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COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS AND THE DEFENDANT’S RIGHT TO REVIEW CLASSIFIED EVIDENCE

*Australia, China, France, Germany, Greece, India, Iran, Israel, Japan, Lebanon, Mexico,
Portugal, Russian Federation, Spain, United Kingdom*

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COMPARATIVE ANALYSIS

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS AND THE
DEFENDANT'S RIGHT TO REVIEW CLASSIFIED EVIDENCE**

This report analyzes the legal approaches of different countries to the implementation of Common Article III of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949¹ (hereafter Common Article III), and to the right of defendants to review classified evidence. The attached individual country reports analyze the applicable law in Australia, China, France, Greece, Germany, India, Iran, Israel, Japan, Lebanon, Mexico, Portugal, Russia, Spain and the UK.

The countries referenced herein were selected for this study because they represent different legal and government systems, and have experienced different national and public security threats. The country reports were updated by Foreign Law Specialists of the Directorate of Legal Research, the Law Library of Congress, and reflect the evolution of the law in the respective countries since the report was originally issued in September 2006.

The reports are designed to provide information on the specific legal measures taken by the countries surveyed, not to evaluate whether these measures conform to the standards of international law. Many in the international community have expressed dissatisfaction regarding the measures taken by various countries as part of their counterterrorism policy. For example, a report recently issued by the non-governmental entity, Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, has found some of these measures to be inconsistent with established principles of international humanitarian law and human rights law.² Discussions regarding the scope, duration and extent of application of the measures referred to in this report will undoubtedly continue.

I. Implementation of Common Article III

Common Article III regulates the treatment of persons in the context of an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties...”³ The designation of an armed conflict as an inter-State (international) rather than intra-State conflict may be complicated at times.⁴ The distinction, however, may not impact the scope of the norms established by Common Article III, because these norms are considered minimal requirements, and potentially less than those required in an international armed conflict.

¹ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

² ASSESSING DAMAGE, URGING ACTION, REPORT OF THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS (International Commission of Jurists, Geneva, 2009).

³ Supra note 1.

⁴ YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 14 (2004).

Common Article III provides protections to persons who take no active part in the hostilities, either because they have laid down their arms, been detained, or have been placed “hors de combat” by sickness or injury (hereafter qualified persons). These protections are the minimum standards that the parties to the Convention are expected to apply to qualified persons. This includes protecting such persons’ lives and dignity, as well as their right not to be subjected to torture, cruel, humiliating and degrading treatment. Common Article III further prohibits subjecting qualified persons to sentences and executions “without previous judgment pronounced by a regularly constituted court,” while affording them “all the judicial guarantees which are recognized by civilized peoples.”⁵

The principles enumerated in Common Article III are basic principles that can be found in the constitutions of the countries surveyed, including the Russian Federation, Mexico, and in Israel’s Basic Law: Human Dignity and Liberty.

All of the surveyed countries have ratified the Geneva Conventions, including Common Article III. Many have also ratified additional relevant international treaties, including the Treaty of Rome of the International Criminal Court,⁶ as detailed in the attached country reports. This ratification is viewed by many as a further reinforcement of the commitment to the enforcement and protection of human rights and humanitarian obligations in time of war. In some countries, once ratified and published in the official gazette, treaties are viewed as self executing, and require no specific implementing legislation for domestic implementation.

Although special implementing regulation was not required following ratification of the Geneva Conventions in Germany, France, Greece and Mexico, these countries have passed additional legislation that ensures the implementation of Common Article III. Germany’s Code of International Criminal Law, enacted after it had ratified the Rome Statute of the International Criminal Court,⁷ specifically applies to conduct related to an international or non-international armed conflict and to offenses in violation of the requirements of Common Article III. Spain’s 1995 reform of the Criminal Code added a special subtitle on “Crimes Against Persons And Protected Property In Case Of Armed Conflict,” that specifically criminalizes violation of the protections of the Geneva Conventions. The provisions of the Criminal Code thus extended the obligation to civilians in addition to military personnel already bound in accordance with Spanish military law. Both France and Greece have incorporated Common Article III standards into their military legislation. Mexico’s various Codes and statutes specifically penalize violation of the requirements established in Article III.

Portugal has implemented Common Article III as part of a general implementation of the Statute of the International Criminal Court, and has criminalized any violation of international

⁵ *Id.*

⁶ Rome Statute of the International Criminal Court, July 17, 1998, 37 ILM 999.

⁷ *Id.*

humanitarian law, including that of Common Article III, in its Law No. 31 of July 22, 2004. General implementation is also found in the law of Australia, which has implemented all four Geneva Conventions into its domestic law via the Geneva Conventions Act 1957. In addition, Australia has substantially codified Common Article III in its Criminal Code Act 1995 and its Security Intelligence Organization Act 1979.

The United Kingdom views the incorporation of the European Convention on Human Rights as the statutory basis for the prohibition on the use of torture in interrogations. Under the Criminal Justice Act 1948, official acts conducted abroad would incur criminal liability just as if they were conducted in the United Kingdom. Violation of the prohibition on torture in interrogation by public officials therefore is punishable whether committed in or outside the United Kingdom.

The same rule applies also to actions of Israeli officials in and outside of Israel's jurisdictional borders. In a leading 1999 decision, Israel's Supreme Court prohibited the use of torture, inhumane treatment and degrading conduct in investigations, based on Israel's constitutional law, its international obligations and penal law that clearly prohibits oppression by public servants, blackmail with the use of force or by means of threats. In addition, Israeli law specifically provides for due process protections and humane treatment during detention. Special training in the Law of Armed Conflict and on lawful methods of conducting interrogations of soldiers, police and interrogators of terrorism are routinely conducted in Israel, as well as in France and the United Kingdom.

Although Lebanese and Russian Federation legislation do not include the exact wording of Common Article III, the principles which require the humane treatment of detainees are legally protected. The Lebanese Procedure Code specifically prohibits coercion in criminal investigations. The Russian Code of Criminal Procedure contains provisions that generally guarantee the Article's minimum requirements of treatment, including the right to face trial and the protection of a person's human dignity and the prohibition on torture. A recent amendment creating special trials for terrorism related cases and cases where classified information is admitted has not yet been signed because of strong public opposition.

No specific information regarding implementation of Common Article III was identified for China, Japan and Iran.

II. The Defendant's right to Review Classified Evidence

Most of the countries surveyed generally recognize the right of defendants to review all evidence that is admitted against them. Many countries also recognize the need to prevent disclosure of information that would be contrary to the public interest or compromise intelligence sources or techniques. The approaches taken by different countries in an effort to balance between these sometimes conflicting interests follows.

- **France**

Classified information may be disclosed to courts only with the permission of the relevant ministry. A commission was specifically created in 1998 to render opinions on the advisability of disclosure, following declassification requests filed in French courts. Although not legally binding, the commission's opinions are usually followed by the relevant ministers. If the information is declassified, it will become part of the record and both the court and the attorneys for the parties will have access to it; otherwise, neither the court nor the attorneys will see the information and it will not be part of the case.

- **Spain**

Classified information may be used as evidence in a criminal trial only if it is declassified by the *Consejo de Ministros* (Council of Ministers within the Presidency of the Government). However, the judge could have access to classified information just to identify and assess the need to produce it, while it remains classified.

- **Israel**

Israeli law requires evidence to be disclosed not only if it constitutes a basis for the indictment, but also if it is essential for the defendant's defense. A determination by an Israeli court that disclosure of the privileged evidence is essential for the defendant's defense outweighs any military consideration. The consideration of the weight of the evidence is based on a determination that the nature of the evidence in question is within the type of matters defined as privileged in the official certificate of privilege. This determination that disclosure will be essential to the defendant is based on a preliminary evaluation of the possible defenses, the extent of the potential contribution of the evidence to the defense, and a determination regarding the possibility of isolating the privileged information from the evidence and authorizing the disclosure of nonprivileged information. If, after this determination by the court, the government continues to insist that it will not disclose the evidence after being ordered to do so by the court, it must either dismiss the indictment or that part of the indictment that is based on the evidence in question.

- **India**

In criminal trials, even under the Official Secrets Act, 1923, the defendant must be supplied with all documents relied upon by the prosecution. Under Indian law, however, not supplying the documents does not render proceedings void unless it is shown that prejudice is caused to the accused.

- **Germany**

In criminal proceedings, the withholding of evidence from the defendant is subject to the fair trial guarantees of article 6 of the European Human Rights Convention. German courts interpret these guarantees to mean that the defendant must be given the right to review the evidence and to confront the witnesses. However, to a limited extent, unidentified witnesses and statements of undisclosed witnesses may be used as evidence. The admissibility of such evidence depends on the existence of sufficient corroborating evidence and on the court's careful weighing of the conflicting interests of the defendant's right to a fair trial with the state's interest in the continued use of the informant and his protection against vengeful acts by the defendant. This approach was confirmed in 2005 by the European Court of Human Rights that held that it had not violated article 6 because of the careful handling of the anonymous evidence by the German Court and the existence of other decisive evidence. According to the analysis provided in the Germany country report, "[t]his decision indicates that the European Court of Human Rights does not pronounce a particular standard for the admissibility of anonymous testimony but instead questions whether its admission makes the entire proceeding unfair."

- **Greece**

In Greek criminal and military procedure law, the defendant, or his counsel, has the right to view all the pertinent documents included in the file and to examine witnesses. Although there is no specific provision regarding classified or secret evidence, Greece amended its counterterrorism law in 2001 and 2004 to provide new investigative tools and powers to investigating authorities. It also added new provisions regarding the protection of witnesses that allow, under certain conditions, anonymous testimony, and the protection of evidence collected during authorized investigations.

- **United Kingdom**

Laws in the United Kingdom recognize two exceptions to the basic rule of recognizing the defendant's right to view all evidence against them. The first exception applies in the case of suspected terrorists subject to control orders, who face the prospect of a trial in which they, or their representative, may not personally view some of the evidence presented by the Crown. In such cases, Special Advocates (who have special security clearances) are appointed to act on behalf of the detainees. The second exception is based on the doctrine of public interest immunity, often covering state interests, the prevention, detection and investigation of crime, financial irregularity, children, and the judicial process. A determination on the merits and scope of public interest immunity is made by the courts. No specific rule exists as to whether the accused should have representation in such proceedings. Public interest immunity is frequently used in cases involving evidence obtained by the Security Service.

- **Australia**

Australian law permits the use of classified evidence in accordance with its National Security Information (Criminal and Civil Proceedings) Act 2004. This Act provides for the proceedings to be undertaken by the court in consideration of the risk of “prejudice to national security” by the disclosure and any “substantial adverse effect on the defendant’s right to a fair hearing.” In its consideration, the court must give the greatest weight to the risk to national security. Additional methods that have been used in Australian courts and tribunals include:

- the use of public interest immunity;
- admission of a statement admitting relevant facts proved or likely to be proven by the classified information;
- providing a witness statement that omits sensitive material (with the sensitive information omitted on the grounds of public interest immunity);
- protective orders against disclosure and sealing orders;
- confidentiality undertakings from lawyers and other persons who are exposed to classified information during the proceedings;
- holding proceedings in camera and suppressing publication of evidence to prevent the disclosure of specific persons’ identities; and,
- orders restricting access to documents containing classified information.

Secret evidence is also used in Australia in hearings regarding migration and refugee status or appeals regarding security clearances. While Australian law does not contain any legislative provision specifically allowing for redaction of documents containing classified information, redaction appears to be used as a matter of practice.

- **Mexico**

Mexico recognizes an exception to the rule recognizing the defendant’s right to view all incriminating evidence. Deviation is authorized in expressly detailed cases where the success of an investigation requires the suppression of certain acts and where deviation is not detrimental to the defense. Specific authorization for the suppression of the name and personal data of the accuser may apply in cases of organized crime. The suppression of additional data may be authorized due to reasons of national or public security, for the protection of the victims, witnesses and minors, when the revelation of protected legal data is at risk, or for other grounds authorized by court.

- **Russian Federation**

The laws of the Russian Federation recognize exceptions regarding information on government informants, undercover police officers and police assistants, as well as on tactics, organization, and the conduct of operative and search activities. Russian law requires that in the resolution of disputes related to or based on secret or classified information, all persons participating in the trial, including defense attorneys, must obtain a special clearance that would allow them to access this information. This requirement does not however, apply to the defendant. If secret information is discussed during the trial, proceedings must be conducted *in camera*, with the individuals involved being required to sign non-disclosure agreements.

- **Lebanon**

Lebanese legislation recognizes the defendant's right to review all incriminating evidence, and his attorney's right to view secret evidence before the commencement of military tribunals in the presence of the presiding judge or his designee. Lebanon has no law that prohibits a criminal defendant from reviewing classified or secret evidence used against him.

- **China**

China generally recognizes the right of defendants to review incriminating evidence based on the Supreme People's Court (SPC) evidentiary requirements. It is unclear, however, if this general right also extends to classified evidence.

- **Iran**

Iranian law makes no reference to the use of secret documents in either criminal or Revolutionary and Military courts trial.

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AUSTRALIA

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS
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Executive Summary

Australia has passed the Geneva Conventions into domestic law. In addition, "Common Article 3" has been substantially codified into Australian criminal law via the Criminal Code Act 1995 (Cth).

Under Australian law, it is possible to use evidence which is based upon national security classified information without revealing the classified information, either by following the procedures provided for within the National Security Information (Criminal and Civil Procedures) Act 2004 (Cth) or by falling within specific circumstances that permit the use of such evidence; for example, in relation to hearings on immigration appeals or criminal trials using undercover police-officers or informants.

I. Introduction

The Commonwealth of Australia ("Australia") is a federation with power divided between the Commonwealth (federal) government, the six states, and three self-governing territories governments (territories).¹ Unless a topic is reserved to the Commonwealth under Australia's Constitution,² the states and territories may legislate upon that topic. Any state or territory law, however, will be invalid to the extent that it is inconsistent with a Commonwealth law.³

While the Australian Constitution does not contain any explicit treaty-making authority, the authority to commit Australia to international obligations resides with the federal executive as part of its prerogative power.⁴ Power to make laws with respect to external relations rests with the Commonwealth;⁵ therefore via this power the Commonwealth may legislate to

¹ The states are: New South Wales (NSW), Victoria (Vic), Queensland (Qld), South Australia (SA), Western Australia (WA) and Tasmania (Tas). Self-governing territories are: Australian Capital Territory (ACT), Northern Territory (NT) and Norfolk Island (NI). Non-self governing territories are: Ashmore and Cartier Islands, Australian Antarctic Territory, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Jervis Bay Territory and Territory of Heard Island and McDonald Islands.

