture, cruel, inhuman or degrading punishment and treatment" and all other forms of degradation.²³⁴ The Charter provides for individual liberty and security of persons, permits deprivation of freedom only for "reasons and conditions previously laid down by law," and prohibits arbitrary arrest or detention.²³⁵ The Charter's provision for counsel is stated as the "right to defence, including the right to be defended by counsel of his choice" in the hearing of the case.²³⁶ The Charter also establishes an African Commission on Human and Peoples' Rights to give its views or make recommendations to governments, to propose principles and rules to solve legal issues, and to promote and ensure the protection of rights recognized in the Charter.²³⁷

The African Charter therefore is similar to the Universal Declaration of Human Rights in recognizing due process and freedom from torture, cruel, inhuman or degrading treatment, adding only the right to counsel at trial. It makes no express provision for a right to silence or privilege against self-incrimination or for exclusion of any evidence. Although not expressed in the Charter, an exclusionary rule against use of coerced admissions or confessions likely would be implied based on the due process and torture provisions. A

²³² See *Hilao v. Estate of Marcos*, 103 F.3d 789, 794-95 (9th Cir. 1996); *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 113 (5th Cir. 1988); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 436-38 (S.D.N.Y. 2002).

²³³ African Charter, *supra* note 231, art. 3.

²³⁴ *Id.* art. 5.

²³⁵ *Id.* art. 6.

²³⁶ *Id.* art. 7(1)(c).

²³⁷ *Id.* art. 45.

review of international tribunal decisions applying similar provisions to protect such interests shows that the Charter probably would be interpreted and applied in the same fashion.

5. *The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*

An additional United Nations General Assembly Resolution warrants consideration. The 1988 resolution on the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment²³⁸ provides that "[a]ll persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person."²³⁹ The Body of Principles provides that any detention or imprisonment must be ordered by, or subject to the effective control of, a judge or other authority.²⁴⁰ Like other human rights instruments, the Body of Principles prohibits torture or cruel, inhuman or degrading treatment or punishment.²⁴¹ The Body of Principles provides that detained persons must be given an effective opportunity to be heard promptly by a judicial or other authority.²⁴² Regarding counsel, the Body of Principles recognizes the right of a detained person "to defend himself or to be assisted by counsel as prescribed by law"²⁴³

²³⁸ G.A. Res. 43/173, U.N. GAOR, 43d Sess., Supp. No. 1, at 11, U.N. Doc. A/43/49 (1989) [hereinafter Body of Principles].

²³⁹ *Id.* Principle 1.

²⁴⁰ *Id.* Principle 4.

²⁴¹ *Id.* Principle 6. The resolution expands upon this term by stating that "it should be interpreted so as to extend to the widest possible protection against abuses" such as depriving someone the use of his sight or hearing or awareness of place and the passing of time.

²⁴² *Id.* Principle 11(1).

²⁴³ *Id.*

and entitlement to counsel free of charge "if he does not have sufficient means to pay."²⁴⁴

Regarding rights advisement, the detaining authority is required to provide the detainee "with information on and an explanation of his rights and how to avail himself of such rights"²⁴⁵ promptly after arrest.²⁴⁶

Although the resolution is not binding on any member of the United Nations, its persuasive force derives in part from its restatement of several principles applicable in the domestic law of the United States as standards for dealing with detainees under international human rights law. It derives even greater force as a unanimously-adopted declaratory resolution of an international organization with universal membership, "provide[ing] some evidence of what the states voting for it regard the law to be."²⁴⁷ Its weight as evidence of customary international law is thus high²⁴⁸ or substantial,²⁴⁹ given the lack of challenge from any principal powers, contradiction by state practice, or rejection by international courts or tribunals.²⁵⁰ The most notable provisions in the resolution are those for counsel for detained persons, regardless of the initiation of proceedings, and the requirement for rights advisement

²⁴⁴ *Id.* Principle 17(2).

²⁴⁵ *Id.* Principle 13. *See also id.* Principle 17(1) ("A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.").

²⁴⁶ *Id.* Principle 17(1).

²⁴⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103, cmt. c (1987).

²⁴⁸ *See id.* § 103, n.2.

²⁴⁹ *See id.* § 103, cmt. c.

²⁵⁰ *Cf. id.* § 103, n.2 (discussing matters detracting from evidentiary weight of declaratory resolutions as evidence of customary international law).

promptly after arrest. The Body of Principles could therefore support an exclusionary rule addressing not only coerced admissions or confessions but also those obtained without counsel or rights advisement.

6. *The Rome Statute of the International Criminal Court*

The most recent treaty establishing standards for the treatment of detained persons is the Rome Statute of the International Criminal Court.²⁵¹ Although the United States is not a party to the treaty, United States courts have cited the Statute as persuasive authority on international norms.²⁵² The Statute established a permanent International Criminal Court with "jurisdiction over persons for the most serious crimes of international concern" as defined in the Statute.²⁵³ The Court applies the Statute, elements of crimes and rules of procedure adopted under the statute, applicable treaties and principles and rules of international law, its own case law, and "[f]ailing that, general principles of law derived by the Court from national law of legal systems of the world."²⁵⁴ The state members of the treaty adopted rules of procedure and evidence under the Statute.²⁵⁵

²⁵¹ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 (1998), at <www.un.org/ice [hereinafter Rome Statute].

²⁵² *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1293 (11th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999).

²⁵³ Rome Statute, *supra* note 251, art. 1. The crimes triggering jurisdiction include genocide, crimes against humanity, war crimes, and "crimes of aggression" to be defined by subsequent agreement. *Id.* art 5(1).

²⁵⁴ *Id.* art. 21.

²⁵⁵ *Cf. id.* art. 51(1) (two-thirds majority of members may adopt rules of procedure and evidence).

The Rome Statute provides in Article 55 that, during investigations under the Statute, a person "[s]hall not be compelled to incriminate himself or herself or to confess guilt" and "[s]hall not be subject to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment."²⁵⁶ The Statute prohibits arbitrary arrest or detention and permits it only in accordance with the procedure established by the Statute.²⁵⁷ Prior to questioning persons suspected of committing a crime within the jurisdiction of the court, the prosecutor or national authorities must inform the person that he or she is suspected of committing a crime.²⁵⁸ They also must inform the person of the right to remain silent, of the entitlement to have legal assistance of choice (or by assignment free of charge where the interests of justice so require), and of the right "[t]o be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."²⁵⁹ These rights apply at trial as well.²⁶⁰ The Statute includes an exclusionary rule on evidence obtained in violation of the Statute or internationally recognized human rights. Such evidence is not admissible if "[t]he violation casts substantial doubt on the reliability of the evidence" or if admitting the evidence "would be antithetical to and would seriously damage the integrity of the proceedings."²⁶¹

²⁵⁶ *Id.* art. 55(1)(a) & (b).

²⁵⁷ *Id.* art. 55(1)(d).

²⁵⁸ *Id.* art. 55(2)(a).

²⁵⁹ *Id.* art. 55(2)(b)-(d).

²⁶⁰ *Id.* art. 67(1).

²⁶¹ *Id.* art. 69(7).

Article 55 of the Rome Statute thus is the most comprehensive, internationally-ratified statement of rights of the accused. It provides for the right to counsel at the initiation of interrogation, prescribes rights warnings before questioning, prohibits coercive practices, preserves the right to remain silent and privilege against self-incrimination. The exclusionary rule turns not merely on the existence of a violation of the Statute or internationally recognized rights but also on serious damage as to the integrity of the proceedings or substantial doubt as to the reliability of the evidence. The Statute represents the most recent instrument in a series of advancing standards in the protection of the rights the accused under international law. The same progression is evidenced upon review of the procedural and evidentiary rules of international tribunals.

C. International Tribunal Rules of Procedure and Evidence

In addition to international human rights treaties and resolutions providing for entitlement to counsel, international tribunals have adopted rules of procedure or evidence providing for entitlement to counsel and protecting the right to remain silent. Pertinent post-World War II tribunals include the Nuremburg Tribunal, the Tokyo Tribunal, and the Korean War Commission, and more recent tribunals include those created for war crimes committed in Yugoslavia, Rwanda, and Sierra Leone. The rules of the Nuremburg Tribunal are illustrative of the immediate post-war period tribunals.

The Nuremburg Tribunal was established to try major war criminals of the German Nazi regime. It was created by the London Charter, a treaty adopted at the close of World

War II.²⁶² The Nuremberg Tribunal adopted "uniform rules" providing for a statement to each defendant of his right to the assistance of counsel.²⁶³ The rules provided that "[e]ach defendant has the right to conduct his own defense or to have the assistance of counsel."²⁶⁴ The tribunal did not adopt any rules regarding the privilege against compulsory self-incrimination, consistent with its mandate to not be "bound by technical rules of evidence" and to "adopt and apply to the greatest possible extent expeditious and non-technical procedure" to "admit any evidence it deems to have probative value."²⁶⁵

The rules for the Yugoslavian war crimes tribunal are illustrative of the recently-created tribunals. The United Nations created the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in 1993 through a statute adopted by the Security Council.²⁶⁶ The ICTY statute provided basic protections for the rights of the accused, including the right to a fair and public hearing, the right to counsel, and the privilege against compelled self-

²⁶² Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter].

