

United States of America

Submission to the  
United Nations Human Rights Council  
Universal Periodic Review

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## Summary

1. The United States is a party to the International Covenant on Civil and Political Rights (“ICCPR”). The ICCPR applies to the administration of justice through military courts. The United States relies extensively on courts-martial to maintain discipline and punish criminal conduct by its military personnel and certain civilians, but it has not domesticated the ICCPR and its military justice system is noncompliant on a host of critical issues. Although the UN Human Rights Committee (“the Committee”) and other human rights bodies and mechanisms have raised questions about aspects of the military commissions conducted at Guantanamo Bay, Cuba, including as recently as March of this year, CCPR/C/USA/CO/4, ¶ 21; CCPR/C/USA/CO/3/Rev.1, ¶¶ 5, 14, 20, the Committee has not focused on compliance issues arising from the United States’ far more numerous traditional courts-martial and non-judicial punishments.

2. The United States will be reviewed under the Universal Periodic Review (UPR) in April-May 2015, during the 20th session of the UPR Working Group. The UPR is concerned with, *inter alia*, “the extent to which States respect their obligations set out . . . in human rights treaties to which the State is party (human rights treaties ratified by the State concerned).” The UPR of the United States therefore provides a valuable opportunity to draw attention to United States noncompliance with its obligations under the ICCPR with respect to its military justice system. This submission identifies major compliance issues in that system and calls on reviewing States parties to make recommendations to the United States for remedial action.

## Governing International and Domestic Sources of Law

3. Because the ICCPR is non-self-executing and has not been directly incorporated through specific United States legislation, it is not enforceable *per se* by United States courts even though its provisions bind the United States as a matter of international law. Unfortunately, the United States is not a party to the First Optional Protocol to the ICCPR. Although United States constitutional law has helped to bring civilian criminal trials into better compliance with applicable human rights standards (death penalty jurisprudence being the notable exception), domestic law has proved insufficient to bring the military justice system into substantial compliance with those standards.

4. Relevant applicable sources of international human rights law include the ICCPR, the Committee’s General Comment (“GC”) 32, as well as its case law and Conclusions and Recommendations following the examination of periodic reports. Useful additional resources include the Draft Principles Governing the Administration of Justice Through Military Tribunals, E/CN.4/2006/58 (“Decaux”), and the related Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/68/285 (“Knaul”).

5. Domestic sources of law include the United States Constitution, the statutory Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq.* (“UCMJ”), and the *Manual for Courts-Martial, United States* (2012 ed., as amended in 2014) (an Executive Order promulgated by the President of the United States), regulations issued by the armed forces, and decisions of the federal courts, including the Supreme Court of the United States and the civilian United States Court of Appeals for the Armed Forces. Because the ICCPR applies not only to the federal government but to the 50 states, each of which maintains its own military forces, compliance issues may also implicate state constitutional, statutory, regulatory, and case law.

6. The United States military justice system’s noncompliance with contemporary international (as well as Canadian) norms was addressed by the Federal Court of Canada in *Tindungan v. Minister of Citizenship & Immig.*, 2013 FC 115, available at <http://www.canlii.org/en/ca/fct/doc/2013/2013fc115/2013fc115.html>, in connection with a United States soldier’s claim for asylum in Canada. Aspects of the United States system’s noncompliance with the ICCPR are currently before the Committee in *Rivera v. Canada*, Communication No. 2196/2012.

7. Although reform measures are under consideration in the United States Congress, none of them would bring the country’s military justice system into full compliance with the ICCPR.

### **Importance of United States Compliance with Respect to the Administration of Justice through Military Courts**

8. United States compliance with the ICCPR is important for several reasons. The country maintains a large standing military which it employs around the globe. Its military justice system affects hundreds of thousands of active, reserve and retired uniformed personnel as well as the thousands of civilian employees and contractors who serve with or accompany its forces in the field in war or contingency operations. In addition to the interests of persons who may be tried before it, the system also affects those civilians, foreign and domestic, who may be victims of crimes committed by military personnel. The administration of justice through military tribunals thus has both internal and external human rights implications.

9. The United States maintains an active program of assistance to other countries’ military justice systems through such activities as the Defense Institute of International Legal Studies. The United States military justice system therefore not only directly affects many individuals but also casts a long shadow over military justice worldwide. When such a country—which can and should be a role model—is non-compliant, it sends a profoundly undesirable message to other ICCPR States Parties as well as non-Parties.