² Commonwealth of Australia Constitution Act 1900 (IMP) (Australian Constitution).

³ Australian Constitution § 109.

⁴ Australian Constitution § 61.

⁵ Australian Constitution § 51(xxix).

implement treaty obligations.⁶ Generally the obligations of treaties or other international agreements must be incorporated into domestic law to have effect within Australia; international obligations, however, are influential in the interpretation of legislation and the development of common law.⁷

II. Geneva I

The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (Geneva I), was ratified by Australia on December 14, 1958 and came into force on April 14, 1959.⁸ All four Geneva Conventions are in force in Australia's domestic law via the Geneva Conventions Act 1957 (Cth).

III. Access to Classified Evidence by Defendant's Counsel

General Position

Australia does not have uniform evidence laws or court procedure laws across its various jurisdictions.⁹ Therefore the Commonwealth, and each state and territory, may make laws regarding evidence and criminal or civil procedure.¹⁰

Australia has an adversarial court system under which the Crown prosecutes criminal offenses. In undertaking prosecutions, the Crown has an obligation to disclose all material in its case and any material that is adverse to the Crown's case or that might assist in the advancement of any defense.¹¹

⁶ *R v Burgess: Ex parte Henry* (1936) 55 CLR 608: T. BLACKSHIELD & G. WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY at 904 (4th ed. Australia, The Federation Press, 2006).

⁷ See Department of Foreign Affairs and Trade, Negotiating and Implementing Treaties - <http://www.dfat.gov.au/treaties/making/making3.html>, (last visited Jan. 29 2009). An international instrument may also influence an administrative decision maker in certain jurisdictions. See Administrative Decisions (Effect of International Instruments) Act 1995 (SA).

⁸ Within Australia, ratification occurs via the Governor-General in Council on the advice of the Minister responsible for foreign affairs.

⁹ There is, however, movement toward uniform evidence laws. See Evidence Amendment Bill 2008 (Cth); Australian Law Reform Commission, UNIFORM EVIDENCE LAWS, Report No. 102, Commonwealth of Australia, 2005 (tabled January 8, 2006). Also see: Australian Government, Attorney-General's Department website at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Evidence_LawReformCommissionReports (last visited January 29, 2009).

¹⁰ As Australia does not have a separate Commonwealth prison system, criminal trials of Commonwealth offenses may be conducted by a state or territory court and sentences served in a state or territory facility, because the Australian Constitution § 120, and section 68(1) of the Judiciary Act 1903 (Cth) states that (as far as they are applicable) laws of a state or territory apply to the arrest, custody, trial and appeal procedures of persons charged with Commonwealth offenses.

¹¹ Commonwealth Director of Public Prosecution, STATEMENT ON PROSECUTION DISCLOSURE, www.cdpp.gov.au/prosecutions/disclosure/ (last visited January 29, 2009).

All accused persons have a right to a “fair trial”.¹² Rather than absolute rights, a “fair trial” is considered to encompass key principles that may be qualified. These principles include:

- a right to a public hearing;
- the right to certain minimum procedural protections, such as being fully informed of the case against him or her;
- the right to “equality of arms” between the parties to the case; and,
- the right to a full statement of the reasons for any decision or judgment.¹³

Thus, a “fair trial” may require legal representation for those persons accused of serious crimes¹⁴ and a jury trial (when charged with a serious offense).¹⁵

The lack of a “fair trial” has been the basis for a “stay” of proceedings on a charge where the defendant was not, for security reasons, granted access to all material relevant to the charge.¹⁶

It is arguable that the inconsistency between the use of secret evidence (evidence that is not disclosed to the defendant) and the right to a fair trial make it unconstitutional for Australian courts to receive and rely on secret evidence, particularly in criminal proceedings.¹⁷ In considering this issue the Australian Law Reform Commission (ALRC) concluded that it is not unconstitutional for legislation to grant courts the discretion as to whether or not to receive secret evidence.¹⁸

Legislative Facilitation of Secret Evidence

Since 2005,¹⁹ the Commonwealth government has consolidated the process for dealing with confidential information in both federal criminal²⁰ and civil proceedings²¹ into the National

¹² *Jago v District Court of New South Wales* (1989) CLR 23.

¹³ Australian Law Reform Commission, *KEEPING SECRETS: THE PROTECTION OF CLASSIFIED AND SECURITY SENSITIVE INFORMATION*, Report no. 98 (2004), ¶ 7.7.

¹⁴ *Dietrich v the Queen* (1992) 177 CLR 292.

¹⁵ Australian Constitution § 80. This, however, does not prevent Parliament from passing a law requiring certain offenses to be tried summarily rather than on indictment. *See Kingswell v the Queen* (1985) 159 CLR 264 at 276–277 per Gibbs CJ, Wilson and Dawson JJ.

¹⁶ *R v Lappas* [2001] ACTSC 115.

¹⁷ While the Australian Constitution does not contain any reference to a “right to a fair trial,” case law has implied the protection of a right to a fair trial and a right to due process for Commonwealth offenses tried in courts established under Chapter III of the Australian Constitution (*i.e.* the High Court and other federal courts). For example, *see Re: Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 *per* Guadron J.

¹⁸ Australian Law Reform Commission, *supra* note 13, at ¶ 10.30.

¹⁹ The National Security Information (Criminal Proceedings) Act 2004 (Cth) was passed by Parliament in December 2004, although many of its provisions in relation to criminal proceedings commenced later (January

Security Information (Criminal and Civil Proceedings) Act 2004 (Cth). The purpose of this legislation is to prevent the disclosure of information “where disclosure is likely to prejudice national security, except to the extent that preventing disclosure would seriously interfere with the administration of justice.”²²

The National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) establishes a series of processes that allow the Commonwealth Attorney-General (Attorney-General) to identify and seek to prevent the disclosure of classified information.²³

At a pre-trial/proceeding conference both sides must indicate if they are likely to rely on classified information and, if so, whether they are able to reach an arrangement regarding the disclosure of that information.²⁴

The defendant, prosecutor, or party to a civil proceeding must notify (in the prescribed form) the court and the Attorney-General when they know or believe that:

- they will disclose information that relates or affects national security;
- they are relying on a witness whose information or presence discloses information that relates to or affects national security; or,
- they are relying on a witness whose response to questioning may disclose information that relates to or affects national security.²⁵

2005). Subsequently this Act was amended by the National Security Information Legislation Amendment Act 2005 (Cth), which extended the operation of the Act to specified civil proceedings (commenced in August 2005). In 2004 the Australian Law Reform Commission (ALRC) undertook to review procedures to protect classified information during investigations and proceedings.

¹⁹ Prior to the delivery of the ALRC’s final report (but subsequent to the publication of its background and discussion papers) the Commonwealth government introduced legislation to protect confidential information during criminal procedures. *See* Australian Law Reform Commission, *supra* note 13, at ¶¶ 11.4, 11.7 & 11.18. *See also* the early background paper, PROTECTION OF CLASSIFIED AND SECURITY SENSITIVE INFORMATION, July 2003, and discussion paper of the same title in 2004.

²⁰ Criminal proceedings means “proceedings for the prosecution, whether summarily or on indictment, of an offence or offences,” National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) § 13. A Federal Criminal Proceeding means a criminal proceeding in relation to an offence against federal law in a court exercising federal jurisdiction, or, a proceeding under the Extradition Act 1988 (Cth), National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) § 14.

²¹ Civil proceedings means “any proceedings in a court of the Commonwealth, a State or Territory, other than a criminal proceeding,” National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) § 15A.

²² *Id.*

²³ In relation to the application of National Security Information (Criminal and Civil Proceedings) Act 2004 §§ 21, 22, 24, 25 and 26 *see*: DPP (Cth) v Thomas (Ruling No 7) [2006] VSC 18.

²⁴ National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth). §§ 21, 38A.

²⁵ *Id.* §§ 24, 38D.

Once the above notification is made, the proceedings must be adjourned to allow the Attorney-General to consider the matter.²⁶

Where the matter involves a witness response, the court must adjourn to a closed hearing where the witnesses' response is given (in written form) to the prosecutor or Attorney-General (in civil proceedings) who must consider whether it affects national security and, if so, the court must notify the Attorney-General.²⁷

The Attorney-General may give notice that he or she does not intend to take any action, or may:

1. where the information is in a document, issue a non-disclosure certificate to each potential discloser and the court and attach a copy of the document with the information deleted by itself or with a summary of the information, or a statement of facts that the information proves or would be likely to prove. The potential discloser may not reveal the information but may reveal the amended document or attachments;²⁸
2. where the information is not in a document, issue a non-disclosure certificate to each potential discloser and the court and attach a written summary of the information or a statement of facts that the information proves or would be likely to prove. The potential discloser may not reveal the information but may reveal the attachments;²⁹
3. issue a non-disclosure certificate to each potential discloser stating that the information must not be disclosed (other than in permitted circumstances);³⁰ or
4. issue a witness exclusion certificate stating that a specified witness must not be called.³¹

The Attorney-General must also provide the court with a copy of the certificate, source document and any attachments.³² Disclosure of information or calling a witness prior to the Attorney-General granting a certificate, or in contravention of a certificate issued by the Attorney-General or court order is an offense.³³

²⁶ *Id.* §§ 24(4); 38D(5).

²⁷ *Id.* §§ 25; 38E.

²⁸ *Id.* §§ 26(2); 38F(2).

²⁹ *Id.* §§ 26(3); 38F(3).

³⁰ *Id.* §§ 26; 38F(2)(b)

³¹ *Id.* §§ 28; 38H.

³² *Id.* §§ 26(4); 38F(5).

³³ *Id.* Part 5.

Once the Attorney-General provides a certificate, the court must hold a hearing on the matter.³⁴ The court convenes a closed hearing,³⁵ and any legal representative, court official, defendant or party to a civil proceeding who does not have an appropriate security clearance may be removed from the hearing while classified information is disclosed or while the prosecutor provides information supporting the non-disclosure of the information or exclusion of a witness.³⁶ The defendant, his representative or a party to the civil proceeding must be given an opportunity to make submissions as to why the information should be disclosed or the witness called.³⁷

At the conclusion of the hearing the court may order that:³⁸

1. no person may disclose the information but may disclose: a copy of the document with the information deleted, a copy of the document with the information deleted but with a summary of the information attached, or a copy of the document with the information deleted and a statement of facts that the information would or would be likely to prove, attached;
2. not person may not disclose the information; or
3. a witness may or may not be called.

In making its decision, the court must consider both the risk of “prejudice to national security” by the disclosure and any “substantial adverse effect on the defendant’s right to a fair hearing,” but must give the greatest weight to the risk to national security.³⁹ The court must provide a statement of reasons for its decision, but prior to releasing the statement, it must be viewed by the prosecutor and Attorney-General (if intervened) who may request the court vary its statement to avoid prejudice to national security.⁴⁰

After receiving the court order, the prosecutor, defendant or party to the civil proceeding must (if requested) be granted an adjournment to decide whether or not to appeal the court order and the prosecutor must (if requested) be granted an adjournment to consider withdrawing the proceeding.⁴¹ The court order does not provide grounds for re-conducting any part of a trial or any pre-trial proceeding that has been conducted.⁴²

³⁴ *Id.* §§ 28(5), 38G, 38H(6).

³⁵ *Id.* §§ 29, 38I. This means that only the judges (or magistrate), court officials, defendant and defendant’s legal representative or parties to the proceedings and their legal representatives, prosecutor, legal representative of the Attorney-General and any witnesses allowed by the court may be present.

³⁶ *Id.* §§ 29(3), 38I(3). For exclusion of legal representative *see*: Regina v Khazaal [2006] NSWSC 1353.

³⁷ *Id.* §§ 29(4); 38I(4).

³⁸ *Id.* §§ 31, 38L.

³⁹ *Id.* §§31(7); 38M(7).

⁴⁰ *Id.* §§ 32, 38M.

⁴¹ *Id.* §§ 36, 38.

⁴² *Id.* § 35.

During either a criminal or civil proceeding the Attorney-General may notify (by written notice) a legal representative (or person assisting his legal representatives), or a party to civil proceedings that an issue regarding classified information is likely to arise. Any person so notified may apply for a security clearance to an appropriate level. An adjournment must be provided for this security clearance to be applied for and granted, or if not granted, for another legal representative to be found.⁴³

There are other methods, in addition to the procedures in the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), to prevent access to classified material by a defendant or his legal representative. The Australian Law Reform Commission has identified the following as being used in Australian courts and tribunals:⁴⁴

1. claim of public interest immunity which will prevent the admission of the classified information into evidence;⁴⁵
2. admission of a statement admitting relevant facts proved or likely to be proven by the classified information;⁴⁶
3. providing a witness statement that omits sensitive material (with the sensitive information omitted on the grounds of public interest immunity);⁴⁷
4. protective orders against disclosure and sealing orders;⁴⁸
5. confidentiality undertakings from lawyers and other persons who are exposed to classified information during the proceedings;⁴⁹

⁴³ *Id.* §§ 39, 39A.

⁴⁴ Australian Law Reform Commission, *supra* note 13.

⁴⁵ Evidence Act 1995 (Cth) § 130 and common law public interest immunity. Public interest immunity may be claimed by the Crown, any party to the proceedings or the court, and operates to exclude information from being adduced into evidence. The Evidence Act is applicable to the admission of evidence at a trial or a hearing, while common law is applicable to pre-trial, *e.g.*, discovery and interrogatories. It is presumed that disclosure of classified information would be contrary to the public interest. It is not, however, an unqualified interest, especially where the information is directly relevant to the defendant's case. *See* *Alister v R* (1983) 50 ALR 41. Legislative provisions requiring certain government information to be kept confidential and criminalizing the disclosure of certain information are currently being reviewed by the Australian Law Reform Commission. *See* ALRC, ISSUES PAPER 34: REVIEW OF SECRECY LAWS, Commonwealth of Australia, 2008, available at: <http://www.austlii.edu.au/au/other/alrc/publications/issues/34/> (last visited January 29, 2009).