²⁶³ Nuremberg R. Proc. 2(a)

²⁶⁴ Nuremberg R. Proc. 2(d).

²⁶⁵ London Charter, *supra* note 262, art. 19. The Tokyo Tribunal adopted similar rules, and, in 1950, military commissions and rules for their procedure were established during the Korean War but never used to prosecute any cases. See General Headquarters United Nations Command, Tokyo, Japan, AG 000.5 (28 October 50) JA (Oct. 28, 1950), *reprinted in* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 724 (1996); Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command (rev. through Mar. 17, 1953), *excerpts reprinted in* PAUST, *supra*, at 725-32.

²⁶⁶ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159, 1169-1201 (1994) [hereinafter ICTY Statute]. A prior Security Council Resolution declared that an international tribunal would be established. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. P 1, U.N. Doc. S/RES/808 (1993).

incrimination.²⁶⁷ It also required the court to develop rules of procedure and evidence,²⁶⁸ which it did in 1994.²⁶⁹

The ICTY Rules provide that the "Prosecutor shall have the power to question suspects" and to "seek the assistance of the State authorities concerned."²⁷⁰ These provisions further state that, "[i]f questioned, the suspect shall be entitled to be assisted by counsel of his choice, including the right to have legal assistance assigned to him without payment by him in any case if he does not have sufficient means to pay for it."²⁷¹ ICTY Rule 42 provides comprehensive rights upon questioning. Prior to questioning, the Prosecutor is required to inform any suspect of the "right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it."²⁷² The Prosecutor must also inform the suspect of the right to remain silent, cautioning him that "any statement he makes shall be recorded and may be used in evidence."²⁷³ In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall

²⁶⁷ ICTY Statute, *supra* note 266, arts. 18(3) (counsel) & 21 (privilege against self-incrimination and right to a fair and public hearing).

²⁶⁸ *Id.* art. 15.

²⁶⁹ ICTY Rules of Procedure and Evidence, at <<http://www.un.org/icty/basic.htm>>

²⁷⁰ ICTY R. Proc. & Evid. 18(2).

²⁷¹ ICTY R. Proc. & Evid. 18(3).

²⁷² ICTY R. Proc. & Evid. 42(A)(i)

²⁷³ ICTY R. Proc. & Evid., 42(A)(iii).

thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel."²⁷⁴

At trial, the defendant has the right "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."²⁷⁵ He has the right "not to be compelled to testify against himself or to confess guilt."²⁷⁶ In cases not otherwise provided for, the tribunal must "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."²⁷⁷ Tribunals may "exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."²⁷⁸ In particular, with regard to evidence obtained by means contrary to internationally protected human rights, "[n]o 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."²⁷⁹

²⁷⁴ ICTY R. Proc. & Evid., 42(B). *See also* ICTY R. Proc. & Evid. 63(A) (questioning of an accused by the prosecutor).

²⁷⁵ ICTY Statute, *supra* note 266, art. 21(4)(d).

²⁷⁶ *Id.* art. 21(4)(a). *See also* ICCPR, *supra* note 163, art. 14(3)(g).

²⁷⁷ ICTY R. Proc. & Evid. 89(B).

²⁷⁸ ICTY R. Proc. & Evid. 89(D).

²⁷⁹ ICTY R. Proc. & Evid. 95. The rules for the Rwanda and Sierra Leone war crimes tribunal mirror those of the ICTY. *See, e.g.*, International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, at

Unique among the recently created tribunals is the International Criminal Court and its rules. The state members of the Rome Statute²⁸⁰ by vote established the Rules of Procedure and Evidence for the International Criminal Court in 2002.²⁸¹ The ICC Rules provide that "[w]hen the Prosecutor or national authorities question a person, due regard be given to article 55."²⁸² The rules require authorities to note when a person is informed of his or her rights under article 55. When a person is a suspect, any waiver of the right to be questioned in the presence of counsel must be recorded in writing and, if possible, audio- or video-recorded. Upon arrest by order of the court, the person concerned must be informed of the right to be assisted or represented by counsel of choice or by assigned counsel.²⁸³

International tribunal rules of procedure and evidence reflect the developing trend in favor of protecting the rights of the accused. Current rules of international tribunals provide for counsel at the initiation of interrogation, protect the privilege against self-incrimination,

<<http://www.ictr.org>>. The United Nations created the ("ICTR") in 1994 through a statute adopted by the Security Council that was similar to the Yugoslavian war crime statute. *See* Statute of the International Criminal Tribunal for the Prosecution of Person Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute]. An earlier Security Council Resolution recognized the extent of the genocide in Rwanda following a report of the Special Rapporteur of the United Nations Commission on Human Rights. *See* S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg., P 1, U.N. Doc. S/INF/50 (1994); Report of the Commission on Human Rights on Its Third Special Session, U.N. ESCOR, 3d Special Sess., 4th mtg., U.N. Doc. E/1994/24/Add. 2 (1994). The Special Court for Sierra Leone was established by an agreement between Sierra Leone and the United Nations as authorized by a Security Council Resolution. *See* S.C. Res. 1315, U.N. SCOR, 4186th Mtg., U.N. Doc. S/R (2000); Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915 (containing agreement establishing court and draft statute later approved as amended).

²⁸⁰ *See supra* text accompanying note 255.

²⁸¹ ICC Rules of Procedure and Evidence, at <<http://www.icc-cpi.int/php/show.php?id=rules>>.

²⁸² ICC R. Proc. & Evid. 111(2). *See supra* text accompanying notes 256 through 259.

²⁸³ ICC R. Proc. & Evid. 121(2)(a).

and prescribe rights warnings before questioning. By their express terms, the exclusionary rules are triggered by failure to advise of rights or to provide counsel but do not operate to forbid use of admissions and confessions unless there is substantial doubt as to the reliability of the evidence or serious doubt as to the integrity of the proceedings.

D. International Human Rights Decisions

Although tribunal rules reflect the developing norms, the most instructive and relevant demonstrations of the current state of international law arguably are the decisions handed down by human rights courts applying international conventions with provisions similar to those in the ICCPR, which has been ratified by the United States. Cases decided by the Inter-American Court of Human Rights²⁸⁴ and the European Court of Human Rights²⁸⁵ involve treaty provisions identical in many respects to those in treaties binding on the United States. Decisions of these two courts can be compared with a recent decision of the ICTY.²⁸⁶

1. *The Inter-American Court of Human Rights*

In the case of *Castillo Petruzzi*,²⁸⁷ The Inter-American Court of Human Rights applied the American Convention on Human Rights to the prosecution of Chilean civilians

²⁸⁴ See *infra* text accompanying notes 287 through 304.

²⁸⁵ See *infra* text accompanying notes 306 through 394.

²⁸⁶ See *infra* text accompanying notes 398 through 412.

²⁸⁷ *Castillo Petruzzi*, Inter-Am. Ct. Hum. Rts., ser. C, No. 52 (May 30, 1999), at <<http://www.corteidh.or.cr/seriecing/index.html>> [hereinafter *Petruzzi*].

before a Peruvian military tribunal. The civilians allegedly were members of the Tupac Amaru Revolutionary Movement (MRTA) and participated in terrorist activity in Peru. As the court observed, "Peru experienced a terrible social upheaval caused by terrorist violence"²⁸⁸ from 1980 to 1994, associated with the Sendero Luminoso (Shining Path) and MRTA. In Peru, the National Counter-Terrorism Bureau ("DINCOTE"²⁸⁹) had the mission of preventing, reporting and combating treason,²⁹⁰ which can apply to terrorist activity committed by aliens. Peruvian law permitted DINCOTE to hold suspects incommunicado for up to fifteen days, with a possible fifteen-day extension.²⁹¹ DINCOTE detained Petruzzi and other Chilean nationals in Lima during an anti-terrorism operation during a state of emergency in 1993.²⁹² The state of emergency permitted a military commander to keep order in declared areas and subject civilian suspects to trial by military tribunal.²⁹³

During investigations, suspects had no right to legal counsel until after making a statement.²⁹⁴ Thus, Petruzzi and the other detainees were assigned court-appointed attorneys only after making statements.²⁹⁵ Thereafter, the court-appointed counsel experienced

²⁸⁸ *Id.* para. 86.1

²⁸⁹ Direccion Nacional contra el Terrorismo.

²⁹⁰ *Id.* para. 86.2.

²⁹¹ *See id.* (citing Decree-Law 25,744, art. 1 & 2(a) (Sept. 21, 1992) (Peru), *reprinted in* GONZALO GOMEZ MENDOZA, CODIGO DE JUSTICIA MILITAR 577).

²⁹² *Id.* paras. 86.3, 86.4.