### Scope of this Submission

10. This submission addresses only the system for courts-martial and non-judicial punishment within the armed forces. The military commissions that were revived after the 9/11 attacks present other important human rights issues that have been the object of close scholarly and judicial scrutiny for over a decade. *E.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). They do not comply with the ICCPR in important respects. See David J. R. Frakt, *Applying International Fair Trial Standards to the Military Commissions of Guantanamo*, 37 SO. ILL. U. L.J. 551 (2013); Jordan J. Paust, *Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit*, 45 CORNELL INT'L L.J. 367, 378-80 (2012); Concluding Observations of the Human Rights Committee: UN Doc. CCPR/C/USA/CO/4 (2014) § 21; Joint special procedures report on the Situation of Detainees at Guantanamo Bay, UN Doc. E/CN.4/2006/120 (2006).

11. As noted above, issues of compliance also arise in the administration of military justice by state (as opposed to federal) military forces in the United States. This submission does not attempt to evaluate compliance by those 50 additional systems, except to note that in some respects, such as subject matter and personal jurisdiction, some of those systems may be more defensible than the federal system addressed below.

### Major Compliance Issues

12. The following table notes major ICCPR compliance issues arising under the UCMJ with citations to the pertinent source(s) of law.

Issue	Domestic Law References	Human Rights References
Military retirees and other civilians are subject to trial by court-martial in the absence of “objective and serious reasons” and where regular civilian courts are available; there is no provision for civilians to serve on courts-martial	Arts. 2(a)(4)-(6), (10)-(12), UCMJ	GC 32 § III ¶¶ 22 & nn.36-37; Decaux ¶¶ 20-21; Knaul ¶¶ 102-04
Courts-martial are not limited to strictly military offenses, and can try persons accused of serious human rights	R.C.M. 203; <i>Solorio v. United States</i> , 483 U.S. 435 (1987)	Decaux ¶¶ 21, 29, 32-35; Knaul ¶¶ 98-100, 106

violations		
Summary courts-martial combine the functions of judge, jury, prosecutor and defense counsel in one person	Art. 20, UCMJ; R.C.M. 1301; <i>Middendorf v. Henry</i> , 425 U.S. 25 (1976)	ICCPR art. 14(1); GC 32 § III ¶¶ 18-21
Personnel may be ordered into correctional custody or confinement by non-judicial punishment imposed by commanders or one-officer summary courts-martial, both of which are noncompliant	Arts. 15, 20, UCMJ	GC 32 § III ¶¶ 15 & n.17, 18
Personnel who refuse non-judicial punishment or trial by summary court-martial are exposed to increased punishment	R.C.M. 1303; MCM Pt. V ¶ 3; <i>Middendorf v. Henry</i> , 425 U.S. 25 (1976)	
Commanders rather than independent prosecutors make charging decisions	Arts. 22-24, 30, 34, UCMJ	ICCPR art. 14(1); GC 32 § III ¶ 19 & n.31; Decaux ¶¶ 13, 45-46; Separate Statement of Eugene R. Fidell, U.S. Dep't of Defense, Defense Legal Policy Board, Report of the Subcomm. on Military Justice in Combat Zones 184-90 (May 30, 2013), <a href="http://www.law.yale.edu/documents/pdf/conference/defenselegalpolicyboard_report.pdf">http://www.law.yale.edu/documents/pdf/conference/defenselegalpolicyboard_report.pdf</a> ; Separate Statement of Elizabeth L. Hillman & Harvey Bryant, Report of the Response Systems to Adult Sexual Assault Crimes Panel 173-75 (June 27, 2014), <a href="http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/00_Report_Final_20140627.pdf">http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/00_Report_Final_20140627.pdf</a> ; Defense Advisory Committee on Women in the Services, U.S. Dep't of Defense, 2013 Report 5-24, <a href="http://dacowits.defense.gov/Portals/48/Documents/Reports/201">http://dacowits.defense.gov/Portals/48/Documents/Reports/201</a>