⁴⁶ A party may adduce evidence of the contents of a document by adducing evidence of an admission made by another party to the proceeding. The use of such evidence may be limited. Evidence Act 1995 (Cth) § 48(1)(a).

⁴⁷ *See* Commonwealth Director of Public Prosecutions, *supra* note 11.

⁴⁸ For example, sealing orders can be made to protect the names of informants. *See* *Attorney-General v Kaddours & Turkmani* [2001] NSWCCA 456; For power to make orders preventing the publication of certain matters on grounds that it would adversely affect national security, *see*: *R v Bersinic* [2007] ACTSC 46 (6 July 2007).

⁴⁹ FEDERAL COURT RULES 1979 (Cth) Order 35, Rule 11.

6. holding proceedings *in camera* and suppressing publication of evidence to prevent the disclosure of specific persons' identities;⁵⁰ and
7. orders restricting access to documents containing classified information.⁵¹

The ALRC notes that while there is no legislative provision specifically allowing for redaction of documents containing classified information, redaction appears to be used as a matter of practice.⁵²

Several Australian tribunals may utilize “secret evidence” in hearings regarding migration and refugee status or appeals regarding security clearances. The Migration Act 1958 (Cth) permits the withholding of certain information as “non-disclosable information”⁵³ (information that may be against the public interest to disclose, would affect national security or would breach confidentiality) from an applicant in relation to a decision being reviewed by the Migration Review Tribunal,⁵⁴ Refugee Review Tribunal,⁵⁵ and the Administrative Appeal Tribunal (merit review of a refusal or cancellation of a visa on character grounds).⁵⁶ When conducting hearings regarding security assessments, the Security Appeals Division of the Administrative Appeal Tribunal may hear evidence that is not revealed to the applicant and may also refuse to disclose the identity of witnesses.⁵⁷

IV. Codification of Common Article 3

In addition to the Geneva Conventions Act 1957 (Cth), Common Article 3 is substantially codified in the Criminal Code Act 1995 (Cth), Chapter 8 “Offences Against Humanity and Related Offences,” subdivision F, “War Crimes That Are Serious Violations of Article 3 Common To The Geneva Convention And Are Committed In The Course Of An Armed Conflict that Is Not An International Armed Conflict.” This section covers the offenses of murder, mutilation, cruel treatment, torture, outrages upon personal dignity, the taking of hostages, and, sentencing or execution without due process.

⁵⁰ For example: Crimes Act 1914 (Cth) § 15XT(1); Administrative Appeals Tribunal Act 1975 (Cth) § 39A(11); Law Enforcement (Controlled Operations) Act 1997 (NSW) § 28; Law Enforcement and National Security (Assumed Identities) Act 1988 (NSW) §§ 14(1), (2). All of these laws operate to prevent the disclosure of the identity of persons involved in undercover operations or working in security organizations.

⁵¹ Court orders restricting access or suppression publication of information. Crimes Act 1914 (Cth) §§ 85B(1)(b) and (c); Criminal Code Act 1995 (Cth) §§ 93.2(b) & (c). *See: R v Benbrika & Ors (Ruling 1) [2007] VSC 141 (21 March 2007).*

⁵² Australian Law Reform Commission, *supra* note 13, ¶ 8.22.

⁵³ Migration Act 1958 (Cth) § 5.

⁵⁴ *Id.* § 359A.

⁵⁵ *Id.* § 424A.

⁵⁶ *Id.* § 500(6)(f).

⁵⁷ Administrative Appeals Tribunal Act 1975 (Cth) § 39A.

The “human rights” aspects of Article 3 are also found in the Australian Security Intelligence Organisation Act 1979 (Cth) § 34T, “Humane Treatment Of Person Specified In Warrant.” This section provides that any person held under a detention or question warrant must be “treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authority under the warrant or implementing or enforcing the direction.”

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CHINA

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS
AND THE DEFENDANT'S RIGHT TO REVIEW CLASSIFIED EVIDENCE**

According to Article 36 of the Criminal Procedure Law of the People's Republic of China (PRC), the defendant's counsel may consult, extract and duplicate the judicial documents and the technical verification materials pertaining to the case. If the counsel is not an attorney, he can only do so with permission of the People's Procuratorate.

According to Article 46 of the Criminal Procedure Law of the PRC, the defendant is to be convicted only with sufficient and reliable evidence. The defendant may not be convicted solely upon his confession. In accordance with Article 47 of the Criminal Procedure Law of the PRC, the testimony of a witness may be used as evidence to convict the defendant only after the witness is cross-examined in the courtroom by the public prosecutor and the victim, as well as by the defendant and his defense counsel, and after the testimonies of the witnesses on all sides have been heard and verified. There is no article in the Criminal Procedure Law or in any other related laws that specify whether or not a criminal defendant or a defendant's counsel may review classified evidence. It is however, worth noting that the Supreme People's Court of China (SPC) requires that all evidence be verified in the courtroom investigation in criminal cases, "including in court showing, identifying, cross-examination, etc;" otherwise, the evidence cannot be taken as the basis for a conviction. (SPC Interpretation on the Implementation of the Criminal Procedure Law (effective Sept. 8, 1998), Fa Shi [1998] No. 23, iSinoLaw Ref. ID. 120-10012940.)

The People's Republic of China ratified all four Geneva Conventions on December 28, 1956.¹ To date, Common Article 3 of the Geneva Convention has not been codified into Chinese law. No Chinese court decisions directly citing to the article could be located.

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¹ Geneva Conventions of 12 August 1949, "China", International Committee of the Red Cross, <http://www.icrc.org/ihl.nsf/NORM/7378C8CD1AA61813C1256402003F93D7> (last visited February 16, 2009). See also, Ministry of Foreign Affairs Department of Treaty and Law, ZHONGHUA RENMIN GONGHEGUO DUOBIAN TIAOYUE JI (I) [PEOPLE'S REPUBLIC OF CHINA MULTIPLE TREATIES, VOL. I], 529 (1987).

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FRANCE

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS
AND THE DEFENDANT'S RIGHT TO REVIEW CLASSIFIED EVIDENCE**

Classified information may be disclosed to French courts only if the relevant ministry agrees to declassify them. A Commission was specifically created in 1998 to render opinions on the advisability of disclosure, following declassification requests filed by French courts.

Opinions of the Commission are not binding but they are published in France's official gazette, which makes it more difficult for a minister not to agree to a disclosure recommendation. If the information is declassified, it will become part of the record and both the court and the attorneys for the parties will have access to it; otherwise, neither the court nor the attorneys will see the information and it will not be part of the case.

National legislation requires that French Armed Forces comply with all obligations resulting from international law that are applicable to armed conflicts, including the four Geneva Conventions and its two additional protocols.

I. Access to Classified Information by Criminal Defendants

Classified information may be disclosed to French courts only if the relevant authority has agreed to its declassification. If the information is not declassified, neither the court nor the attorneys will see the information and it will not be part of the case. The court, which needs access to such information during the preparation for a case, must ask the competent minister to declassify the information. In turn, this minister must call upon an independent administrative authority, the *Commission consultative nationale du secret de la défense nationale* (Consultative Commission on National Defense Secrecy) to review the documents and render an opinion on the advisability of the disclosure.

A. Creation and Composition of the Consultative Commission on National Defense Secrecy

The Commission was created in 1998 specifically to render opinions on declassification requests filed by French courts.¹ Any judicial or administrative court, or the military tribunal

¹ Law No. 98-567 of July 8, 1998, creating a Consultative Commission on National Defense Secrecy [Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 9, 1998, p. 10488, art. 1.

with jurisdiction over military personnel stationed abroad,² may ask for the declassification of information. In practice, investigating judges³ issue most requests. The law provides that “the commission is an independent administrative authority. It is charged to give an opinion regarding the declassification and the communication of information subjected to classification under article 413-9⁴ of the Penal Code. The opinion of the Commission is rendered following a request from a French court.”⁵ The Commission cannot answer requests from foreign courts.

The Commission is comprised of five members: a president, vice president, and one other member, all chosen by the President of the Republic from a list of six members from the *Conseil d’Etat* (France’s highest administrative authority), the *Cour de Cassation*, or the *Cour des comptes* (national audit court), that is compiled by the vice-president of the *Conseil d’Etat*, the First President of the *Cour de Cassation* and the First President of the *Cour des comptes*; a deputy of the National Assembly, appointed by the President of the National Assembly; and finally, one senator, appointed by the President of the Senate. Members are appointed for six-year, non-renewable terms, with the exception of the deputy and the senator who are appointed for the term of the legislature.⁶

B. Procedure Before the Commission

The law provides that the court must ask for the declassification of the information from the administrative authority where it was first classified. The requester must establish the grounds for his request including names of the persons concerned, offenses, facts, and dates. This information is needed to guide the commission in finding all the classified documents needed to establish the truth.⁷ The administrative authority, usually a minister, must without delay consult the Commission. One of the more delicate tasks involved is ensuring that all information possibly covered by the court’s request is effectively communicated to the Commission. This fact explains why the President of the Commission has been given broad powers to investigate. He first must determine what materials to search and then where and how

² In 1982, based on the principle of equality before and under the law, France abolished the use of military tribunals in times of peace, except for offenses committed abroad by members of its Armed Forces. Instead, military justice is rendered under the supervision of the *Cour de Cassation* (France’s judicial Supreme Court). Offenses committed by military personnel are tried before the courts of general competence. See Ordinance 2006-637 of June 1, 2006, reforming the Code of Military Justice, J.O. June 2, 2006, p. 8266, arts. L. to L.3.

³ The investigation of serious criminal cases is entrusted to investigating judges. They aim to discover the objective truth, rather than the guilt of a particular suspect. To fulfill their task, they have very extensive powers. They carry “out in accordance with the law, all acts of investigation that they consider useful for the establishment of the truth.” CODE DE PROCÉDURE PÉNALE art. 81 (Dalloz 2009). The prosecution and the attorneys for the suspect and the victim have liberal access to the file prepared by the investigating judge. See *id.* arts. 81, 114 & 197.

⁴ The protection of national defense secrets, as defined by articles 413-9 and subsequent provisions of the Penal Code, permits the government to safeguard the fundamental interests of the nation in the following domains: defense, internal security, economic activities, and France’s patrimony.

⁵ Law No. 98-567 of July 8, 1998, creating a Consultative Commission on National Defense Secrecy, J.O. July 9, 1998, p. 10488, art. 1.

⁶ *Id.* art. 2.

⁷ *Id.* art. 4.

to find them.⁸ In its report covering the years from 1998 to 2004, the Commission stated that its efforts were never hindered by the various administrative services concerned.⁹

The Commission must render an opinion on the advisability of the disclosure of the information within two months of receiving a request. To reach its recommendations, the Commission must balance the interests of justice, the defendants' rights, and the presumption of innocence, on the one hand, against the preservation of the country's defense capabilities, respect for France's international commitments, and the security of the personnel involved, on the other hand.¹⁰

The opinions are not binding but are published in the *Journal Officiel*. This publication gives some transparency to the process and makes it more difficult for the administrative authority not to follow a disclosure recommendation. Within two weeks, the administrative authority must communicate its decision to the requester, accompanied with the Commission's opinion.¹¹

C. Statistics

A review of the Official Gazettes shows that from 1999 until September 2006, the Commission rendered eighty opinions. In eighteen of these cases, the Commission recommended that none of the information be declassified. In the remaining cases, it recommended either full or partial declassification. It does not appear from the information listed in the opinions that any of the requests dealt with information concerning terrorists' activities. Many addressed the investigation of well-known political or financial scandals, while others dealt with military personnel stationed abroad (i.e., Ivory Coast, Rwanda, and Kosovo). According to the Commission's 1999-2004 report, the various ministers involved in the declassification process always followed its recommendations.

II. Common Article 3 of the Geneva Conventions

France ratified the four Geneva Conventions and their two additional protocols. Once published in the *Journal Officiel*, ratified treaties and international agreements immediately are enforceable. They have an "authority superior to that of laws, subject, in regard to each agreement or treaty, to its application by the other party."¹² No specific implementation legislation is needed for their application.

⁸ *Id.* arts. 5, 6.

⁹ Rapport de la *Commission consultative du secret de la defense nationale*, 1998-2004, 47 (Documentation Française 2005).

¹⁰ Regulation of the Ministry of Justice 2004-18G1/15-11-2004 of November 15, 2004, Bulletin Officiel du Ministère de la Justice, No. 96.

¹¹ Law 98-567 of July 8, 1998, creating a Consultative Commission on National Defense Secrecy, J.O. July 9, 1998, p. 10488, arts. 7, 8.

¹² 1958 CONSTITUTION art. 55, <http://www.legifrance.gouv.fr> File: La Constitution (last visited January 28, 2009).

France, however, passed additional legislation that ensures the implementation of Common Article 3 by its Armed Forces. Decree 2005-796 of July 15, 2005, on General Military Discipline¹³ provides that French Armed Forces must comply with “all obligations resulting from international law applicable to armed conflicts and, in particular, the laws and customs of war, including the four Geneva Conventions of August 12, 1949, and the two additional protocols adopted on June 8, 1977.”¹⁴

The Decree further states that French Armed Forces must show respect and treat with humanity all persons protected by applicable international conventions. It prohibits, among others actions, torture and humiliating and degrading treatment. Any captured enemy combatant receives prisoner-of-war status, and the Armed Forces “must respect the right to an equitable trial for the persons who are suspected of having committed criminal offenses.”¹⁵

French military personnel receive mandatory training in international law that is applicable to armed conflicts.¹⁶ All laws and regulations applicable to armed conflicts have been compiled and published in the official bulletin of the Defense Ministry. Since 1998, this publication is available in all military headquarters, units, and military schools. The Minister of Defense has used directives on several occasions to emphasize and reaffirm that French Armed Forces should know this body of law.¹⁷

III. Concluding Remarks

Classified information cannot be used before French courts. It first has to be declassified by the relevant authorities. Once declassified, it is accessible to the courts and the attorneys for the parties. In addition to ratifying the four Geneva Conventions and its two protocols, which became enforceable upon their publication in the official gazette, France passed national legislation that requires its Armed Forces to comply with Common Article 3.