²⁹³ *Id.* para. 86.5 (citing CONST. PERU art. 231).

²⁹⁴ *Id.* para 86.6.

²⁹⁵ *Id.*

numerous difficulties and denials of access to DINCOTE and military bases where the suspects and evidence were held.²⁹⁶ After trial, the military tribunals found the suspects guilty of treason and sentenced each of them to life imprisonment.²⁹⁷

Upon review, the IACHR considered, *inter alia*, whether the accused were deprived of the right to counsel under Article 8(2)(d) of the American Convention on Human Rights.²⁹⁸ The court observed that "by virtue of the laws currently in effect in Peru, the victims were not allowed legal counsel between the time of their detention and the time they gave their statements to DINCOTE. Only then were they assigned court-appointed attorneys." ²⁹⁹ The court went on to observe that, even then, the attorney's role "was peripheral at best."³⁰⁰ Noting that it found violations of Article 8(2)(d) "in similar cases, where it was shown that defense attorneys had difficulty conferring in private with their clients,"³⁰¹ the court concluded that Peru had violated their right to counsel under the Convention.³⁰²

²⁹⁶ See *id.* paras. 86.11, 86.16, 86.20, 86.28-.30, 86.33, 86.35, 86.46, 86.48, 86.51.

²⁹⁷ *Id.* paras. 86.25, 86.36, 86.52.

²⁹⁸ *Id.* paras. 143-49.

²⁹⁹ *Id.* para. 146.

³⁰⁰ *Id.*

³⁰¹ *Id.* para. 148.

³⁰² *Id.* para. 149.

The court rejected Peru's argument that "exceptional criminal laws had to be enforced to cope with the irrational violence of terrorist organizations."³⁰³ The court stated as follows:

As this Court has pointed out, there can be no doubt that the State has the right and the duty to guarantee its own security. Nor is there any question that violations of the law occur in every society. But no matter how terrible certain actions may be and regardless of how guilty those in custody on suspicion of having committed certain crimes may be, the State does not have a license to exercise unbridled power or to use any means to achieve its ends, without regard for law or morals. The primacy of human rights is widely recognized. It is a primacy that the State can neither ignore nor abridge.³⁰⁴

The decision appears to base its right-to-counsel conclusion on the totality of the circumstances and not on the denial of access to counsel at any particular stage of the interrogations or proceedings. The denial of counsel during custodial interrogation clearly was a factor in the decision, but several other factors, including difficulties in conferring privately with the suspects throughout the proceedings, also appear to support the decision. Finally, the court's rejection of the state emergency justification for the abridgment of human rights demonstrates the level of scrutiny an international tribunal may give to a state party's reasons for derogating a protected human right.³⁰⁵

2. *The European Court of Human Rights*

³⁰³ *Id.* para. 203(a).

³⁰⁴ *Id.* para. 204.

³⁰⁵ *See supra* text accompanying notes 91 through 93.

Decisions under the European Convention on Human Rights also demonstrate a developing body of fundamental rights under international law. The European Court of Human Rights (ECHR) has decided several cases under the Convention relating to the right to counsel and the right to remain silent upon interrogation or detention.

*Imbrioscia v. Switzerland*³⁰⁶ is one of the first reported cases on the right to counsel under the European Convention. Although the ECHR ultimately held that the right to counsel had not been violated, the decision paved the way for later decisions defining the right to counsel at the interrogation stage.³⁰⁷

In seeking review of his conviction for drug smuggling, Imbrioscia claimed that he had been deprived of his right to a fair hearing on the basis of the failure to provide counsel during the initial investigatory stage.³⁰⁸ The ECHR rejected the government's argument that Article 6 has no application to pre-trial proceedings.³⁰⁹ The court recognized that the right to counsel under Article 6, section 3(c), of the European Convention is an element of the concept of a fair trial protected under Article 6, section 1.³¹⁰ That is, burdens on the right to

³⁰⁶ *Imbrioscia v. Switzerland*, 275 Eur. H.R. Rep. 4 (1993).

³⁰⁷ Swiss authorities detained Imbrioscia after they found drugs on a fellow traveler from Bangkok. *Id.* para. 8, at 7. The police interrogated him over the course of several days while the attorney he requested failed to meet with him, withdrew, and was replaced by another attorney who did appear to represent him in person during the final interview. *Id.* paras. 10-19, at 7-8. Under Swiss law at the time, the prosecuting authorities could refuse to allow a lawyer to be present during an initial interrogation of a suspect without giving reasons but thereafter could continue to exclude the lawyer only upon giving reasons, such as the likelihood that the purposes of the investigation would be jeopardized. *Id.* para. 27, at 10-11. The court noted that, after Imbrioscia's conviction and before review by the ECHR, these rules were changed to expand the right to counsel. *Id.* para. 28, at 11.

³⁰⁸ *Id.* para. 32, at 12 (citing the European Convention, *supra* note 218, art. 6, paras 1 & 3(c)).

³⁰⁹ *Id.* para. 36, at 13.

³¹⁰ *Id.* para. 37, at 13.

counsel could be countenanced if, considering the special features of the proceedings and the circumstances of the case, the entirety of the proceeding resulted in a fair trial.³¹¹ In reviewing the proceedings as a whole, a majority of the justices found no denial of a fair trial in violation of Article 6 based on the denial of access to counsel.³¹²

The right to counsel was later developed by the ECHR in the context of anti-terrorism provisions adopted by the United Kingdom. In the 1980s, the United Kingdom adopted several provisions to deal with domestic terrorism. Under a statutory rule of evidence, adverse inferences could be drawn from a suspect's failure to mention any fact upon questioning and later relied on in his defense.³¹³ In addition, adverse inferences could be drawn from a suspect's failure, after warning, to account for his presence at a place and time that a constable could reasonably believe was attributable to his participation in the commission of an offense.³¹⁴ With regard to counsel, a statutory emergency provision provided that a person who was detained under the terrorism provisions could be delayed access to counsel if a police superintendent had reasonable grounds to believe that providing counsel would interfere "with the gathering of information about the commission,

³¹¹ *Id.* para. 38, at 14.

³¹² *Id.* para. 44, at 15. Note that the court in part relied on the idea that the state was not responsible for the problems Imbrioscia had in retaining counsel who failed to visit him and later withdrew. *See id.* para. 41, at 14. Six justices found no denial of a fair trial, but three dissents addressed the indispensable nature of the assistance of counsel during the preliminary investigation. *Id.* at 16-18 (Pettiti, J., dissenting; De Meyer, J., dissenting; Lopes Rocha, J., dissenting). One dissent in particular relied on *Miranda v. Arizona*, 384 U.S. 436 (1966), as authority for the proposition that advisement and opportunity to request counsel "belong to the very essence of a fair trial." *Id.* at 19 (De Meyer, J., dissenting) (footnotes omitted).

³¹³ *Murray v. United Kingdom*, 1996-I Eur. H.R. Rep. 30, para. 27, at 40-41 (quoting Criminal Evidence (Northern Ireland) Ord. 1988, art. 3(1) & (2) (Eng.)).

³¹⁴ *Id.* para. 27, at 41-42 (quoting Criminal Evidence (Northern Ireland) Ord. 1988, art. 4(1) & (2) (Eng.)).

preparation or instigation of acts of terrorism" or, "by alerting any person, ... make it more difficult ... to prevent an act of terrorism, or ... to secure the apprehension, prosecution or conviction of any person in connection with the preparation or instigation of an act of terrorism"³¹⁵ The suspect had to be told the reason for the delay, the maximum delay being forty-eight hours.³¹⁶

In *Murray v. United Kingdom*, the ECHR found that the applicant was denied a fair trial based on the use of adverse inferences. During an initial interrogation without counsel, Murray had failed to account for his presence at the scene of the crime. The police had found Murray in the victim's home. The victim had been held against his will and forced to confess to being an informant against the Irish Republican Army (IRA). Police arrested Murray under the Prevention of Terrorism Act 1989 and cautioned him under Article 3 of the Criminal Evidence (Northern Ireland) Order 1988.³¹⁷ The caution advised him that he did not have to say anything but warned him that, under the 1988 Order, failure to mention any fact later relied upon in defense "may be treated in court as supporting any relevant evidence against you."³¹⁸ Murray told them he had nothing to say.³¹⁹ Taken to Castlereagh Police Office, he indicated he wished to consult with a lawyer.³²⁰ Pursuant to the Northern Ireland

³¹⁵ *Id.* para. 33, at 44 (quoting Northern Ireland (Emergency Provisions) Act 1987, § 15 (Eng.)).

³¹⁶ *Id.* para. 34, at 44.

³¹⁷ *Id.* para. 11, at 36.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* para. 12, at 36.

(Emergency Provisions) Act 1987, the police delayed his access to counsel for forty-eight hours.³²¹ At no time did Murray account for his presence in the house.