		<a href="#">3/Annual%20Report/2013_DAC_OWITS_Report_FINAL.pdf</a> ); Letter from Nat'l Women's Law Center to U.S. Senators (Nov. 12, 2013), <a href="http://www.nwlc.org/resource/letter-senate-support-military-justice-improvement-act">www.nwlc.org/resource/letter-senate-support-military-justice-improvement-act</a> ; Letter from Nat'l Women's Law Center to Dep't of Defense, Military Justice Review Group (June 26, 2014), <a href="http://www.nwlc.org/sites/default/files/pdfs/military_justice_review_ndc_20140626.pdf">http://www.nwlc.org/sites/default/files/pdfs/military_justice_review_ndc_20140626.pdf</a>
Commanders pick court-martial members (jurors)	Art. 35(d)(2), UCMJ	ICCPR art. 14(1); GC 32 § III ¶ 19 & n.31; Decaux ¶¶ 45-46; [1997] <i>Findlay v. United Kingdom</i> , 24 EHRR 221
Even after recent legislative changes, commanders can in some circumstances still overturn or modify court-martial results	Art. 60, UCMJ	ICCPR art. 14(1); GC 32 § III ¶ 19 & n.31; Decaux ¶¶ 45-46 & Principle No. 15(j)
Military judges lack the protection of fixed statutory terms of office; those in the Army and Coast Guard have renewable three-year terms by regulation only, with no assurance of renewal; those in the Air Force, Navy and Marine Corps lack any fixed term of office	Art. 26(c), UCMJ; <i>Weiss v. United States</i> , 510 U.S. 163 (1994); Army Regulation 27-10 ¶¶ 7-1, 12-13; U.S. Coast Guard Military Justice Manual ch. 6-E; Eugene R. Fidell, <i>Department of Unfinished Business: Military Judicial Terms of Office</i> , Global Military Justice Reform, Jan. 13, 2014, <a href="http://globalmjreform.blogspot.com/2014/01/department-of-unfinished-business.html">http://globalmjreform.blogspot.com/2014/01/department-of-unfinished-business.html</a>	ICCPR art. 14(1); GC 32 § III ¶ 19-20 & nn.30-32; Knaul ¶¶ 93-96; CCPR/C/79/Add.95 (¶ 14) (judges irremovable only after 10 years) (Algeria); CCPR/C/79/Add.100 (¶ 8) (election by popular vote, 6-year terms) (Armenia); CCPR/C/79/Add.67 (¶ 14); <i>cf. Incal v. Turkey</i> , Application No. 22678/93 (ECHR 9 June 1998) (¶ 68) (4-year terms with mere possibility of reappointment held not violate European Convention on Human Rights art. 6)

<p>Many courts-martial (including all summary courts-martial) are not subject to direct appellate review by a court of law</p>	<p>Arts. 64, 66-67, 69, UCMJ; R.C.M. 1306</p>	<p>ICCPR art. 14(5); GC 32 § VII ¶ 45</p>
<p>There is no guarantee of a “duly reasoned” written judgment in courts-martial trials or first-level court-martial appeals; most intermediate military appellate decisions are utterly summary; denials of discretionary review by the United States Court of Appeals for the Armed Forces do not state reasons</p>		<p>ICCPR art. 14(5); GC 32 § VII ¶ 49 &amp; n.104; <i>Henry v. Jamaica</i>, Communication No. 230/87 (¶ 8.4) (“accused has right to written judgements, duly reasoned, for all instances of appeal,” including levels of appellate review beyond the one level required by the ICCPR)</p>
<p>The prosecution has a right to appellate review by the highest court of the military justice system in any case, while the accused must show “good cause” to obtain review; this is a denial of equality of arms</p>	<p>Art. 67(a)(2), -(a)(3), UCMJ; Eugene R. Fidell <i>et al.</i>, <i>How “Robust” is Appellate Review of Courts-Martial?</i>, Balkinization, 8 May 2013, <a href="http://balkin.blogspot.com/2013/05/how-robust-is-appellate-review-of.html">http://balkin.blogspot.com/2013/05/how-robust-is-appellate-review-of.html</a></p>	<p>ICCPR art. 14(1); GC 32 § II ¶ 13 &amp; n.14; Knaul ¶ 109; <i>Dieter Wolf v. Panama</i>, Communication No. 1347/2005 (¶ 7.4)</p>
<p>The United States Court of Appeals for the Armed Forces, which is the sole civilian tribunal in the military justice system, is located for administrative purposes in the Department of Defense, is subject to a statutory political-balance requirement, and lacks power to review sentences for ap-</p>	<p>Arts. 67(c), 141, 142(b)(3), UCMJ; <i>e.g.</i>, <i>United States v. Winckelmann</i>, 73 M.J. 11 (C.A.A.F. 2013); <i>United States v. Ne-rad</i>, 69 M.J. 138, 142 (C.A.A.F. 2010)</p>	<p>ICCPR arts. 14(1), (5); GC 32 § VII ¶ 48 &amp; nn.100-01; Knaul ¶ 110; <i>Uclés v. Spain</i>, Communication No. 1364/05 (¶ 11.3); <i>cf. Saidova v. Tajikistan</i>, Communication No. 964/2001, CCPR/C/81/D/964/2001 (2004) (¶ 6.5)</p>