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¹³ Decree 2005-796 of July 15, 2005, on General Military Discipline, J.O., July 17, 2005, p. 11719.

¹⁴ *Id.* art. 9.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Ministère de la Défense, Manuel de droit des conflits armés, http://www.defense.gouv.fr/sites/defense/enjeux_defense/defense_et_droit/droit_des_conflits_armes/manuel_de_droit_des_conflits_armes/ (last visited Jan.. 28, 2009).

Addendum – Access to Classified Information by Criminal Defendants

The 2005-2007 report prepared by the Consultative Commission on National Defense Secrecy shows that the number of declassification requests has steadily increased each year. They address, for example, classified documents relating to: the bombing of the French troops stationed in Bouake, Ivory Coast; the role of French troops in Rwanda; detainees from Guantanamo Bay who were sent back to France and are the subjects of a judicial investigation; and the possible sanitary consequences of the Gulf War. The Commission noted that the various ministers involved in the declassification process did not always follow the Commission's recommendations, as previously had been the case.

The Commission received several requests from ministries, requests which had originated from the Prosecutor's Office, and had to decide whether the Prosecutor's Office should be included under the definition of "French court." The Commission decided in favor of it.¹⁸

Finally, a review of the official gazettes shows that the Commission issued 128 opinions since its creation. Eighty percent of these opinions recommended either partial or full declassification.

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¹⁸ Rapport de la Commission Consultative du secret de la défense nationale 2005-2007, La documentation Française, <http://www.ladocumentationfrancaise.fr/rapports-publics/074000706/index.shtml> (last visited Jan. 28, 2009).

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GERMANY

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS AND THE DEFENDANT'S
RIGHT TO REVIEW CLASSIFIED EVIDENCE**

Executive Summary

Germany has no military courts and no military criminal provisions that could apply to international terrorists or individuals involved in hostilities in foreign countries. In Germany, such persons would be criminally liable on the basis of the generally applicable provisions of the Criminal Code and/or the German Code of International Criminal Law and they would be tried in ordinary criminal proceedings.

In German criminal proceedings, the withholding of evidence from the defendant is subject to the fair trial guarantees of article 6 of the European Human Rights Convention. German courts interpret these guarantees to the effect that the defendant must be given the right to review the evidence and to confront the witnesses. However, to a limited extent unidentified witnesses and statements of undisclosed witnesses can be used as evidence.

Germany has codified the content of Common Article 3 of the Geneva Conventions in its Code of International Criminal Law of 2002. This Code enacts German sanctions against violations of international humanitarian law and its section 8, paragraph 1 reiterates or paraphrases the wording of Common Article 3 without further interpretations. This is the only German codification of Article 3.

I. Secret Evidence in Criminal Proceedings

Germany does not have military courts¹ nor does it have military criminal provisions that could be applied to international terrorists or to persons tried in the context of international hostilities.² Germany tries international terrorists on the basis of the generally applicable

¹ The Allied Powers abolished the German military courts in 1946: Control Council Law No. 36, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY.

² The German Military Criminal Code deals primarily with breaches of discipline committed by German military personnel: Wehrstrafgesetz, repromulgated Mai 24, 1974, BUNDESGESETZBLATT [BGBl, official law gazette of the Federal Republic of Germany] I at 1213, as amended.

provisions of the German Criminal Code³ and if Germany had occasion to try someone involved in international hostilities, the German Criminal Code and possibly the German Code of International Criminal Law⁴ would establish criminal liability. All such proceedings are or would be carried out in the courts of ordinary jurisdiction in accordance with the Code of Criminal Procedure.⁵

German procedural law does not contain a specific prohibition of secret evidence. German criminal procedure is inquisitorial and the judge evaluates all the evidence according to its merit without specific evidentiary rules.⁶ Instead, the judgment must give a reasoned explanation of the fact-finding.⁷

The use of secret evidence in the trial is prohibited to a large extent by article 6 of the European Human Rights Convention [EHRC],⁸ which guarantees a fair proceeding to the criminal defendant and addresses secret evidence in its paragraph 3 letters (a) and (d) by giving the defendant the minimum right:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; and
- ...
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

A German case that demonstrates how the defendant must be given the benefit of the doubt if classified evidence cannot be disclosed is the Motassadeq case. Mounir al Motassadeq was an alleged co-conspirator of the September 11, 2001, attacks in the United States. A German court convicted him for being an accessory to 3,006 counts of murder, yet the German Supreme Court reversed and remanded, because the trial court could not obtain testimony from Ramzi Binalshib, a terrorist suspect in United States custody.⁹ The German Supreme Court held that the unavailability of the witness might have deprived the defendant of valid defenses. If evidence is withheld that might help the defendant then the defendant must be given the benefit of the doubt. On remand, Motassadeq was convicted of lesser offenses and his appeal against this latest conviction is still pending.¹⁰

³ Strafgesetzbuch [StGB], repromulgated Nov. 13, 1998, BGBl I at 3322, as amended. The Criminal Code sanctions participation in terrorist organizations [StGB §§ 129 a and 129 b]; all other terrorist offenses are tried as ordinary crimes.

⁴ See *infra* note 22.

⁵ Strafprozessordnung [StPO] repromulgated Apr. 7, 1987, BGBl I at 1074, as amended.

⁶ Strafprozessordnung, § 261.

⁷ C. Safferling, *Verdeckte Ermittler im Strafverfahren*, 26 NEUE ZEITSCHRIFT FÜR STRAFRECHT 75 (81) (2006).

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, EUROPEAN TREATY SERIES No. 5, in effect in Germany as amended by Protocols 1 – 11, and as repromulgated in BGBl 2002 II at 1054.

⁹ Bundesgerichtshof [BGH] decision, Mar. 4, 2004, docket no. 3 StR 218/03, available at JURIS, a subscription database.

¹⁰ E. Eusterhus et al., *Wie die Anschläge die Stadt verändert haben*, WELT AM SONNTAG (SEP. 10, 2006), LEXIS/library News/file Zeitng.

However, Germany does not deduce from article 6 of the Convention that the use of evidence from anonymous sources is totally banned. In established case law, Germany interprets article 6 to the effect that it is permissible for the court to respect the anonymity of a secret informant by using hearsay evidence through which a prosecution witness or even a written report relates what the anonymous witness had communicated.¹¹ Reliance on such anonymous evidence is permissible if there is enough corroborating evidence and if the court carefully weighs the conflicting interests of the defendant's right to a fair trial with the state's interest in the continued use of the informant and his protection against vengeful acts by the defendant. The court must discount the value of anonymous evidence according to its shortcomings but may consider it under these safeguards. The use of secret evidence beyond these limits is not permissible and would taint the proceeding for being a prohibited secret proceeding, in German parlance, an "*in camera* proceeding."¹²

A German Supreme Court decision of 2000 elucidates these principles in a case involving a terrorist who had been convicted of aiding and abetting an airplane hijacking in 1977.¹³ Among the evidence before the trial court had been protocols of testimony obtained from an anonymous witness in Lebanon and hearsay evidence about statements made by a secret agent who had shadowed the terrorist while she flew to Malta to hand weapons and money to the perpetrators of the subsequent hijacking. On appeal, the Supreme Court upheld the conviction because there had been enough corroborating evidence in the form of airline records, telephone records, recovered weapons, etc., and the limited reliance on the anonymous evidence had been explained carefully in the trial court's fact finding conclusions.

The Supreme Court distinguished this case from *van Mechelen vs. the Netherlands*, a case decided in 1997 by the European Court of Human Rights in which the Dutch conviction of organized criminals was found to be in violation of EHRC article 6(3) (d).¹⁴ In the *van Mechelen* case there had also been other evidence, but the only evidence on the identity of the perpetrators was testimony given before an investigative judge by police officers who remained anonymous. In 2005 the European Court of Human Rights agreed with the reasoning of the German Supreme Court decision of 2000 and found that the decision had not violated article 6 because of the careful handling of the anonymous evidence by the German Court and the existence of other decisive evidence.¹⁵ This decision indicates that the European Court of Human Rights does not pronounce a particular standard for the admissibility of anonymous testimony but instead questions whether its admission makes the entire proceeding unfair.

The German procedural rule for classified evidence is section 96 of the Code of Criminal Procedure. It provides that the Court must ask the government to declassify classified information that is needed for the trial. The agency in charge may deny such a request to protect

¹¹ Safferling *supra* note 7.

¹² L. MEYER-GOSSNER, STRAFPROZESSORDNUNG 301 (München, 2003).

¹³ BGH decision, Feb. 11, 2000, docket no. 3 StR 377/99, available at JURIS.

¹⁴ *Van Mechelen and Others v. the Netherlands*, European Court of Human Rights [ECHR], Apr. 23, 1997, EUROPEAN COURT OF HUMAN RIGHTS, REPORTS OF JUDGMENTS AND DECISIONS No. 36 (1997).

¹⁵ *Haas v. Germany*, ECHR Nov. 17, 2005, summarized in COUNCIL OF EUROPE, EUROPEAN COURT OF HUMAN RIGHTS, INFORMATION NOTE NO. 80 at 23 (2005).

the government against detrimental consequences. Ultimately, the courts have no recourse against the government's refusal to release evidence.¹⁶

Procedural provisions on the use of secret informants were enacted in 1992, in the course of a law reform aimed at combating organized crime.¹⁷ Although the validity of the testimony of secret informants is governed by ECHR article 6, as explained above, reliance on such testimony has been much discussed in Germany. Secret informants are considered necessary to combat organized crime and terrorism, and the manner in which their evidence can be used is continuously redefined in case law and literature.¹⁸

II. German Codification of Common Article 3

Germany ratified the four Geneva Red Cross Conventions of 1949 in 1954¹⁹ and it ratified the two Additional Protocols of 1977 in 1990.²⁰ By virtue of their ratification, these treaties have become applicable in Germany in the same manner as statutory law without the need for further implementing legislation.²¹ However, Germany reiterates some of the language contained in Common Article 3 in its Code of International Criminal Law (Code),²² and this is the only German codification of Article 3.

Germany enacted the Code in 2002 after it ratified the Rome Statute in 2000 and thereby became a member in the International Criminal Court.²³ In the Code, Germany codifies German criminal provisions on crimes of international law, provides procedural rules for trying them, and establishes German criminal jurisdiction over these offenses irrespective of their place of commission and of the nationality of the perpetrator.²⁴ On the basis of this legislation, Germany

¹⁶ Meyer-Gossner *supra* note 12.

¹⁷ Gesetz zur Bekämpfung des illegalen Rauschgifthandels, Jul. 17, 1992, BGBl I at 1302, introducing StPO §§ 110 a through 110 e.

¹⁸ Safferling *supra* note 7.

¹⁹ Gesetz, Aug. 21, 1954, BGBl II at 1550, ratifying Convention for the amelioration of the conditions of the wounded and sick in armed forces in the field, August 12, 1949, 6 UST 3114; TIAS 3362, UNTS 31, Convention for the amelioration of the conditions of the wounded, sick and shipwrecked members of armed forces at sea, Aug. 12, 1949, 6 UST 3217; TIAS 33 63; 75 UNTS 85, Conventions relative to the treatment of prisoners at war, Aug. 12, 1949, 6 UST 3316; TIAS 3364, 75 UNTS 135, and Convention relative to the protection of civilian persons in time of war, all ratified by Germany Dec. 11, 1990, BGBl II at 1550.

²⁰ Gesetz, Dec. 11, 1990, BGBl II 1990 1550, 1633, ratifying Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Conflict (Protocol I), June 8, 1977, and Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, both reprinted at 16 INTERNATIONAL LEGAL MATERIALS [ILM] 1391 (1977).

²¹ B. SCHMIDT-BLEIBTREU AND F. KLEIN, KOMMENTAR ZUM GRUNDGESETZ 923 (München, 1999).

²² Völkerstrafgesetzbuch [VStGB] Jun. 26, 2002, BGBl I at 2252.

²³ Rome Statute of the International Criminal Court, July 17, 1998, 37 ILM 999 (1998), ratified by Germany Dec. 4, 2000, BGBl II at 1393.

²⁴ The principle of universal jurisdiction is mitigated by giving the German prosecutor discretion to refrain from prosecuting if an offense has no contacts with Germany. StPO § 153 f, as introduced by Gesetz zur Einführung des Völkerstrafgesetzbuches, Jun. 26, 2002, BGBl I at 2252, art. 3.

is capable of trying perpetrators of international crimes domestically instead of handing them over to the Court.²⁵

The German Code follows the outline of the Rome Statute²⁶ in defining the offenses of international criminal law to which it applies and it breaks them down into the three categories of genocide, crimes against humanity, and war crimes. Of these, the provision on genocide was merely moved from the German Criminal Code to the new Code on International Criminal Law,²⁷ whereas the provisions on war crimes and crimes against humanity describe conduct banned by various international conventions.²⁸ The German wordings are similar yet not identical to the Rome Statute.

Section 8 of the German Code is entitled “War Crimes Against Individuals” and its paragraph 1 defines about 15 different offenses, some of which relate to Common Article 3 of the Geneva Conventions. Paragraph 1 of section 8 applies to conduct related to an international or non-international armed conflict²⁹ and its numerical list of war crimes includes the following acts perpetrated against persons to be protected according to humanitarian international law as war crimes:

- Killing (no. 1);
- Hostage-taking (no. 2);
- Torture or inhuman treatment through the infliction of physical or emotional harm or suffering, in particular torture or mutilation (no. 3);
- Sexual coercion, rape, enforced prostitution, enforced sterilization, imprisonment of a forcibly impregnated woman with the intent of influencing the ethnic composition of a population (no. 4);
- The passing of sentences and the carrying-out of executions of a significant severity, in particular the death penalty or a penalty of imprisonment, without previous judgment pronounced in the course of an impartial regularly constituted court proceeding that lives up to the due process guarantees required by international law (no. 7); and
- Humiliating and degrading treatment of a serious nature (no. 9).

Also related to Common Article 3 may be section 8(3)(1) of the Code, which prohibits unjustified detention of individuals after the cessation of hostilities.

These provisions are not further explained in the Code. The other portions of section 8, paragraph 1 deal with other violations of the Geneva Conventions, as do the remainder of section 8, and sections 9 through 12 of the Code. Altogether, these provisions are limited to reiterating or paraphrasing the Rome Statute and the Geneva Conventions.