Charged with unlawful imprisonment and conspiracy to murder a person suspected of being an informant against the IRA and with the offense of belonging to the IRA, Murray submitted no evidence at trial, and his counsel argued that his presence in the house when the police arrived was innocent in that he had arrived only just before the police.³²² In finding Murray guilty of aiding and abetting false imprisonment, the trial judge stated that the effect of the 1988 order was to permit a judge "to draw such inferences against the accused from his failure to give evidence in his own defence common sense requires."³²³ The judge sentenced Murray to eight years imprisonment. After exhausting appeals in the national courts, Murray applied to the ECHR, complaining that he was deprived of the right to silence and the right not to incriminate himself under Article 6(1) and (2) of the Convention and the right to counsel under Article 6(1) in conjunction with Article 6(3)(c).³²⁴ He contended that the right to silence included two elements: "the right to remain silent in the face of police questioning

³²¹ *Id.* When the police informed him that his right of access to counsel had been delayed, Murray then requested consultation with a different lawyer. *Id.* para. 14, at 36-37. Over the next two days, police interrogated him twelve times for a total of over twenty-one hours. *Id.* para. 15, at 37. During the first ten sessions, Murray made no reply to questions. In the eleventh session, he stated: "I have been advised by my solicitor not to answer any of your questions." During the twelfth session, he said nothing. *Id.* para. 16, at 37.

³²² *Id.* para. 21, at 38.

³²³ *Id.* paras. 22-24, at 38-39.

³²⁴ *Id.* para. 40, at 46.

and not to have to testify against oneself at trial" and "that the exercise of the right by an accused would not be used as evidence against him in his trial."³²⁵

The ECHR considered whether the drawing of inferences against the applicant rendered the proceedings and the conviction unfair under Article 6 of the Convention.³²⁶ The court stated that "[a]lthough not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6."³²⁷ Such reasoning is analogous to a United States court holding that the right to silence and the privilege against self-incrimination lie at the heart of due process of law, and it constitutes substantial evidence that these rights are protected by customary international law.³²⁸

The ECHR refused to find that the right to silence is absolute and, consistent with *Imbrioscia's* "entirety of the proceedings" test, set out the following test:

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be

³²⁵ *Id.* para. 41, at 47.

³²⁶ *Id.* para. 44, at 48-49.

³²⁷ *Id.* para. 45, at 49.

³²⁸ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103(2)(a) (1987).

drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.³²⁹

After considering these matters, the court concluded that drawing adverse inferences based on Murray's unexplained presence in the house "was a matter of common sense and not unfair or unreasonable under the circumstances."³³⁰ Murray's complaint based on denial of counsel, however, remained for consideration.

The ECHR observed that Murray was denied counsel for forty-eight hours, during which time the police cautioned him on the effect of remaining silent without providing him access to counsel as he requested.³³¹ When finally given access to counsel, Murray's prior silence already had triggered the adverse inferences and set the conditions for even stronger adverse inferences in the event he then offered an explanation for his presence in the house.³³² Under these circumstances, the court found that "the decision to deny him access to a solicitor unfairly prejudiced the rights of the defence and rendered the proceedings against him unfair contrary to Article 6(1) and (3)(c) of the Convention."³³³ Relying on *Imbrioscia*, the court noted that the fairness of a trial can be seriously prejudiced by an initial failure to comply with the right to counsel.³³⁴ Because the 1988 Order created and imposed serious

³²⁹ *Id.* para. 47, at 49-50.

³³⁰ *Id.* para. 54, at 51.

³³¹ *Id.* para. 59, at 53.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* para. 62, at 54.

consequences to the decision of an accused to provide a statement or to remain silent at the initial stages of police interrogation, Article 6 required that the accused be provided counsel at the initial stages of interrogation.³³⁵

In *Magee v. United Kingdom*,³³⁶ the ECHR considered a case in which the applicant requested counsel but, unlike Murray, decided to talk with police interrogators after they delayed his access to counsel under the Emergency Provisions.³³⁷ Police arrested Magee under the Prevention of Terrorism Act in connection with an attempted bomb attack on military personnel and took him to Castlereagh police station.³³⁸ Magee claimed that he requested to see his lawyer immediately upon arrival; in any event, he requested counsel within a few hours when the police advised him that the 1988 order permitted adverse inferences based on failure to explain certain matters.³³⁹ Advised that access to counsel would be delayed and interviewed eight times over the next two days, Magee confessed and, during the last two sessions, signed a written confession to involvement in acts of terrorism.³⁴⁰ On the third day, the police allowed Magee to consult with counsel.³⁴¹

³³⁵ *Id.* para. 66, at 55.

³³⁶ *Magee v. United Kingdom*, 2000-VI Eur. H.R. Rep. 159.

³³⁷ *Id.* para. 8, at 164 (referring to Northern Ireland (Emergency Provisions) Act 1987, § 15 (Eng.)).

³³⁸ *Id.* Castlereagh police station is no longer in use. Authorities closed it following an inspection report concluding that the station was unfit for extended detention.

³³⁹ *Id.*

³⁴⁰ *Id.* paras. 9-11, at 164.

³⁴¹ *Id.* para. 12, at 164-65.

Charged with conspiracy to cause explosions, possession of explosives with intent, conspiracy to murder, and membership of the Irish Republican Army, Magee was tried and convicted based on his admissions during the interviews and, in particular, the written statement he signed.³⁴² No adverse inference from failure to explain matters was used at trial.³⁴³

On review by the ECHR, Magee alleged he had been denied a fair trial by reason of the denial of counsel during the police interrogation, in violation of Article 6, section 1, taken in conjunction with Article 6, section 3.³⁴⁴ Magee complained that the implications of deciding to remain silent or to give a statement could only be properly understood and assessed with the help of legal advice.³⁴⁵ Relying on *Murray*, he argued that he should have had access to his solicitor at the initial stages of interrogation. Because he was convicted almost entirely on the basis of his statement, Magee argued that, had he held his silence, the government would have had no case against him.³⁴⁶

³⁴² *Id.* paras. 14, 19-23, at 165-67.

³⁴³ *Id.* The trial judge cautioned Magee regarding inferences that could be drawn from his failure to give evidence, based on Article 4 of the 1988 Order, but drew not inferences in deciding the case. *Id.* para. 23, at 166-67, & para. 38, at 173.

³⁴⁴ *Id.* para. 32, at 171.

³⁴⁵ *Id.* para. 33, at 171-72.

³⁴⁶ *Id.* para. 34, at 172. He also submitted that consideration should be given to the conditions of the Castlereagh facility and the use of successive teams of police interrogators after a request for legal advice, all designed to break down the will of the individual to remain silent. *Id.* para. 35, at 172. The government attempted to distinguish *Murray* based on the idea that no adverse inferences were used, arguing that the trial was fair and that, since the right to counsel did not attach at the commencement of interrogation, the only choice presented after deciding to speak with the police was whether to tell the truth or not, a decision not requiring counsel. *Id.* para. 36, at 172-173. Compare *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (recognizing "that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with

The ECHR noted that, when the police cautioned Magee about failure to account for his whereabouts leading to adverse inferences at trial, they placed him in a dilemma at the beginning of the interrogation.³⁴⁷ The court concluded that, "[u]nder such conditions the concept of fairness requires the accused have the benefit of the assistance of a lawyer already at the initial stages of the police interrogation."³⁴⁸ The court recalled that, although Article 6 ensures a fair trial, it also applies to pre-trial proceedings if "the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions."³⁴⁹ Considering the conditions at Castlereagh designed to break an individual's will to remain silent, the court concluded that "the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators."³⁵⁰ The court found that the extended denial of access to a lawyer under circumstances where the defense was irretrievably prejudiced violated Article 6.³⁵¹

incriminating evidence from the speaker's own mouth."). Because the statement was accurate, reliable and voluntary, the government maintained that its use at trial did not deprive Magee of a fair hearing, and thus did not implicate the right to counsel in connection with the right to a fair hearing. *Magee*, 2000-VI Eur. H.R. Rep., para. 37, at 173.

³⁴⁷ *Magee*, 2000-VI Eur. H.R. Rep., para. 39, at 174.

³⁴⁸ *Id.* (referring to *Murray*, 1996-I Eur. H.R. Rep. 30).

³⁴⁹ *Id.* para. 41, at 174 (referring to *Imbrioscia*, 275 Eur. H.R. Rep. 4).

³⁵⁰ *Id.* para. 43, at 175.

³⁵¹ *Id.* para. 44, at 175.