propriateness		
Because of jurisdictional thresholds and other statutory limitations, over 90% of courts-martial are ineligible for review by the Supreme Court of the United States, unlike other American criminal defendants, while the prosecution can always ensure that a case is eligible for Supreme Court review	Art. 67, 67a, UCMJ; 28 U.S.C. § 1259(3); Eugene R. Fidell <i>et al.</i> , <i>How "Robust" is Appellate Review of Courts-Martial?</i> , Balkinization, 8 May 2013, <i>supra</i>	ICCPR arts. 14(1), (5); GC 32 §§ II ¶ 13 & n.14, VII ¶ 45 & n.94; De-caux Principle No. 17; <i>cf. Kulikowski v. Poland</i> , Application No. 1835/03 (ECHR 19 Aug. 2009) (Mijović, J., concurring) ("Each and every individual should be granted the right to state his case before a last-instance jurisdiction if she or he considers that the law has been violated or misinterpreted by the lower courts")

13. The deficiencies identified in the above table offend a variety of ICCPR provisions. The most prevalent theme is that American courts-martial lack the structural arrangements needed to ensure independence and impartiality. Excessive jurisdictional claims, such as the prosecution of offenses that have no connection to military duties, occur regularly. A recent blatant example is the court-martial of a U.S. Marine Corps staff noncommissioned officer for the murder of a civilian woman in Honolulu, Hawaii. He was sentenced to imprisonment for life. Regrettably, contemporary American constitutional jurisprudence no longer finds anything improper in such prosecutions.

## Recommendations

### 14. Overall Recommendations

1. The United States should, in consultation with all relevant stakeholders, promptly formulate and implement a national action plan, with a concrete timeline and clear targets, to bring all aspects of its military justice system into compliance with the ICCPR.
2. The United States should become a party to the First Optional Protocol to the ICCPR.
3. When the United States ratified the ICCPR it included a declaration to the effect that the ICCPR would not be self-executing, in keeping with general principles of federal law. It should promptly enact legislation domesticating the ICCPR for both federal and state governments. It should promptly enact legislation and promulgate the regulatory changes needed to bring the military justice into full compliance.

## 15. Specific Recommendations

1. Non-judicial punishment powers exercised by military commanders should not include custodial sentences of any duration unless there is provision for prompt *de novo* review through a process that is ICCPR-compliant.
2. Where a soldier refuses non-judicial punishment or a summary court-martial and the authorities decide to convene a general or special court-martial, the maximum punishment should not exceed what was permissible as non-judicial punishment or at a summary court-martial.
3. Under no circumstances should civilians or retired military personnel be subject to trial by court-martial.
4. Court-martial subject matter jurisdiction should be confined to military offenses and should exclude serious human rights violations.
5. Summary courts-martial should be abolished.
6. All courts-martial should be subject to appeal as of right with respect to both guilt and sentence.
7. The prosecution and defense should have equal access to appellate review.
8. The political balance requirement for the United States Court of Appeals for the Armed Forces should be repealed.
9. All courts-martial should be eligible for discretionary review by the Supreme Court of the United States, on an equal footing with civilian criminal cases.
10. All military judges should have nonrenewable fixed terms of office of at least 10 years' duration.
11. The power to decide how charges should be disposed of should be transferred from commanders to civilian prosecutors or military prosecutors who are independent of the chain of command except for minor disciplinary offenses.
12. Court-martial members (jurors) should be selected by a court-martial administrator independent of the chain of command rather than by military commanders.
13. Commanders should have no power to set aside or modify the findings and sentence adjudged by a court-martial.