²⁵ D. Klocke, *Das Deutsche Völkerstrafgesetzbuch*, <http://www.dias-online.org/218.0.html>.

²⁶ Rome Statute, *supra* note 23.

²⁷ VStGB, § 6, formerly StGB § 220 a.

²⁸ F. Neubacher, *Strafzwecke und Völkerstrafrecht*, 59 NEUE JURISTISCHE WOCHENSCHRIFT 966.

²⁹ Persons to be protected by humanitarian international law in an international or non-international conflict are “members of the armed services and combatants of the opposing party who have laid down their arms or are defenseless through other circumstances.” VStGB, § 8, ¶ 6, no. 3.

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Addendum

On September 11, 2006, the European Court of Human Rights issued a decision concerning a German judgment that was based on information by an undisclosed informer with whom the defendant could only communicate through written questions.³⁰ The Court held that the German proceeding had not violated article 6 of the European Human Rights Convention³¹ because the overall proceeding had been fair.

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³⁰ Sapunarescu v. Germany, judgment of Sept. 11, 2006, ECHR, No. 22007/3, HRRS 2006 No. 946, available at <http://www.hrr-strafrecht.de/hrr/egmr/03/22007-03.php> (last visited Feb. 10, 2009).

³¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, EUROPEAN TREATY SERIES No. 5, 213 U.N.T.S. 222, in effect in Germany as amended by Protocols 1 – 11, and as repromulgated in BUNDESGESETZBLATT 2002 II at 1054.

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GREECE

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS
AND THE DEFENDANT'S RIGHT TO REVIEW CLASSIFIED EVIDENCE**

Since 2001, Greece has allowed the testimony of anonymous witnesses to be assessed by the courts. During a hearing, the anonymous witness is called by an alias. The public prosecutor, the defendant, or the court, on its own motion, has the right to request that the identity of the witness be revealed. A conviction cannot be based only on anonymous testimony. Greece has ratified the 1949 Geneva Conventions, which upon ratification became part of the Greek legal order. The 1995 Greek Military Code has incorporated the language of Common Article 3.

I. Classified or Secret Evidence

The principle of “equality of arms” in human rights law requires that in criminal proceedings both parties, prosecution and defendant, are equal before the court and have equal access. This principle is enshrined *inter alia* in article 6 of the European Convention on Human Rights and Fundamental Freedoms¹ and article 14 of the International Covenant on Civil and Political Rights.² Greece has ratified both legal instruments, which upon their ratification form part of the Greek legal system and prevail over any other conflicting provision. The equality of arms principle also is enshrined broadly in article 4 of the Constitution, which guarantees equality of all persons before the law, and article 20, which provides for a fair hearing.

Pursuant to the Code of Greek Criminal Procedure, the general rule is that the defendant, or his counsel, has the right to view all the pertinent documents included in the file. The investigating judge is obliged to inform the defendant of reasons for the accusations and of the existence of any other document that is part of the file. The defendant, or his counsel, also has the right to ask, in writing, for a copy of all documents upon payment.³

Testimony from witnesses, as part of the evidence, is assessed by the courts. The provisions of the Code of Criminal Procedure on evidence include specific and detailed provisions regarding examination and testimony from witnesses. There is no specific provision

¹ The Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, entered into force Sept. 3, 1953, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>.

² International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

³ Kodikas Poinikes Dikononias [KPoi.D] [Code of Criminal Procedure] art. 101.

on classified or secret evidence. The Military Criminal Code does not contain specific provisions in regard to witnesses. However, it states that the provisions of the Code of Criminal Procedure apply accordingly to the procedure followed by military courts.⁴

International and domestic incidents of terrorism, as well as legal commitments arising from European Union (EU) legislation, gave the impetus to the Greek legislature in 2001 and in 2004 to amend its law on terrorism and to introduce new investigative tools and powers to investigating authorities. It also added new provisions on the protection of witnesses that allow, under certain conditions, anonymous testimony.

Thus, Law No. 2928/2001 on Amendments to the Criminal Code, Code of Criminal Procedure and Other Provisions for the Protection of Citizens from Organized Crime⁵ contains certain provisions which have a bearing on classified or secret evidence, such as those provisions on guarantees for the protection of witnesses and the provisions on evidence collected during the authorized investigations.

A. Testimony of Anonymous Witnesses

During criminal proceedings related to terrorist crimes and organized crime, a number of measures can be taken to protect witnesses from intimidation, threats, or possible acts of retaliation. Among those measures, the Law provides that the competent prosecutor may order critical information sufficient to identify a witness to be excluded from the written testimony or the witness to be identified under an alias.⁶

During the hearing, anonymous witnesses are called to testify under their given aliases. The prosecutor or the accused, however, has the right to request that the witness be identified. In such a case, the court is bound to order the disclosure.

Law 2928/2001 explicitly states that “only the testimony of an anonymous witness is not sufficient to convict the accused.”⁷

B. Investigating Files

Law 2928/2001 provides that every piece of information or evidence which was collected pursuant to the new investigative powers authorized by this Law is part of the investigative file and can be used only for the purposes determined by the competent judicial commission. These powers include infiltration of a terrorist group, recording criminal activities through technical means or cross-checking data of a personal nature. It is not clear as to whether evidence collected in such a manner will be made available to the defendant as well, because the Law is silent on this issue.

⁴ Stratiotikos Poinikos Kodikas [Str.P.K.] [Military Criminal Code] art. 213, para. 1.

⁵ Ephemēris tes Kyverneseos tes Hellenekes Demokratias [EKHD] [Gazette of the Hellenic Republic], Part A, No. 141 (2001).

⁶ *Id.*, Law 2928/2001 art. 9, para. 2.

⁷ *Id.* para. 4.

C. Court Decisions

No specific domestic court decisions⁸ dealing with secret or classified evidence could be found to ascertain the manner by which Greek judges use and assess such evidence.

A judge confronted with the issue of a defendant's right to access classified information will often examine how international courts and tribunals have dealt with similar issues. Because Greece is a member of the Council of Europe, and because the European Convention on Fundamental Rights and Freedoms is part of the Greek legal order, Greek judges often review and cite relevant judgments of the European Court of Human Rights in Strasbourg. Persons whose rights are violated, upon exhausting their domestic remedies, have the right to seek redress before the European Court of Human Rights.

Two judgments issued by the Strasbourg court are relevant to the issue at hand.

In the 1997 case of *Van Mechelen and Others v. the Netherlands*,⁹ the applicants were convicted of attempted murder and robbery, and their convictions were upheld by the Supreme Court of the Netherlands. The convictions essentially were based on evidence provided by police officers whose identities were kept confidential. The applicants alleged violations of article 6, paras. 1 and 3(d), of the European Convention on Human Rights and Fundamental Freedoms.¹⁰ The defense counsel argued before the European Court of Human Rights that police officers identified only by a number were anonymous witnesses. Thus, their testimony was not sufficient proof in the absence of corroborating evidence to secure a conviction. The Court stated that admissibility of evidence is mainly a matter of national law and that the domestic courts have the authority to assess the evidence before them. It also stated that evidence must be produced at a public hearing in the presence of the accused. There are exceptions to the rule; however, they should not violate the rights of the defendant. The Court, referring to a prior case, reiterated that,

[The] use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention.... However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the Court recognized

⁸ Based on materials available at the Library of Congress.

⁹ *Van Mechelen and Others v. The Netherlands*, Eur. Ct. H. R. (1997), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=mechelen%20%7C%20netherlands&sessionid=19420451&skin=hudoc-en> (last visited Feb. 19, 2009).

¹⁰ These articles state:

1. In the determination of ...any criminal charge against him, everyone is entitled to a fair and public hearing. Judgment shall be pronounced publicly.
2. Everyone charged with a criminal offence has the following minimum rights:
 - ... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

that in such cases, article 6 para. 1 and para. 3(d) require that the handicaps under which the defense labors be sufficiently counterbalanced by the procedures followed by the judicial authorities.¹¹

It also stated that “a conviction should not be based either solely or to a decisive extent on anonymous statements.”¹²

The Court held that the proceedings, taken in their entirety, were not fair. The reasoning was based on the above principles and that the testimony of police officers was taken at the exclusion of the defendants and their counsel, who were prevented from observing their demeanor under direct questioning.

The case of *Birutis and Others v. Lithuania*¹³ of March 28, 2002, deals also with convictions based on the testimony of anonymous witnesses. The applicants argued before the Strasbourg Court that they were deprived of a fair trial and that their defense rights were infringed because the conviction was based on anonymous evidence, without having the opportunity themselves, or through their counsel, to examine the witnesses. The court, upon reiterating the basic principles stated above, held that an applicant should not be prevented from testing anonymous witnesses’ reliability. In this case, the applicants were not able to question the anonymous witnesses. Nor did the court examine on its own motion the manner and the circumstances under which the anonymous testimony was taken. Therefore, the court found that there was a violation of article 6, paras. 1 and 3(d), of the Convention.¹⁴

II. Common Article 3 of the Geneva Conventions

Greece ratified the Geneva Conventions of 1949 by Law No. 348/1956. As stated above, pursuant to the Constitution, the Convention, upon its ratification, constitutes part of the domestic law of Greece and prevails over any law that is contrary to its provisions. Consequently, the Convention is part of the legal system of Greece and is invoked and applied by the courts.

Moreover, the Military Criminal Code,¹⁵ the scope of which extends only to military personnel, contains a chapter on crimes committed by the military against prisoners of war and noncombatants. The introductory report of the Code clearly indicates that the Code incorporated

¹¹ Van Mechelen and Others, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=mechelen%20%7C%20netherlands&sessionid=19420451&skin=hudoc-en>.

¹² *Id.*

¹³ *Birutis and Others v. Lithuania*, Eur. Ct. H. R. (2002), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=birutis%20%7C%20others&sessionid=19420175&skin=hudoc-en> (last visited Feb. 20, 2009).

¹⁴ *Id.*

¹⁵ Str.P.K., codified by Law 2287/1995, as amended.

the language of Common Article 3 of the Geneva Conventions.¹⁶ The following articles of the Code incorporate language of Common Article 3:

- Article 156 provides for punishment of at least three months in jail, to a military person who threatens, or commits acts of violence against a prisoner of war;
- Article 157 prohibits torture or other acts against human dignity, and provides for punishment of imprisonment of at least ten years;
- Article 158 provides for imprisonment of at least a year to a military person who prevents a prisoner of war from exercising his religious duties, or offends the religion of the prisoner;
- Article 159 provides for imprisonment of at least six months if a military person uses violence or threatens to use violence in order to extract information from the prisoner, which could be harmful to the interests of his country, or forces prisoners to participate in military exercises;
- Article 160 provides for imprisonment of at least a year for theft from a prisoner; and
- Article 161 provides for imprisonment of at least two years for violent acts against civilians without provocation, or for taking hostages.

The military criminal courts have jurisdiction over the military and prisoners of wars.¹⁷ Specifically, the military criminal court of the armed forces branch (ground, marine, or air) which is in charge of prisoners of war has jurisdiction. The military criminal courts, to a great extent, are composed of regular judges of the armed forces, whose personal and functional independence is guaranteed by the Constitution and the Military Criminal Code.¹⁸ The courts apply the Military Criminal Code as well as the regular Criminal Code, and their decisions must be well reasoned and substantiated.¹⁹

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¹⁶ See A. PAPAMADAKI, *MILITARY CRIMINAL CODE AND OTHER RELEVANT LAWS* 12 (2005).

¹⁷ Str.P.K. art. 193.

¹⁸ Syntagma of 1971 [The Constitution] art. 96, para. 5; Str.P.K. art. 167, para. 2.

¹⁹ Str.P.K. arts. 3, 67 para. 3.

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INDIA

COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS
AND THE DEFENDANT'S RIGHT TO REVIEW CLASSIFIED EVIDENCE

Executive Summary

In India, an accused is entitled to receive all documents relied on by the prosecution. Although India has ratified all four Geneva Conventions, it has not codified Common Article 3 specifically into its military or municipal laws, and so does not provide sanctions for the violation of Common Article 3.

I. The Defendant's Right to Documents

The Army Rules, 1954, framed under the Army Act No. 46 of 1950, obligate a court of inquiry that may be assembled concerning a prisoner of war to require that defendants will be entitled to receive copies of the relevant statements and documents contained in the proceedings.¹ Because the Evidence Act, 1872 governs rules of evidence in military trials, the provisions as to facts that are "relevant" are contained in that Act.² Thus, all facts that impinge on facts in issue are relevant.

In criminal trials, the accused must be supplied with all documents relied upon by the prosecution,³ especially when the defendant has demanded them. Not supplying the documents, unless prejudice is caused to the accused, does not render proceedings void.⁴ The accused, even under the Official Secrets Act, 1923, is entitled to copies of statements and documents.⁵

II. Codification

India is a signatory to the Convention Geneva I⁶ for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. As a signatory to the Convention, however, India has not specifically codified Common Article 3 into its military or municipal laws. The

¹ The Army Act, No. No. 46 of 1950, and Rules 181 and 184.

² The Evidence Act, No. 1 of 1872, §§ 5-16.

³ The Code of Criminal Procedure, 1973, No. 2 of 1974, §173.

⁴ Patel H.M. Malle Gowda v. The State of Mysore, 1973 CRIM. L. J. 1047.

⁵ Superintendent and Remembrancer of Legal Affairs, West Bengal v. Satyen Bhowmick, A.I.R. 1981 S.C. 917.

⁶ The International Committee of the Red Cross, Treaties and Documents by Country, India, <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c> (last visited Feb. 11, 2009). India ratified all four 1949 Geneva Conventions on Sept. 11, 1950, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited Feb. 11, 2009), but not the 1977 protocols.

reason for this may be that the provision does not obligate states to enact laws punishing its violation.

The primary obligation under Common Article 3 is to allow an impartial humanitarian body, such as the International Committee of the Red Cross (ICRC), to make access to its services available. India is also a signatory to the International Covenant on Civil and Political Rights.⁷ The latter expressly prohibits derogation from the right to life. Thus, even during an emergency, the Indian government could not order deprivation of life.