In *Averill v. United Kingdom*,³⁵² the ECHR considered a Northern Ireland case in which four men wearing balaclava masks stole a car and used it ten minutes later when shooting to death the drivers of two other cars and injuring one of their passengers, all for no apparent reason other than terrorism.³⁵³ Thirty minutes later, police found the stolen car burning.³⁵⁴ About twenty-five minutes later, soldiers at an Army checkpoint eight miles away from the place where the stolen car was found stopped Averill along with two other men.³⁵⁵ Sergeant Ford, a soldier, questioned Averill, who stated that he had been helping the other men with sheep that day, had washed and had tea at their place, and was going to town for a drink. The soldiers did not advise Averill of any rights prior to questioning. They arrested Averill under the Prevention of Terrorism Act of 1989, took him to the barracks, and deferred his access to legal counsel under the Northern Ireland (Emergency Provisions) Act of 1991 for twenty-four hours, during which time police officers questioned him. The police advised Averill of his right to remain silent but also advised him that, at trial, adverse inferences could be drawn from his failure to account for certain facts.³⁵⁶

Charged with the murder of two persons and the attempted murder of a third, Averill was convicted based on forensic evidence (hair and fabric fibers) linking him to a balaclava and gloves recovered from the burning car, on the circumstances of his apprehension, and on

³⁵² *Averill v. United Kingdom*, 2000-VI Eur. H.R. Rep. 203.

³⁵³ *Id.* para. 9, at 210.

³⁵⁴ *Id.*

³⁵⁵ *Id.* para. 11, at 210.

³⁵⁶ *Id.* para. 13, at 210-11.

his failure to account for his evident links to the balaclava and gloves upon questioning.³⁵⁷

At trial, Averill had testified, along with the other two men, of his alibi, including an explanation about wearing the gloves and the balaclava while working the day before the shootings.³⁵⁸ He was convicted and lost on appeal and then applied to the ECHR for review.

The ECHR first considered whether Averill was denied a fair hearing under Article 6, Section 1, of the European Convention, based on the use of adverse inferences drawn from his failure during questioning to account for his evident links to the balaclava and gloves found in the car used in the shootings. Referencing its decision in *Murray*, the court noted that, although not absolute, "the right to silence, like the privilege against self-incrimination, lay at the heart of the notion of a fair procedure under Article 6" and requires caution before using an accused's silence against him.³⁵⁹ The court, applying the test from *Murray*,³⁶⁰ observed that, although it was not a crime to refuse to answer questions, the police warnings to Averill that his silence might lead to adverse inferences at trial created a "level of indirect compulsion."³⁶¹ Also, Averill's interrogation began and continued for twenty-four hours without legal counsel, weighing against the fairness of using adverse inferences at trial based on his silence.³⁶² On the other hand, Averill consulted with counsel every day thereafter

³⁵⁷ *Id.* para. 16-18, 21-27, at 211-214.

³⁵⁸ *Id.* paras. 19-20, at 212.

³⁵⁹ *Id.* para. 45, at 220 (quoting *Murray v. United Kingdom*, 1996-I Eur. H.R. Rep. 30, para. 47, at 49-50). See *supra* text accompanying note 329.

³⁶⁰ *Averill v. United Kingdom*, 2000-VI Eur. H.R. Rep. 203, para. 44, at 220.

³⁶¹ *Id.* para. 48, at 221.

³⁶² *Id.*

throughout the course of the police questioning.³⁶³ Upon considering the limited circumstances under which the national rules allowed adverse inferences to be drawn, the trial judge's reasons for relying on the inferences, and the weight of the evidence apart from the inferences, the court concluded that the decision to draw adverse inferences was only one element of the convictions and did not exceed the limits of fairness.³⁶⁴

The ECHR next considered whether denial of access to legal counsel for the first twenty-four hours of interrogation and the exclusion of counsel from subsequent police questioning violated the entitlement to counsel under the Convention and deprived Averill of a fair hearing.³⁶⁵ The court noted that the scheme permitting the use of adverse inferences from silence under certain circumstances is such that it is "of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation."³⁶⁶ The court observed that, under the 1998 Order, "an accused is confronted at the beginning of police interrogation with a fundamental dilemma relating to his defence."³⁶⁷ Because of this, "the concept of fairness enshrined in Article 6 requires that the accused have the benefit of the assistance of a lawyer already at the initial stages of police interrogation."³⁶⁸ The court concluded that, "[a]s a matter of fairness, access to a lawyer

³⁶³ The 1988 Emergency Order provisions permitted continued police questioning outside the presence of counsel.

³⁶⁴ *Id.* para. 51, at 222-23.

³⁶⁵ *Id.* para. 55, at 223-24.

³⁶⁶ *Id.* para. 59, at 224 (referring to *Murray*, 1996-I Eur. H.R. Rep. 30).

³⁶⁷ *Id.* para. 59, at 225.

³⁶⁸ *Id.*

should have been guaranteed to the applicant before his interrogation began."³⁶⁹ The denial of access to counsel during the first twenty-four hours of detention failed to comply with the right to counsel and the right to a fair hearing under the Convention.

Taken as a whole, the decision indicates that the right to counsel is commensurate with the legal risks faced by the suspect upon detention and questioning. Under the court's view, the national authorities were free to create a scheme where adverse inferences could be drawn from an accused's silence under limited circumstances, but the increased legal risks to the defense caused the right to counsel to attach upon the commencement of custodial interrogation. Where adverse inferences, conclusive presumptions, or rules preventing the use of certain defenses or proof are triggered at the interrogation stage, the right to counsel attached.

Contrasted with *Averill* is the case of *Dikme v. Turkey*,³⁷⁰ in which the court considered complaints of excessively long police custody and ill-treatment without being told of the suspected offenses and without counsel. *Dikme* possessed false identity papers when stopped and questioned by Turkish police office in Istanbul in February 1992.³⁷¹ The police

³⁶⁹ *Id.* para. 60, at 225.

³⁷⁰ *Dikme v. Turkey*, 2000-VIII Eur. H.R. Rep. 223.

³⁷¹ *Id.* para. 12, at 233.

took him to the anti-terrorism branch of their headquarters, denied him the assistance of counsel, interrogated him, and obtained statements.³⁷²

Indicted for violent attacks between 1990 and 1992 against a prosecutor, a retired general, and six police officers³⁷³ and facing the possibility of the death penalty, Dikme denied the charges and repudiated the statements as obtained by torture.³⁷⁴ He submitted that he "had to use false identity paper for fear of police reprisals on account of the criminal record of his sister, who had been killed during a clash with police."³⁷⁵ At trial, Dikme was convicted and sentenced him to death.³⁷⁶

In considering the claim that Dikme was not given a fair trial on the ground that he had been denied access to a lawyer during police custody, in breach of Article 6, sections 1 and 3(c) of the Convention, the ECHR observed as follows:

³⁷² The interrogation included extreme interrogation techniques. *Id.* paras. 12-15, at 233-35. On the sixteenth day of custody, the public prosecutor interviewed Dikme following a medical examination and brought him before a judge of the National Security Court. *Id.* paras. 17-18, at 235. At the hearing, Dikme retracted statements made to police, said they were signed under torture, and denied the accusations against him. *Id.* para. 18, at 234. The judge found substantial evidence that Dikme was a member of a terrorist group and was involved in violent acts carried out by it. *Id.* Dikme signed a statement at that time that he did not wish to inform anyone that he was being detained. *Id.* Upon being taken to prison, a medical examination confirmed numerous bruises and scabs, and the doctor ordered five days of convalescence. *Id.* para. 19, at 235-36. In June 1992, Dikme signed an authority for a lawyer to act on his behalf and obtained counsel. *Id.* para. 21, at 236.

³⁷³ The prosecutor later added charges for murders, armed assaults and robberies, bomb attacks, and assault and battery. *Id.* para. 24, at 237.

³⁷⁴ *Id.* paras. 22-23, at 236.

³⁷⁵ *Id.* para. 23, at 236-37.

³⁷⁶ *Id.* para. 25, at 237.

Article 6 applies even at the stage of a preliminary investigation by the police and that paragraph 3 is one element, amongst others, of the concept of a fair trial in criminal proceedings as set forth in paragraph 1 and may, for example, be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions.³⁷⁷

The court observed that Turkish law did not attach consequences to confessions obtained during police questioning but denied in court.³⁷⁸ Because Dikme's conviction had been set aside and set for re-trial by the Turkish courts, the European Court of Human Rights was unable to determine what use, if any, the trial judge would put the confessions and other statements made by Dikme to the police while in custody.³⁷⁹ The court concluded there was no violation of the Convention.³⁸⁰

Accordingly, the ECHR's analysis makes it clear that, under the Convention, being deprived of counsel at the initial stage of custodial police interrogation does not violate the Convention; the extraction of a confession without counsel does not violate the Convention either. It is the use of unadvised confessions at trial that links the denial of counsel to the right to a fair proceeding.³⁸¹

³⁷⁷ *Id.* para. 108, at 258 (referring to *Imbrioscia*, 275 Eur. H.R. Rep. 4, and *Murray*, 1996-I Eur. H.R. Rep. 30).

³⁷⁸ *Id.* para. 111, at 259.

³⁷⁹ *Id.*

³⁸⁰ *Id.* para. 112, at 259.

³⁸¹ A subsequent case further illustrates the limits to the right to counsel under the European Convention. *See Brennan v. United Kingdom*, 2001-X Eur. H.R. 211. In *Brennan v. United Kingdom*, the police arrested the applicant, delayed his requested access to counsel for twenty-four hours, informed his counsel of the deferral, and obtained incriminating statements from Brennan, in the absence of counsel, after the expiration of the

As in cases addressing the right to counsel, cases under the European Convention on the right to remain silent and the privilege against self-incrimination base their reasoning on the right to a fair trial.³⁸² The European Convention does not expressly protect the right to remain silent or the privilege against self-incrimination.³⁸³ Recognizing that these rights "are generally recognized international standards,"³⁸⁴ the ECHR incorporates them into the notion of a fair procedure under Article 6 of the European Convention.³⁸⁵ The court's rationale is based on "the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice" and the provision of a fair trial.³⁸⁶ The court's rationale also is tied to the presumption of innocence protected by the European Convention,³⁸⁷ which "presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused."³⁸⁸

twenty-four hour period. Because access to counsel was no longer being denied at that point, the court held that the use of incriminating statements obtained after the deferral period ended and before counsel's arrival did not violate the Convention. *Id.* paras. 44-48, at 228-230. After counsel arrived and consulted with Brennan, the police continued interrogations outside the presence of counsel. The court held that the use of confessions made during these interrogations also did not violate the Convention. The court was satisfied that the adversarial procedure at trial was capable of exposing any police misconduct and that the trial court properly inquired into and determined the reliability and fairness of the evidence. *Id.* paras. 51-55, at 231-32.

³⁸² See, e.g., *Heaney & McGuinness v. Ireland*, 2000-XII Eur. H.R. Rep. 419, para. 40, at 434; *Condron v. United Kingdom*, 2000-V Eur. H.R. Rep. 1, para 56, at 21; *Murray*, 1996-I Eur. H.R. Rep., para. 59, at 53.

³⁸³ *Heaney & McGuinness*, 2000-XII Eur. H.R. Rep., para. 40, at 434.

³⁸⁴ *Id.*

³⁸⁵ See *supra* text accompanying note 327.

³⁸⁶ *Id.*

³⁸⁷ See European Convention, *supra* note 218, art. 6(2).

³⁸⁸ *Heaney & McGuinness*, 2000-XII Eur. H.R. Rep., para. 40, at 434.

Recognizing as it did in *Murray* that the right to silence is not absolute, the court in *Quinn v. Ireland*³⁸⁹ held that an applicant's conviction under a statute penalizing his refusal to account for his whereabouts during the shooting of two police officers violated his right to silence. The statute applied during times of declared emergency and to terrorist acts against the state.³⁹⁰ In another case involving defendants who made statements (*Heaney & McGuinness v. Ireland*³⁹¹), the court held that the same statute imposed such a degree of compulsion that it "extinguishe[d] the very essence of the ... rights to silence and against self-incrimination guaranteed by ... the Convention."³⁹² In a recent case where the defendant testified at trial (*Condrón v. United Kingdom*³⁹³), the court held that a trial judge's instruction to a jury allowing it to draw adverse inferences from the defendant's silence during police interrogations also violated his right to silence under the Convention.³⁹⁴

Taken together, the cases indicate that the right to silence is not absolute. The right was not violated in *Murray*, where the defendant was found at the victim's home, gave no explanation at the time, and submitted through argument at trial that his presence was innocent.³⁹⁵ The statutory scheme permitted the trial judge to draw adverse inferences from the defendant's unexplained presence. Although not burdening the right to silence or the

³⁸⁹ *Quinn v. Ireland*, Eur. H.R. no. 36887/97, Mar. 21, 2001 (unreported).

³⁹⁰ *See id.* paras. 18-24 (describing The Offences Against the State Act 1939, §52 (Ire.)).

³⁹¹ 2000-XII Eur. H.R. Rep. 419.

³⁹² *Heaney & McGuinness*, 2000-XII Eur. H.R. Rep., paras. 47-59, at 436-39.

³⁹³ 2000-V Eur. H.R. Rep. 1.

³⁹⁴ *Condrón*, 2000-V Eur. H.R. Rep., para 55-68, at 21-26.

³⁹⁵ *See supra* text accompanying notes 313 through 327.

privilege against self-incrimination, the statutory scheme instead triggered the right to counsel during initial interrogation.³⁹⁶ In *Quinn* and in *Heaney & McGuiness*, a statute criminalizing failure to account for whereabouts created compulsion that extinguished the right to silence; in *Condrón* the trial judge burdened the right to silence by allowing the jury to draw adverse inferences from silence during police questioning.³⁹⁷

Taken together, the cases also indicate that the right to counsel is not absolute. The court has found a right to counsel at the initiation of interrogation only where domestic law attached irreversible adverse inferences or criminal penalties to the failure to explain one's whereabouts during the commission of a crime or to the failure to include matters later relied upon in the defense. Furthermore, the court found violations of the right to counsel and the right to remain silent only where the use of evidence obtained in violation of those rights burdened the right to a fair trial under the totality of the circumstances.

3. *The International Criminal Tribunal for the Former Yugoslavia*

The decisions of the Inter-American Court of Human Rights and the European Court Human Rights can be compared with a decision the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the case of *Prosecutor v. Delalic*,³⁹⁸ the court considered the admissibility of the statements obtained from the accused by Austrian police where he was

³⁹⁶ See *supra* text accompanying notes 329 through 335.

³⁹⁷ See *infra* text accompanying notes 389 through 394.

³⁹⁸ *Prosecutor v. Delalic*, Case No. IT-96-21-A (Trial Chamber, ICTY, Sept. 2, 1997) at <<http://www.un.org/icty/judgment.htm>>.

not offered or advised of his right to counsel or any other rights before questioning.³⁹⁹ The court also considered the admissibility of statements obtained by the Prosecutor following the Austrian police questioning.

The court turned to Article 18(3) of the ICTY Statute, under which "the suspect shall have right to counsel of his own choice, including provision of free legal assistance if he has no means to pay."⁴⁰⁰ The court observed that "[t]his right has been elaborated in Rule 42 and establishes a procedural pre-condition to be observed and satisfied during the questioning of the suspect."⁴⁰¹ Turning to the test for admissibility, the Prosecution submitted that Rule 42 governs only the admissibility of evidence obtained by Prosecution investigators and not by other authorities, arguing that Rule 95 is the appropriate standard for evidence obtained by Austrian authorities.⁴⁰² The court discerned no distinction or inconsistency between the two rules and the standards for admissibility of evidence.⁴⁰³ The court reasoned as follows:

³⁹⁹ Before discussing the specific rule to apply regarding admissibility of the statements obtained by Austrian police, the court determined what law it was required to apply. The court addressed whether it should apply national rules of evidence to statements obtained in compliance with national law but potentially at variance with international law or the rules of the court. *Id.* para. 34. The court concluded that it was not bound by national rules of evidence but was permitted to apply them and "any 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." *Id.* The court also observed that it ought to exclude evidence where the probative value of it is substantially outweighed by the need to ensure a fair trial. *Id.* para. 35. Finally, the court noted its obligation to exclude evidence obtained by means contrary to internationally protected human rights. *Id.* Accordingly, the court concluded that the admissibility of evidence obtained in compliance with national rules of evidence still must be determined according to international law and the rules of the court.

⁴⁰⁰ *Id.* para. 36.

⁴⁰¹ *Id.*

⁴⁰² *Id.* para. 43.

⁴⁰³ *Id.*

Rule 42 embodies the essential provisions of the right to a fair hearing as enshrined in Article 14(3) of the International Covenant on Civil and Political Rights and Article 6(3)(c) of the European Convention on Human Rights. These are the internationally accepted basic and fundamental rights accorded to the individual to enable the enjoyment of a right to a fair hearing during trial. It seems to us extremely difficult for a statement taken in violation of Rule 42 to fall within Rule 95 which protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial doubts on its reliability.⁴⁰⁴

The court opined "that the surest way to protect the integrity of the proceedings is to read both Rules 42 and 95 together."⁴⁰⁵ The court thus "read Rule 95 as a summary of the provisions in the Rules, which enable the exclusion of evidence antithetical to and damaging, and thereby protecting the integrity of the proceedings," regarding the rule as a residual exclusionary provision.⁴⁰⁶

Turning to the Austrian police interrogation, the court stated that "the litmus test of the right of the suspect is clearly laid down in Article 18 of the Statute as elaborated in Rule 42."⁴⁰⁷ Austrian law did not recognize a suspect's right to counsel during questioning.⁴⁰⁸ Its provisions actually precluded that right, providing that "you may not have legal Counsel present when you are questioned for a criminal offence."⁴⁰⁹ The court found that "[t]his is in direct contradiction to the provisions of Article 18 of the Statute and Rule 42 of the Rules of

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* para. 44.

⁴⁰⁶ *Id.* 44.

⁴⁰⁷ *Id.* para. 47.

⁴⁰⁸ *Id.* para. 50.