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⁷ P.C. Sinha, *India's Global Human Rights Obligations: A Status Report*. NEW DELHI, KANISHKA PUB., 2003, 2 parts, xx, 604 p., ISBN 81-7391-541-5, available at <http://www.vedamsbooks.com/no29225.htm> (last visited Feb. 11, 2009).

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IRAN

**COMMON ARTICLE THREE OF THE GENEVA CONVENTIONS
AND THE DEFENDANT'S RIGHT TO REVIEW CLASSIFIED EVIDENCE**

Iran is a signatory (December 8, 1949) to the Diplomatic Conference held at Geneva in 1949, for the purpose of revisiting the 1929 Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field. The full text of the Convention is printed in Persian as part of the COLLECTION OF THE COMPLETE LAWS AND REGULATIONS OF THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN (1985-86), compiled by Gholam Reza Hujjati Ashrafi, Tehran.

The entire 1280-page COLLECTION OF THE COMPLETE LAWS AND REGULATIONS listed above has been studied, as well as other criminal laws and procedure. There is no reference to the question of allowing a criminal defendant (or defendant's counsel) to review classified or secret evidence. According to article 66 of the Constitution of the Islamic Republic of Iran of 1979, however, "court decisions must be substantiated and supported by articles of law and the principles on the basis of which such judgments are made."

The Supreme Court in its decision of May 1983 (adopted in a general meeting, which has the force of law and has to be followed by the Supreme Court and other courts in similar cases), struck down a criminal court judgment that was found to be in defiance of article 66 of the Constitution.

Based on article 66 of the Constitution of the Islamic Republic of Iran and the decision of the Supreme Court, which are in conformity with the principles stated in the Geneva I Convention as ratified by Iran, it may be concluded that a judge in a criminal trial must ensure that, based on the principle of fairness, both the prosecution and the defense are given equal opportunity to review the evidence presented to the court, including classified or secret evidence.

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ISRAEL

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS
AND THE DEFENDANT'S RIGHT TO REVIEW CLASSIFIED EVIDENCE**

Executive Summary

The substance of the Common Article Three requirements has been incorporated into Israel's statutes and regulations and implemented by Israeli courts. A criminal defendant has a right to review, and the court will order, disclosure of any evidence essential to his defense.

I. Introduction

Israel is a signatory to the Geneva Conventions and other Conventions relevant to the humane treatment of persons. The principles established in Common Article Three are guaranteed by Israel's constitutional provisions, as well as by its domestic laws that provide for the right of due process and humane treatment. Israel's Supreme Court has implemented these principles in its judicial review.

A criminal defendant has a right to review, and the court will order, disclosure of any evidence essential to his defense. Evidence may not be disclosed to a defendant for reasons of national security, foreign relations or the public interest. The privileged status of evidence is subject to judicial review. Disclosure will be ordered if the need for disclosure of the evidence for the purpose of doing justice outweighs the interest in its non-disclosure. The Israel Supreme Court has established that in determining whether to disclose privileged evidence to the defendant, the court has to conclude that the evidence in question is essential to the defense. Once the court has so concluded, the State may disclose the evidence, or dismiss or amend the indictment. This rule applies to trials in both regular and military courts in Israel, in the West Bank, and Gaza.

II. Implementation of the Principles of Humane Treatment under the Geneva Convention

Israel ratified the Geneva Conventions of August 12, 1949 on July 6, 1951.¹ The principles of humane treatment established by Common Article Three of the Geneva Convention relative to the treatment of Prisoners of War has been recognized in Israel's domestic laws and implemented by Israeli courts. The following are some examples.

¹ Geneva Conventions of August 12, 1949, International Committee of the Red Cross, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P#res> (last visited Feb. 11, 2009).

- Humane Treatment in Interrogations

The prohibition against torture and other cruel, inhuman or degrading treatment or punishment is anchored in Israel's constitutional law. In accordance with Basic Law: Human Dignity and Liberty,² and with case law that had been developed by the Supreme Court prior to the enactment of the Basic Law, “[f]undamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free.”³

Israel's Penal Law⁴ prohibits torture by prohibiting “oppression by a public servant,”⁵ as well as “blackmail with use of force”⁶ and “blackmail by means of threats.”⁷ In addition, Israel signed the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the Convention) on October 22, 1986, and deposited its instrument of ratification with the Secretary-General of the United Nations on October 3, 1991.

In a leading 1999 decision, the Israel Supreme Court prohibited the use of torture, inhuman treatment and degrading conduct in investigations. The Court also rejected the State's claim that an authorization to use physical means in interrogations may be derived in specific cases by virtue of the criminal law defense of “necessity.”⁸ Following issuance of the decision, Israel's Security Agency (ISA, also known as the GSS, The General Security Service) issued a directive to all personnel, including all investigators, directing that “the decision of the Court should be strictly adhered to in all investigations conducted by the ISA.”⁹

The ISA currently requires its employees to attend courses, educational seminars and training programs on the subject. It disciplines and, in appropriate cases, dismisses from the agency, investigators who were found to have used physical pressure against a suspect during an investigation. Persons who are detained by the Israeli Police or by the ISA for purposes of investigation are entitled to file complaints concerning any alleged mistreatment during such investigations. All complaints are thoroughly investigated. If the investigation reveals evidence of a criminal offence, the case is transferred to the office of the District Attorney in the area

² See Basic Law: Human Dignity and Liberty (5752 – 1992), *as amended*, Knesset (Israel's Parliament) website, available at www.knesset.gov.il. The Basic Law is accorded a higher normative status than regular laws, see CA 6821/93 Bank Hamizrahi Hameuchad Ltd. et al v. Migdal Kfar shitufi, 49(4) Piske Din [Decisions of the Supreme Court, hereinafter PD] 221 (5755/56-1995).

³ *Id.*

⁴ Laws of the State of Israel (hereinafter LSI), Special Volume, Penal Law, 5737-1977, as amended.

⁵ *Id.* § 277.

⁶ *Id.* § 427.

⁷ *Id.* § 428.

⁸ HJC 5100/94 Public Committee Against Torture in Israel v. The State of Israel et. al. *Judgments of the Israel Supreme court: Fighting Terrorism Within the Law*, ISRAEL SUPREME COURT 43-44 (2004).

⁹ *Committee Against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention, Israel, U.N. Doc. CAT/C/54/Add.1 (2001)*, p. 7, University of Minnesota, Human Rights Library, available at <http://www1.umn.edu/humanrts/cat/israel2001.html>.

where the offense occurred for a final decision on whether to file an indictment. Disciplinary actions are possible as well.¹⁰

- Adjudication, Due Process and Humane Treatment in Detention

Prisoners of war are subject to the jurisdiction of military courts operating under the Military Justice Law, 5715-1955.¹¹ The Law provides that the passing of a sentence has to follow a judgment that is pronounced by a regularly constituted court that affords judicial guarantees, including defense, clearly established evidentiary rules, public reading of judgments, and the right to appeal.

Military Justice Regulations (Adjustment of the Law with the Geneva Convention Relative to the Treatment of Prisoners of War (hereafter POWs)) 5726-1966¹² address specific issues such as the need to provide orders relating to the behavior of a POW in a language he understands or with the assistance of a translator. The regulations also detail disciplinary authorities and measures while requiring that POWs should be given an opportunity to defend themselves. The regulations further require that any disciplinary judgment be brought to the attention of a POW's representative in accordance with the Convention.

The Internment of Unlawful Combatants Law, 5761-2000, regulates the treatment of persons not recognized as POWs.¹³ A June 2008 Supreme Court decision¹⁴ on the legality of this Law determined that the term "unlawful combatant" does not create a separate category of persons in addition to the two recognized by international humanitarian law, namely "combatants" and "civilians." "Unlawful combatants", thus, are considered a sub-group of the category of "civilians."¹⁵

The Internment of Unlawful Combatants Law regulates the internment of unlawful combatants and establishes judicial review procedures in detention hearings. The law further provides for the right of detainees to meet with an attorney and to be held in proper conditions that will not harm their health or dignity. The Regulations of Internment of Unlawful Combatants (Conditions of Internment) 5762-2002 list specific requirements relating to the conditions of such detainees.¹⁶ Unlawful combatants are specifically entitled to clothing, food,

¹⁰ *Id.* For additional information on humane treatment in interrogation of suspects *see* RUTH LEVUSH, ISRAEL: INTERROGATION TECHNIQUES ON BOTH SIDES OF THE GREEN LINE (LAW LIBRARY OF CONGRESS REPORT FOR CONGRESS LL FILE NO. 2009-01935, DECEMBER 2008).

¹¹ 9 LSI 184 (5715-1954/55).

¹² Nevo legal database (in Hebrew), www.nevo.co.il (last visited Feb. 5, 2009).

¹³ SEFER HA-HUKIM [book of Laws, Official gazette] issue no. 1834, at 192.

¹⁴ CrimA 6659/06 etc., A & B v. State of Israel, para.11, THE STATE OF ISRAEL: THE COURT AUTHORITY website, http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf (last visited Feb. 5, 2009).

¹⁵ For comprehensive discussion *see* RUTH LEVUSH, *Israel: Detention of Terrorism Suspects on Both Sides of the Green Line* (THE LAW LIBRARY REPORT FOR CONGRESS, LL File 2009-01734, December 2008).

¹⁶ Kovetz HaTakanot [subsidiary legislation, hereafter K.T.] 5762 no. 616 at 588 (April 11, 2002), *as amended* in K.T. 5763 no. 6221 at 426 (1/16/03).

medical exams and treatment, hygienic conditions, physical activity, receipt of personal items, exercise of religious practice, visits by representatives of the Red Cross, family members and by an attorney, among others.

III. A Criminal Defendant's Right to Review Classified Evidence

Israeli law recognizes evidence as privileged when it is in the interest of national security and foreign relations as well as in the public interest.¹⁷ The use of privileged evidence in trials, however, is greatly restricted by judicial review. The disclosure of evidence certified by the Prime Minister or the respective Minister as likely to impair the State's national or internal security, its foreign relations or another important public interest (hereafter "certificate of privilege"), may be ordered if a Justice of the Supreme Court, in a case involving national security and foreign affairs, or a judge of another appropriate court, in other cases, "[f]inds that the necessity to disclose it for the purpose of doing justice outweighs the interest in its non-disclosure."¹⁸

- Statutory Basis for Privileged Evidence

The Evidence Ordinance (New Version), 5731-1971,¹⁹ recognizes special procedures for the treatment of privileged evidence. Non-disclosure of such evidence may be authorized if the evidence is certified as privileged by the relevant authorities. Disclosure of such evidence, however, may be ordered by the appropriate court if it is found that that the necessity to disclose it for the purpose of doing justice outweighs the interest in its non-disclosure.

The Evidence Ordinance (New Version), 5731-1971, provides:

44. Privilege in the interest of the State

(a) A person is not bound to give, and the court shall not admit, evidence regarding which the Prime Minister or the Minister of Defence [sic], by certificate under his hand, has expressed the opinion that its giving is likely to impair the security of the State, or regarding which the Prime Minister or the Minister of Foreign Affairs, by certificate under his hand, has expressed the opinion that its giving is likely to impair the foreign relations of the State, unless a Judge of the Supreme Court, on the petition of a party who desires the disclosure of the evidence, finds that the necessity to disclose it for the purpose of doing justice outweighs the interest in its non-disclosure.

(b) Where a certificate as referred to in subsection (a) has been submitted to the court, the court may, on the application of a party who desires the disclosure of the evidence, suspend the proceedings for a period fixed by it, in order to enable the filing of a petition for disclosure of the evidence or, if it sees fit, until the decision upon such a petition.

45. Privilege in the public interest

¹⁷ The Evidence Ordinance (New Version), 5731-1971, 2 LSI (New Version) 198 (1972), *as amended*.

¹⁸ The Evidence Ordinance (New Version), 5731-1971 § 44-45, 2 LSI (NEW VERSION) 198 (1972), *as amended*.

¹⁹ 2 LSI (NEW VERSION) 198 (1972), *as amended*.

A person is not bound to give, and the court shall not admit, evidence regarding which a Minister, by certificate under his hand, has expressed the opinion that its giving is likely to impair an important public interest, unless the court which deals with the matter, on the petition of a party desiring the disclosure of the evidence, finds that the necessity to disclose it for the purpose of doing justice outweighs the interest in its non-disclosure.

46. Hearing of petition for the disclosure of privileged evidence

(a) A petition for the disclosure of evidence under section 44 or 45 shall be heard *in camera*. For the purpose of deciding upon the petition, the Judge of the Supreme Court or the Court, as the case may be, may demand that the evidence or its contents be brought to his or its knowledge, and he or it may receive explanations from the Attorney-General or his representative, and from a representative of the Ministry concerned, even in the absence of the other parties

52. The provisions of this chapter shall apply to giving evidence both before a court or tribunal and before any authority, body or person competent under law to take evidence; and every reference in this chapter to a court shall be deemed to be a reference also to a tribunal and to any such authority, body or person as aforesaid.²⁰

- **Judicial Implementation**

As stated above, evidence will be disclosed if the purpose of doing justice outweighs the interest in its non-disclosure. Israel's Supreme Court has interpreted "the purpose of doing justice" as "the conduct of a fair criminal process, which will reveal the truth and not cause injustice to the specific defendant facing trial."²¹ The Court established the rule that if the evidence in question is essential for the defendant's defense, justice requires that it be disclosed.

The consideration of the weight of the evidence is based on a three prong test:

1. whether the nature of the evidence in question is within the type of matters defined as privileged in the certificate of privilege;
2. whether disclosure will be essential to the defense based on a preliminary evaluation of the possible defense avenues and the extent of the potential contribution of either the specific or the whole evidence to the defense; and
3. whether it is possible to isolate from the privileged evidence some parts and authorize their disclosure.²²

A determination by the court, based on the above test, that disclosure of the privileged evidence is essential for the defendant's defense outweighs any military consideration.²³ If the government continues to insist that it will not disclose the evidence after being ordered to do so

²⁰ *Id.*

²¹ Motion no. 838/84 Menachem Livni v. State of Israel, 38(3) Piske Din (Decisions of the Supreme Court, hereafter P.D.) 729, 738 (5744/45-1984), translated by author.

²² Criminal Motion 155/08 Maamun Abu Tir v. State of Israel, STATE OF ISRAEL: THE JUDICIAL AUTHORITY website, <http://elyon1.court.gov.il/files/08/550/001/r03/08001550.r03.pdf>. (Decision rendered 5/19/08).

²³ Motion no. 838/84 Menachem Livni v. State of Israel, 38(3) P.D. 729, 738 (5744/45-1984).

by the court, it must either dismiss the indictment or that part of the indictment that is based on the evidence in question.

The evidentiary rules relating to privileged evidence and disclosure apply to all courts, tribunals and any body “competent under law to take evidence.”²⁴ Military courts, therefore, apply the same evidentiary rules to criminal trials involving terrorism offenses.

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²⁴ *Id.*

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JAPAN

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS
AND THE DEFENDANT'S RIGHT TO REVIEW CLASSIFIED EVIDENCE**

Japan ratified the Geneva Conventions I through IV in 1953.¹

I. Right of the Accused to Review Classified or Secret Evidence

When a prosecutor wants to submit evidence for a judge's consideration, he must disclose the evidence to the defendant.² When a judge wants to examine evidence without a party's request, he must ask the parties' opinion in advance on the necessity and admissibility of the evidence.³ There is no exception for this rule. Japan does not have a military court. Therefore, under Japanese criminal procedure, it is impossible not to allow a criminal defendant or his counsel to review any classified or secret evidence which is going to be used in a trial.

II. Law Reflects the Substance of Common Article 3

The Geneva Conventions have been effective in Japan since 1953. There is no separate law which reflects the substance of Common Article 3 of the Convention.

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¹ Treaty No. 23-26 of 1953. *See also* Ratification of Geneva Conventions of 12 August 1949, International Committee of the Red Cross, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P#res> (last visited Jan. 30, 2009).

² Keiji soshō hō [Code of Criminal Procedure], Law No. 131 of 1948, *as amended*, art. 299, para. 1.

³ *Id.* art. 299, para. 2.

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LEBANON

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS AND
THE DEFENDANT'S RIGHT TO REVIEW CLASSIFIED EVIDENCE**

Executive Summary

Lebanese law incorporates the substance of Common Article 3 of the Geneva Conventions and has no provisions that do not allow a criminal defendant to review classified or secret evidence used against him.

Lebanon is a state party to the four Geneva Conventions and ratified them on October 4, 1951.¹ Common Article 3 basically requires the contracting parties to treat detainees of armed conflicts humanely. Section (d) of this Article considers as inhumane the passing of sentences by a court that does not afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.” There is no pronouncement in the Conventions, however, as to whether or not granting the review of classified evidence by an accused violates judicial guarantees against inhumane treatment. This brief report addresses two questions:

- does the Lebanese law permit the use of classified evidence without allowing the accused to review it; and
- has Lebanon incorporated Common Article 3 in its domestic law?

I. Right of the Accused to Review Classified or Secret Evidence

One of the legal principles adopted by the Lebanese criminal system is the right of the accused to have access to the evidence used against him. This principle is evident in several statutory provisions. The Criminal Procedure Code provides that in the trial of misdemeanor cases the judge of first instance may not issue a verdict based on evidence that had not been put forward for discussion during the trial.² It also provides that in felony cases the evidence must be put forward for discussion among the parties during the trial.³ The law on military tribunals only addresses the issue of secret evidence and provides that prior to trial the attorney for the accused has the right to review secret documents in the presence of the presiding judge or a

¹ See State Parties to the Geneva Conventions of Aug. 12., 1949, available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited January 29, 2009).

² Criminal Procedure Code, Law Number 328 of 2001, article 179 states, in pertinent part, that “the judge cannot base his judgment except on evidence that has been before him provided the evidence was put forward for discussion during trial.”

³ *Id.* at article 250 which states, in pertinent part, that “all the evidence that may be relied upon to dispose of the case shall be put forward for discussion among the parties, the culpatory materials shall be displayed and the report of their seizure read, and every party has the right to take a position thereat.”

judge he designates.⁴ Lebanon has no law that prohibits a criminal defendant from reviewing classified or secret evidence used against him.

II. Lebanese Law Reflects the Substance of Common Article 3

As mentioned above, the essence of Common Article 3 is to ensure the humane treatment of detainees. Any deviation from such humane treatment generally is related to coercive actions against the detainee in connection with obtaining information deemed valuable to the detaining state. Lebanese law clearly prohibits using any coercive action in this respect. The Criminal Procedure Code provides that law enforcement personnel may, when permitted, interrogate the accused but without the use of any coercive action.⁵ The same rules apply to investigative judges.⁶

III. Concluding Remarks

Lebanese law incorporates the substance of Common Article 3 of the Geneva Conventions and does not allow a conviction based on classified or secret evidence that the defendant has not been allowed to review during trial.

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⁴ Law Number 24 of 1968, article 28 provides that “[t]he file of the case shall be available to the attorney at least twenty four hours prior to trial. The attorney may obtain copies of all documents except those of a classified nature which he has the right to review only in the presence of the presiding judge or a judge he designates for this purpose.”

⁵ Criminal Procedures Code, art. 41.

⁶ *Id.* art. 77.

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MEXICO

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS
AND THE DEFENDANT'S RIGHT TO REVIEW CLASSIFIED EVIDENCE**

Executive Summary

The Mexican Constitution grants criminal defendants an unlimited right to the discovery of all evidence of any nature used against them in court. The Constitution also provides them an equal unlimited right to confront in court all accusers and witnesses testifying against them, but in the case of organized crime, the judicial authority may authorize the suppression of the name and personal data of the accuser. The Code of Criminal Procedure restates these constitutional guarantees and gives defendants the right to know the names of all their accusers and witnesses against them. Any additional information that is classified and that is not part of the defendant's trial record and that is in possession of an administrative agency that the defendant believes is required for his defense, may be requested by the Court following a procedure under the Federal Law on Transparency and Access to Public Government Information. Crimes such as terrorism and crimes against humanity are tried in military courts only when committed by military personnel.

Mexico has ratified the four Red Cross Geneva Conventions and the First Protocol, as well as the Rome Statute on the International Criminal Court. By constitutional mandate, international legal instruments are binding without further legislation. However, the conduct prohibited in common Article 3 is also found in the Constitution and in various codes, including the Military Code, and in statutes. Mexico is a party to many multilateral and regional conventions on human rights and civil and political rights.

I. Right of the Accused to Review Classified or Secret Evidence

One of the constitutional guarantees embodied in the Mexican Constitution is the defendant's unlimited right to discover all the prosecution's evidence against him.¹ This guarantee has been granted by the Constitution since it was originally promulgated in 1917.²

¹ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONSTITUCIÓN POLÍTICA], art. 20 B, § VI, as amended (originally published in Diario Oficial [D.O.] on Feb. 5, 1917), available at the website of the Chamber of Deputies of the Mexican Congress, <http://www.diputados.gob.mx/LeyesBiblio/index.htm> (current amended version).

² Constitución Política de los Estados Unidos Mexicanos que Reforma la de 5 de Febrero de 1857, art. 120, § VII (D.O. Feb. 5, 1917).

Mexico enacted extensive constitutional amendments reforming the criminal justice system in June of 2008. The judicial reform adopts the oral, adversarial and public trial system.³ The amendments state that the defendant and his legal representative must have access to all the prosecutorial evidence gathered against him when he is taken into custody, when seeking his deposition or interview, and also prior to his first appearance before the judge, in order to prepare his defense. From this moment, the evidence gathered from investigated acts shall not be suppressed, except in expressly detailed cases where the success of an investigation requires the suppression of said acts and as long as they are appropriately revealed so as not to be of detriment to the defense.⁴

The amendments guarantee a defendant's right to be informed about the acts imputed to him and also about his rights. In the case of organized crime, the judicial authority may authorize the suppression of the name and personal data of the accuser.⁵

Trials must be held in a public forum before a judge or tribunal. The defendant has the right to present oral arguments and evidence in a public and adversarial manner in the judge's presence.⁶ The public aspect of it may be restricted only in exceptional cases that the law so determines, due to reasons of national or public security; for the protection of the victims, witnesses and minors; when the revelation of protected legal data is at risk, or when the court deems that there are grounds that justify the suppression of said data.⁷

The amendments provide that the victim or the offender has the right to the protection of their identity and other personal data in the following cases: when they are minors; when dealing with crimes of rape, kidnapping, or organized crime; and when the adjudicator deems it necessary for his/her protection, safeguarding in every case the rights of the defense.⁸

The above constitutional amendments provide the broad, general rules that must be implemented by local legislation throughout the Republic. The amending decree mandates its full implementation within a term not exceeding eight years from the date of its publication in *Diario Oficial*, the official federal gazette, June 18, 2008.

As stated above, the constitutional provision granting the defendant's unlimited right to discover all the prosecution's evidence against him dates from 1917. The commentary to this constitutional provision, found in an annotated edition of the Constitution, states that upon the defendant's request, all materials, such as "transcripts of declarations, confessions, expert witness testimony, documentary evidence either provided by the parties or requested by the judge, and any other evidence" that the judge and other parties may use to perform their

³ Decreto por el que se reforma y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, art. 20 (D.O. June 18, 2008).

⁴ *Id.* art. 20 B, § VI.

⁵ *Id.* art. 20 B, § III.

⁶ *Id.* art. 20 A, § IV.

⁷ *Id.* art. 20 B, § V.

⁸ *Id.* art. 20 C, § V.

respective functions in the process must be provided to him.⁹ These constitutional guarantees are restated in the Federal Code of Criminal Procedure,¹⁰ which adds that a defendant is entitled not only to be informed of his accusers' names, as mandated by the Constitution, but also the names of the witnesses that testify against him.¹¹

If classified information is used against a defendant before the trial starts he may not be allowed to see it, but once it has been formally used against him during the trial, the information must be available to him and his attorney, in compliance with the constitutional guarantee, although it will remain classified to anyone else.¹²

Although the Constitution provides defendants the right to have access to all the evidence used in a criminal proceeding against them, they also may need additional classified information that is not part of the trial records, but is found in a government agency. The Federal Law on Transparency and Access to Public Government Information provides the procedure to follow for accessing this type of information,¹³ including reserved and confidential information, such as that dealing with national security of the state that is in possession of the different administrative agencies.¹⁴ Under this statute, such information may remain unavailable for up to twelve years.¹⁵ If a defendant needs classified information in possession of a government authority as evidence for his own defense, the information may be provided to him as per the court request. This information remains unavailable to everyone else.¹⁶

⁹ CONSTITUCIÓN POLÍTICA annotated, Vol. I, at 286 (Editorial Porrúa-Universidad Nacional Autónoma de México, México, D.F., 15th ed., 2000) (translated and paraphrased by the author). The constitutional provision referred to was located in art. 20 A, § VII, in 2000; currently, after the amendments of 2008, it is located in art. 20 B, § VI.

¹⁰ Código Federal de Procedimientos Penales, as amended, arts. 128, 154, 265 and 268 (originally published in D.O. Aug. 30, 1934), *available at* the website of the Chamber of Deputies of the Mexican Congress, <http://www.diputados.gob.mx/LeyesBiblio/index.htm> (current amended version).

¹¹ *Id.* art. 154.

¹² Telephone Interview with Mario Alberto Torres López, head of the Public Defense Unit and Evaluation on Criminal Matters (Unidad de Defensoría Pública y Evaluación Penal) of the Federal Institute of Public Defense (IFDP) (Sept. 19, 2006).

¹³ Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental (D.O. June 11, 2002).

¹⁴ *Id.* arts. 13,14. Article 14 states that the confidential character of information may not be raised when there is an investigation of grave violations to fundamental rights or crimes against humanity.

¹⁵ *Id.* art. 15.

¹⁶ Telephone Interview with Juan Antonio Casas de León, head of the Directorate of Litigation Affairs of the Federal Institute of Access to the Public Government Information (IFAI) (Sept. 19, 2006). Mr. Casas de León added that if a defendant had to wait for 12 years until the information he needs becomes declassified to use it in his own defense, the constitutional guarantee of art. 20 of the Constitution would be meaningless. The IFAI is the institution that rules on the denial to access of information issued by government administrative agencies. *See Acerca del IFAI*, <http://www.ifai.org.mx> (last visited Feb. 5, 2009).

Crimes such as terrorism and crimes against humanity are governed by the Federal Penal Code¹⁷ and prosecuted in courts of ordinary jurisdiction, under the rules of the Federal Code of Criminal Procedure.¹⁸ Although Mexico has a Code of Military Justice, these crimes are prosecuted in military tribunals only when committed by military personnel.¹⁹

II. Codification of Common Article 3 in the Mexican Law

Mexico is party to the four Red Cross Geneva Conventions of 1949. Mexico ratified the four Conventions in 1952²⁰ and the First Protocol in 1983.²¹ Mexico ratified the Rome Statute on the International Criminal Court in October 2005.²² The legislative process for Mexico's adherence to the Rome Statute included an amendment to Article 21 of the Constitution granting the Federal Executive and the Senate authorization to recognize the authority and jurisdiction of the International Criminal Court.²³

These international legal instruments became binding in Mexico upon their ratification and without any further legislation.²⁴ Nevertheless, the conduct prohibited in Common Article 3 also is prohibited in Mexico's various bodies of laws such as the Constitution and its Codes and statutes.

¹⁷ Código Penal Federal, as amended, arts. 139, 139 *Bis*, 139 *Ter*, 148 *Bis*, 148 *Ter*, 148 *Quáter*, 149, and 149 *Bis* (originally published in D.O. Aug. 14, 1931), available at the website of the Chamber of Deputies of the Mexican Congress, <http://www.diputados.gob.mx/LeyesBiblio/index.htm> (current amended version).

¹⁸ Código Federal de Procedimientos Penales, as amended, art. 194, § 4 (originally published in D.O. Aug. 30, 1934), available at the website of the Chamber of Deputies of the Mexican Congress, <http://www.diputados.gob.mx/LeyesBiblio/index.htm> (current amended version).

¹⁹ Código de Justicia Militar, as amended, art. 57 (originally published in D.O. Aug. 31, 1933), available at the website of the Chamber of Deputies of the Mexican Congress, <http://www.diputados.gob.mx/LeyesBiblio/index.htm>.