⁴⁰⁹ *Id.*

Procedure and Evidence which provide for Counsel prior to questioning."⁴¹⁰ Referring to the European Court of Human Rights' decision in *Imbrioscia v. Switzerland*, the ICTY observed that "Article 6(3)(C) [of the European Convention], which is equivalent to Article 18 of the Statute, applies to pre-trial proceedings."⁴¹¹ By recognizing the right to speak to a lawyer only after being questioned or upon transfer to a Court prison only if there is sufficient time remaining, the Austrian procedure fettered the right to counsel and was "so fundamentally different from the rights under the International Tribunal's Statute and Rules as to render the statements made under it inadmissible."⁴¹²

The *Delalic* case shows that compliance with national rules may not satisfy an international tribunal considering the admissibility of evidence under international law or its own rules. The case also highlights the difference between the ICTY Statute and Rules and the European Convention and ICCPR: the ICTY Statute and Rules expressly require rights warnings and advisement of counsel upon arrest or interrogation in all circumstances; the European Convention and ICCPR do not. Although the court in *Delalic* states that Rule 42 embodies the provisions of the European Convention and ICCPR, Rule 42 actually goes

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* para. 52. In considering the admissibility of statements obtained by Prosecution investigators, the court noted that the investigators advised the accused of his rights to counsel in accordance with the rules and that Delalic knowingly waived his right to counsel. The court rejected the defense argument that cultural differences faced by a Yugoslavian accused in Austria required the investigators to explain his rights more fully. The Court observed that "Rule 42 is an adaptation *mutatis mutandi* of Article 6(3) of the [European Convention] and Article 14(3) of the [ICCPR]." The court characterized these treaties as "supranational conventions based on the most elementary and fundamental provisions for the protection of individual human rights. The former Yugoslavia was a party to the ICCPR. It will, therefore, be anomalous to rely on cultural differences for their interpretation." *Id.* para. 60.

much farther by expressly requiring warnings and extending the right to counsel to all interrogations and arrests for crimes punishable under the ICTY Statute.

By contrast, the cases under the European Convention recognize the right to counsel at the initiation of interrogation only where the rights of the defense are irretrievably burdened by adverse inferences or criminal liability for failing to account for one's whereabouts during a crime or for omitting matters later relied upon in the defense. The European Convention cases also demonstrate that it is the use of such evidence at trial or unfairness in the proceedings under the totality of the circumstances that leads to a violation of the right to counsel or right to silence. The court in *Delalic* arguably did not fully consider its own Statute and Rules in this respect: after concluding that the Austrian interrogators did not comply with Rule 42, the court decided that the confession obtained was inadmissible without apparently considering whether the circumstances of the case cast substantial doubt on the reliability of the confession or whether its admission would seriously damage the integrity of the proceedings. The court essentially concluded that evidence obtained in connection with a violation of Rule 42 is *per se* evidence "obtained by methods which cast substantial doubt on its reliability" and which would, if admitted, "seriously damage the integrity of the proceedings."

V. Conclusions and Recommendations Regarding Entitlement to Counsel in Military Intelligence Interrogations

Using observations on the treaties binding on the United States and on other international law expressed in treaties, resolutions, and international tribunal rules and

decisions, several conclusions can be drawn. The right to counsel, at least at the initiation of criminal proceedings, is well established.⁴¹³ The right to remain silent at trial is equally respected.⁴¹⁴ The use of torture to obtain admissions or confessions is universally condemned,⁴¹⁵ and statements obtained by torture of the accused are inadmissible.⁴¹⁶ All instruments protect the right to a fair hearing or fair proceedings,⁴¹⁷ implicating due process concepts that may encompass rights currently not clearly defined under international law, including those that are the subject of developing international law.

Recent developments in international law reveal a discernable trend in favor of recognizing rights to counsel and silence upon detention or interrogation, along with rights advisements or warnings to give effect to those rights.⁴¹⁸ Recently developed exclusionary rules triggered by the failure to provide counsel or to give rights warnings prevent the use of admissions or confessions where they were obtained by methods casting substantial doubt upon the reliability of the evidence or where their use would seriously damage the integrity of the proceedings.⁴¹⁹ At the extreme end of the spectrum, the ICTY in *Delalic* treated evidence obtained without counsel or warnings as unreliable *per se* and damaging to the

⁴¹³ See *supra* text accompanying notes 145, 152, 175, 213, 226, 236, 243, 259, 263, & 267.

⁴¹⁴ See *supra* text accompanying notes 176, 214, 256, 267, & 276.

⁴¹⁵ See *supra* text accompanying notes 146, 153, 169, 183, 198, 209, 220, 234, 241, & 256.

⁴¹⁶ See *supra* text accompanying notes 189, 215, & 261.

⁴¹⁷ See, e.g., *supra* text accompanying notes 144, 151, 155, 173, 183, 201, 210, 224, 235, & 260.

⁴¹⁸ See *supra* text accompanying notes 245, 259, & 272.

⁴¹⁹ See *supra* text accompanying notes 261 & 279.

integrity of the proceedings.⁴²⁰ On the other hand, the European Court of Human Rights, in applying provisions similar to those in the ICCPR, considers the totality of the circumstances and determines whether use of statements obtained without counsel or warnings resulted in the denial of a fair trial.⁴²¹

No express provisions or decisions indicate that a right to counsel or warnings applies to military intelligence interrogations. Instead, the use of admissions and confessions obtained during military intelligence interrogations likely would be reviewed in any subsequent criminal proceedings, under existing international norms, for voluntariness, reliability, and impact on the integrity of the proceedings. The brightest line under international law is the inadmissibility of admissions and confessions obtained by torture.

Taken together, a body of customary international law⁴²² has developed a right to counsel at trial, a right to silence at trial, and a right to be free from official torture or coercion to compel a confession. At their core, these basic protections may constitute *jus cogens* or peremptory norms of international law.⁴²³ The strongest argument against that idea with regard to counsel and silence at trial is the recognition in Article 4(2) of the ICCPR that a state may "take measures derogating from their obligations [including respect for the right

⁴²⁰ See *supra* text accompanying notes 402 through 406.

⁴²¹ See *supra* text accompanying notes 306 through 394.

⁴²² See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) ("a general and consistent practice of states followed by them from a sense of legal obligations"). See also *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001).

⁴²³ See generally *Buell*, 274 F.3d at 373 (discussing point at which no derogation from a norm is permitted, in context of claim that death penalty violates peremptory norms of international law).

to counsel and the right to remain silent]... to the extent strictly required by the exigencies of the situation."⁴²⁴

Accordingly, the right to counsel and the privilege against compulsory self-incrimination appear to be *jus dispositivum* or obligatory under international law by reason of treaty provisions⁴²⁵ and customary international law, but not peremptory norms applying at all times. Concurrently, states are not free to disregard these rights without reason, and any departure from state practice or customary international law must be supported by legally sufficient reasons. Recalling that courts considering the threat of terrorism have found it, by itself, an insufficient reason to deprive an accused of the right to counsel or the right to remain silent, states facing such threats must accord terror suspects these rights.

Given that terror suspects retain certain rights at trial, including the right to counsel, the right to remain silent, and the right to a fair hearing (a concept that includes voluntariness as a basis for using any admissions or confessions of the accused), new developments in the handling of such suspects must account for these rights. As applied to the recent military intelligence interrogations of unlawful combatants and creation of military commissions, these rights require standards guiding those whose actions implicate those rights. Accordingly, the following standards for military intelligence interrogations and the use of admissions and confessions in military commissions are proposed.

⁴²⁴ ICCPR, *supra* note 163, art. 4(2) (rights not subject to derogation or suspension during times of emergency include the right to life and freedom from torture, slavery, imprisonment for mere breach of contract, ex post facto crimes and punishments, and loss of status as a person before the law).

⁴²⁵ See generally *Buell*, 274 F.3d at 371; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. f.

A. Standards for Advisement, Invocation, and Waiver of Counsel in Military Intelligence Interrogations

Under current United States and international law, military intelligence interrogators are not required to give *Miranda* warnings to terror suspects during military intelligence interrogations. On the other hand, giving rights warnings may be advisable. Where a military intelligence interrogation obtains an admission or confession, the use of the statement as evidence in any criminal proceeding likely will turn on the voluntary nature of the statement.⁴²⁶ The voluntary nature of the statement will depend, in part, on whether the suspect was advised of the right to counsel or to remain silent, requested counsel, or declined any offer to remain silent or to request counsel.⁴²⁷

When a detainee is suspected of violating United States or international law, military intelligence interrogators should advise terror suspects of the right to counsel and the right to remain silent. The reasons for doing so include ensuring the admissibility of confessions obtained during the interrogation, dispelling any aura of coercion, obtaining the cooperation of the suspect, and compliance with domestic and international law that may later be determined to have governed the interrogation. Consistent with both United States and international law, the suspect could be advised that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the

⁴²⁶ See *supra* text accompanying notes 65 through 76.

⁴²⁷ *Id.*

presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to questioning if he so desires.⁴²⁸

In the event of waiver, any issues related to voluntariness, right to counsel, or privilege against self-incrimination largely are resolved. Waiver occurs "when a reasonable officer would conclude, in light of all facts he or she knows or should know, that the suspect is aware of the opportunity to demand counsel but has voluntarily decided to forgo that opportunity and to submit to custodial interrogation alone."⁴²⁹ No higher standard for waiver is discernable under United States or international law, and a knowing, intelligent waiver of counsel or right to silence under this objective standard likely will resolve any issues of admissibility.

In the event that the suspect requests counsel or declines to respond to questioning, the interrogator should treat such conduct as an invocation of rights. An invocation consists of "any conduct that a reasonable person would conclude is more likely than not an expression of a present desire for counsel"⁴³⁰ or to remain silent. Because United States and international law currently does not expressly recognize the right to counsel or right to remain silent during military intelligence interrogations of terror suspects, the officer should inform the suspect that questioning will continue as a military intelligence interrogation.

⁴²⁸ Cf. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

⁴²⁹ Tomkovicz, *supra* note 2, at 1051.

⁴³⁰ *Id.*, at 1012.

Continued questioning as a military intelligence interrogation indicates that the purpose of session is not law enforcement or criminal investigation. Dishonor of a request for counsel or to remain silent indicates that the government considers that any information obtained will have a higher value as military intelligence than as evidence of a crime for later prosecution. The use of any admissions or confessions will then be a matter for later determination by any tribunal considering its admissibility, but issues relating to rights advisement, invocation, waiver, and voluntariness will be clearly defined.

Upon informing the suspect that questioning will continue as a military intelligence interrogation and proceeding with questioning, the interrogator should not revisit the issue of waiver or invocation in an attempt to get the suspect to revoke a request for counsel or to remain silent. Doing so would only raise issues regarding the voluntariness of the subsequent waiver, a proposition already suspicious in light of the earlier invocation. Instead, questioning should continue with a focus on getting the suspect to provide information of value as military intelligence without "any behavior that a reasonable officer should know would tend to influence a suspect to reconsider his or her invocation and forgo counsel"⁴³¹ or expressly revoke a claimed right to remain silent.

The suspect may, during the interrogation, raise the revocation issue and indicate, for example, that he or she no longer wants to talk to an attorney. Under such circumstances, "when a reasonable officer would conclude that there is a substantial chance that a suspect has decided to revoke an earlier claim, the officer should be permitted to clarify the suspect's

⁴³¹ *Id.*, at 1030.

intent."⁴³² Approached in this manner, any waiver likely will be given effect as a voluntary act and any admissions or confessions likely will be admissible in criminal proceedings.

The forgoing standards for rights advisement, invocation, and waiver of counsel in military intelligence interrogations recognize that the Global War on Terror, the advent of military commissions, and developments in international law since World War II have changed the nature of such interrogations when the person being questioned is a suspected terrorist. The information obtained from terror suspects in such interrogations likely will be evidence of a crime under United States or international law. By recognizing that questioning may continue even in the event of an invocation of rights, the standards avoid interfering with the collection of information valuable as military intelligence. Applying these standards in such interrogations will resolve significant and developing issues about the admissibility of admissions and confessions obtained during military questioning.

B. Proposals for a Military Commission Rule of Evidence on the Use of Admissions and Confessions

In assessing the admissibility and use of admissions and confessions obtained in military intelligence interrogations, military commissions should be guided by definite standards drawn from United States and international law. The standards for admissibility should be based on current United States and international law embodied in the Supreme Court's fundamental due process jurisprudence,⁴³³ Congress' stated standard for

⁴³² *Id.*, at 1034-35.

⁴³³ See *supra* text accompanying notes 65 through 71.

voluntariness,⁴³⁴ and the President's orders recognizing the binding effect of ratified human rights treaties on Article II actors.⁴³⁵ From these sources, several standards can be proposed.

First, a military commission rule of evidence should clearly state that no statement obtained from the accused by torture shall be admissible for any purpose. This standard is based on the exclusionary rule stated in the Convention on Torture⁴³⁶ and is consistent with treaty-based and customary international law⁴³⁷ and with United States law under Fifth, Eighth, and Fourteenth Amendments. As the brightest line that can be drawn in the context of military intelligence interrogations, this standard should not "go without saying" or be omitted from any rule applying to the use of admissions or confessions.

Second, the rule of evidence should allow the use of admissions and confessions made voluntarily. This standard should apply even where rights warnings or advisements were not given, where counsel was requested, or where a claimed right to silence was invoked. The focus on the voluntary nature of the statement is consistent with the current international law concepts of due process.⁴³⁸ The proposed rule gives due regard to the nature of military commissions and the status of terror suspects as unlawful combatants.⁴³⁹ It

⁴³⁴ See *supra* text accompanying notes 73 through 76.

⁴³⁵ See *supra* text accompanying notes 110 through 117

⁴³⁶ See *supra* text accompanying notes 183 through 189.

⁴³⁷ See *supra* text accompanying notes 415 and 416

⁴³⁸ See Cristian DeFrancia, Note, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1437-39 (2001)

⁴³⁹ See *supra* text accompanying notes 9 through 31.

recognizes the limited applicability of the right to counsel or privilege against self-incrimination in military intelligence interrogations prior to the initiation of criminal proceedings.

Third, the proposed rule, consistent with Congress' framework for determining voluntariness,⁴⁴⁰ requires the military commission to consider whether rights warnings were given or requests for counsel or silence were made. The rule will avoid any issues concerning the applicability of the Congressional standard to military commission proceedings. It recognizes that the totality of the circumstances surrounding the admission or confession is the relevant inquiry under international law, with a focus on the fairness of the proceedings as a whole.

Fourth, a military commission rule of evidence should include a residual exclusionary provision forbidding the use of admissions or confessions where obtained by methods that cast substantial doubt on the reliability of the evidence or where use would seriously damage the integrity of the proceedings.⁴⁴¹ The proposed rule would address circumstances where the statement is voluntary but unreliable or so wrongfully obtained that exclusion is required under concept of fundamental fairness. On the other hand, where evidence is admitted into evidence, the rule guides the presiding officer to make findings demonstrating the reliability of the evidence and protecting the integrity of the proceedings.

⁴⁴⁰ See *supra* text accompanying notes 73 through 76.

⁴⁴¹ See *supra* text accompanying note 419.

Finally, the proposed rule should state that no adverse inferences may be drawn from a request for counsel or from silence, including the omission of matters where a statement was made. This rule avoids burdening the right to counsel, the right to silence, or other rights of the defense at trial and avoids the evils addressed by the European Court of Human Rights in its decisions involving the statutory schemes in Ireland and the United Kingdom.⁴⁴²

The answer to the *Miranda* rights issue raised by Mr. Ashcroft's question⁴⁴³ is not as simple as it might seem at first glance and not as far-fetched as its context might suggest. At the heart of the matter is the fact that military operations -- and military intelligence interrogations -- now may focus largely on terrorist activity. Given the stakes in securing the convictions and incarceration of terror suspects, every advantage toward ensuring the validity of judgments against them is advisable. The proposals presented here will further the goals of certainty, legitimacy, and validity in handling admissions and confessions of terror suspects in military commission proceedings and help guide interrogators in an area of uncertainty.

⁴⁴² See *supra* text accompanying notes 313 through 394.

⁴⁴³ See *supra* text accompanying note 1.

Appendix A.

Military Commission Rule of Evidence ____: Admissions and Confessions

(a) Statements Obtained by Torture. No statement obtained by torture of the Accused, or any forced admission or confession, shall be admitted as evidence against the Accused.

(b) Voluntary Statements. Admissions and confessions shall be admissible in evidence if voluntarily given. Before such admission or confession is received in evidence, the Presiding Officer shall, out of the presence of the other members, determine any issue as to voluntariness. If the Presiding Officer determines that the admission or confession was voluntarily made, the members shall hear relevant evidence on the issue of voluntariness, giving such weight to the admission or confession as the members feel it deserves under all the circumstances.

(c) Factors in Determining Voluntary Nature of Statement. The Presiding Officer and members shall in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the admission or confession, including

- (1) the time elapsing between detention and initiation of proceedings against the Accused making the admission or confession, if it was made after detention and before initiation of proceedings;
- (2) whether such Accused knew the nature of the offense with which he was charged or of which he was suspected at the time of making the admission or confession;
- (3) whether or not such Accused was advised or knew that he was not required to make any statement and that any such statement could be used against him;
- (4) whether or not such Accused had been advised prior to questioning of his right to the assistance of counsel; and
- (5) whether or not such Accused was without the assistance of counsel when questioned and when giving such admission or confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration need not be conclusive on the issue of voluntariness of the admission or confession.

(d) Statements Unreliable or Prejudicial to Proceedings. Any admission or confession obtained by methods casting substantial doubt on the reliability of the evidence or which would, if admitted seriously damage the integrity of the proceedings, may be excluded.

(e) Prohibited Adverse Inferences. No inferences adverse to the Accused shall be drawn from any request for counsel or silence.