²⁰ Decreto promulgatorio (D.O. June 23, 1953).

²¹ Decreto promulgatorio (D.O. Apr. 21, 1983).

²² The Rome Statute on the International Criminal Court was ratified on October 10, 2005, and deposited with the Secretary General of the United Nations on October 28, 2005. Decreto Promulgatorio del Estatuto de Roma de la Corte Penal Internacional, Adoptado en la Ciudad de Roma, el Diecisiete de Julio de Mil Novecientos Noventa y Ocho, D.O. Dec. 31, 2005.

²³ Decreto por el que se Adiciona al Artículo 21 de la Constitución Política de los Estados Unidos Mexicanos, D.O. June 20, 2005.

²⁴ Article 133 of the Mexican Constitution states that the Constitution, the laws of the Congress of the Union and the international treaties entered into by Mexico are the supreme law throughout the Union. The Mexican Supreme Court has interpreted the constitutional provision as placing international treaties in the second hierarchical level of the country's legal system. That is, they are subordinated only to the Constitution. *Semanario Judicial de la Federación y su Gaceta*, Tomo X, Nov. 1999, Tesis: P. LXXVII/99, at 46, tesis jurisprudencial.

A. The Federal Constitution

The Federal Constitution explicitly prohibits slavery,²⁵ punishment by mutilation, and infamy, branding, flogging, beatings with sticks, torture of any kind, excessive fines, confiscation of property, and any other unusual or extreme penalties.²⁶

The judicial guarantees afforded to every defendant in a criminal trial are extensively provided for in the Federal Constitution.²⁷ The Constitution states that the military has jurisdiction for the trial of crimes in violation of military discipline, but military tribunals have no jurisdiction over persons who do not belong to the Armed Forces. Whenever a civilian is implicated in a military crime or violation, the corresponding civil authority will have jurisdiction over the case.²⁸

B. Federal Code of Criminal Procedure

The judicial guarantees the Constitution gives to accused persons in criminal trials are restated in and implemented by the Federal Code of Criminal Procedure.²⁹

C. Federal Penal Code

The Federal Penal Code has a rather general provision that punishes those who violate their “duty of humanity” toward war prisoners, hostages, the wounded, or persons in hospitals.³⁰ This provision has been in the Code since its promulgation in 1931,³¹ prior to the 1949 Red Cross Conventions. The Code also prohibits torture and imposes penalties for this crime.³²

Under the Federal Penal Code, genocide is committed when a person has the purpose of totally or partially destroying one or more national groups, or groups of ethnic, racial, or religious character, or uses any means to commit crimes against the life of their members or impose a massive sterilization to impede their reproduction. This extensive article includes

²⁵ CONSTITUCIÓN POLÍTICA, as amended, art. 1, *available at* the website of the Chamber of Deputies of the Mexican Congress, <http://www.diputados.gob.mx/LeyesBiblio/index.htm> (current amended version).

²⁶ *Id.* art. 22.

²⁷ *Id.* arts. 13, 16-23.

²⁸ *Id.* art. 13.

²⁹ Código Federal de Procedimientos Penales, as amended, arts. 128, 154, 265 and 268 (originally published in D.O. Aug. 30, 1934), *available at* the website of the Chamber of Deputies of the Mexican Congress, <http://www.diputados.gob.mx/LeyesBiblio/index.htm> (current amended version).

³⁰ Código Penal Federal, as amended, art.149 (originally published in D.O. Aug. 14, 1931), *available at* the website of the Chamber of Deputies of the Mexican Congress, <http://www.diputados.gob.mx/LeyesBiblio/index.htm> (current amended version).

³¹ Código Penal para el Distrito Federal y Territorios Federales en Materia Común y para toda la República en Fuero Federal art. 149 (Secretaría de Gobernación, México, D.F., 1931).

³² Código Penal Federal, as amended, arts. 215, 225 and 315 (originally published in D.O. Aug. 14, 1931), *available at* the website of the Chamber of Deputies of the Mexican Congress, <http://www.diputados.gob.mx/LeyesBiblio/index.htm> (current amended version).

several kind of modalities to execute this crime and imposes additional sanctions upon perpetrators when they are public officers.³³ The crime of genocide is also dealt with in the Federal Code of Criminal Procedure, which includes a long list among those crimes considered to be of a grave character.³⁴

D. Code of Military Justice

The Code of Military Justice punishes those who commit acts of violence against prisoners, persons held in detention, or the wounded or their respective family members who are with them or in their presence. The severity of the punishment varies according to the kind of violence committed, whether the action caused lesions, physical pain, or is cruel, and whether the perpetrator deprived the victims of food or medical care.³⁵ Other provisions of the Code impose punishment upon those who, without being extremely compelled by war operations, attack hospitals, ambulances, or welfare hospices, which are recognized by well-established signs or that can be distinguished as such from far away. The same provision also punishes those who destroy libraries, archives, museums, infrastructure, noticeable art works, and means of communication; those who burn buildings; and those who cause devastations in cemeteries or loot towns.³⁶ Additional provisions of the Military Code punish the taking of hostages or the commission of any kind of ill treatment towards the civil population of the enemy.³⁷ The Code mandates that a confession in court must be given voluntarily, without intimidation or torture.³⁸

E. Federal Statute to Prevent and Sanction Torture

The Federal Statute to Prevent and Sanction Torture applies at the federal and state level. Many provisions apply to public servants who inflict torture on others for a variety of motivations.³⁹ Moreover, no confession or information obtained by means of torture can be invoked as evidence in court.⁴⁰

³³ *Id.* art. 149 *bis*.

³⁴ Código Federal de Procedimientos Penales, as amended, art. 194 (originally published in D.O. Aug. 30, 1934), available at the website of the Chamber of Deputies of the Mexican Congress, <http://www.diputados.gob.mx/LeyesBiblio/index.htm> (current amended version).

³⁵ Código de Justicia Militar, as amended, arts. 324-337 (originally published in D.O. Aug. 31, 1933), available at <http://www.ordenjuridico.gob.mx>.

³⁶ *Id.* art. 209.

³⁷ *Id.* art. 215.

³⁸ *Id.* art. 523.

³⁹ Ley Federal para Prevenir y Sancionar la Tortura, as amended (D.O. Dec. 27, 1991), available at <http://www.ordenjuridico.gob.mx>.

⁴⁰ *Id.* art. 8.

F. National Security Statute

In addition, the National Security Statute mandates that the agencies in charge of gathering intelligence information enjoy technical autonomy to do so by using any means of intelligence, but in no case may they affect a person's individual guarantees and human rights.⁴¹ The Statute charges the National Security Center (CISEN) with the duty of providing technical support to the Federal Prosecutor's Office in the prosecution of organized crime, but in doing so, CISEN must, at all times, respect individual guarantees and human rights.⁴² Furthermore, the Statute mandates that public servants, whose work is related to national security, perform their duties in respect of fundamental rights and individual and social guarantees.⁴³

G. International Treaties

Mexico ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in 1986;⁴⁴ the Optional Protocol to the same Convention in 2005;⁴⁵ the Inter-American Convention to Prevent and Sanction Torture in 1987;⁴⁶ the International Convention on Civil and Political Rights in 1981;⁴⁷ and the Convention for the Prevention and Sanctions of the Crime of Genocide in 1952.⁴⁸ Mexico is a party to many multinational and regional conventions on human rights.⁴⁹

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⁴¹ Ley de Seguridad Nacional, as amended, art. 31, D.O. Jan. 31, 2005.

⁴² *Id.* art. 25.

⁴³ *Id.* art. 61.

⁴⁴ Decreto Promulgatorio, D.O. Mar. 6, 1986.

⁴⁵ Protocolo Facultativo de la Convención Contra la Tortura y Otros Tratos o Penal Crueles, Inhumanos o Degradantes, D.O. June 15, 2006. Diario Oficial is available at <http://dof.gob.mx/index.php?year=2006&month=06&day=15> (click on document name; last visited Feb. 6, 2009).

⁴⁶ Decreto Promulgatorio, D.O. Sept. 1, 1987.

⁴⁷ Decreto Promulgatorio, D.O. May 20, 1981.

⁴⁸ Decreto Promulgatorio, D.O. Oct. 11, 1952.

⁴⁹ Tratados, Derechos Humanos, http://www.ordenjuridico.gob.mx/derechos_humanos.php (last visited Feb. 4, 2009).

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PORTUGAL

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS AND THE DEFENDANT'S
RIGHT TO REVIEW CLASSIFIED EVIDENCE**

Executive Summary

In criminal proceedings, all evidence must be produced and the defendant must have an opportunity to discuss it before the judge makes any decision. When deciding a case, the judge and the jurors must indicate, if possible, the evidence supporting their decisions. A judge may reject a claim if no evidence is offered to support it. However, no information may be disclosed and no documents or objects may be produced, if the Ministry of Justice declares them to be state secrets.

Portuguese domestic legislation, specifically Law No. 31 of July 22, 2004, incorporates provisions of Common Article 3 of the Geneva Conventions.

I. Evidence in a Criminal Proceeding

The Portuguese Code of Criminal Procedure establishes that a criminal tribunal must order, officially or by request, the production of all evidence it deems necessary to discover the truth and to obtain a good decision for the case.¹

According to the Code the object of the evidence is the production of all the facts judicially relevant for: (1) the existence or inexistence of a crime; (2) the possibility of a defendant's punishment; and (3) the corresponding sentence for the crime committed.² All evidence is presented in a trial hearing and its production follows the adversary principle, even if it is officially produced by the tribunal.³ This principle gives the defendant an opportunity to build an ample defense for the case, where no evidence can be admitted against him and the judge cannot make any decision without it first being fully discussed, contested, and assessed by the defendant.⁴

The accusation against the defendant may be rejected as groundless by the president of the criminal tribunal, if there is no indication of the legal dispositions applicable to the case or no

¹ Código de Processo Penal, Decreto-Lei No. 78, de 17 de Fevereiro de 1987, art. 340.

² *Id.* art. 124.

³ *Id.* art. 327(2).

⁴ MANUEL LOPES MAIA GONÇALVES, CÓDIGO DE PROCESSO PENAL ANOTADO 601 (Almedina, Coimbra, ed. 1999).

evidence to support the claims presented.⁵ If the charges against the defendant are accepted by the president of the tribunal, the judge and the jurors, when deciding the case, declare the reasons for their opinions, indicating, whenever possible, the evidence used to reach their conclusions.⁶

The Code further determines that a witness in a criminal proceeding cannot be queried about facts that constitute a state secret.⁷ The term “state secret” refers to facts that, if disclosed, although not constituting a crime, may cause damage, internal or external, to the Portuguese nation or to the defense of the constitutional order.⁸ If a witness invokes a state secret, the claim must be confirmed within thirty days by the Ministry of Justice. If after thirty days no confirmation is provided, the testimony must be given.⁹

Additionally, article 182 of the Code of Criminal Procedure dictates that, when ordered, the witness must present to the judicial authority documents or any other objects under his possession that must be obtained, unless he asserts, in writing, that it is a state secret. Again, the state secret must be confirmed within thirty days by the Ministry of Justice. If after thirty days no confirmation is provided, the documents or objects must be turned in to the judicial authority.¹⁰

Based on the current legislation, it would appear not to be possible to bring criminal charges against a defendant without full disclosure, a subsequent discussion, and a debate of all the evidence supporting the charges, otherwise the defendant would be denied due and fair process of law.

II. Common Article 3 of the Geneva Conventions

The Geneva Convention I was ratified by Portugal on May 26, 1960, through Decree-Law No. 42,991.¹¹

Provisions of Common Article 3 of the Geneva Convention can be verified in Law No. 31 of July 22, 2004, which adapts the Portuguese penal legislation to the statute of the International Criminal Tribunal, criminalizing conduct that violates international humanitarian law.¹² Article 2 of Law No. 31 defines, *inter alia*, armed conflict not of an international character, the Geneva Conventions, and protected persons; article 9 enumerates crimes against humanity; and article 10 deals with war crimes against persons, which includes homicide, torture, mutilation, cruel treatment, taking of hostages, passing of sentences, and carrying out executions without a previous judgment pronounced by a regularly constituted court.

⁵ Código de Processo Penal, Decreto-Lei No. 78, de 17 de Fevereiro de 1987, art. 311(3)(c).

⁶ *Id.* art. 365(3).

⁷ *Id.* art. 137(1).

⁸ *Id.* art. 137(2).

⁹ *Id.* art. 137(3).

¹⁰ *Id.* art. 182.

¹¹ Decreto-Lei No. 42.991 de 26 de Maio de 1960.

¹² Lei No. 31 de 22 de Julho de 2004, arts. 2, 9 & 10.

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RUSSIAN FEDERATION

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS
AND THE DEFENDANT'S RIGHT TO REVIEW CLASSIFIED EVIDENCE**

Executive Summary

Russian legislation provides for unrestricted access of the defendant to all trial materials, and prohibits the admission of evidence if its source cannot be disclosed, except information on police tactics and the identity of undercover agents and informants. The provisions of Common Article 3 of the Geneva Conventions are included in the nation's Constitution and Code of Criminal Procedure.

I. Review of Classified Evidence by a Criminal Defendant

The Russian Criminal Procedural Code, which entered into force in 2002, defines what types of evidence must be submitted by the investigators to the court, and under what circumstances evidence can be and cannot be admitted.¹ The Code provides that evidence acquired in violation of the law, or based on statements or testimony of witnesses who cannot reveal the source of their information, cannot be accepted or used for sentencing. The Code does not allow the withholding of evidence and other information, even if classified, from the parties participating in the trial.

The collection of evidence is regulated by the Federal Law on Operative and Search Activities.² The Law defines what type of information cannot be divulged. Judges are prohibited from requesting information on government informants inserted into criminal groups, undercover police officers and police assistants, and on tactics, organization, and the conduct of operative and search activities. Subsequently, this information is not available to the defendants; therefore, the information cannot be considered evidence.

In the resolution of disputes related to or based on secret or classified information, all persons participating in the trial, including defense attorneys, must obtain a special clearance that would allow them to access this information. This requirement does not apply to the defendant, however. If secret information is discussed during the trial, proceedings must be conducted *in camera*, with the individuals involved being required to sign non-disclosure agreements.

¹ SOBRANIE ZAKONODATELSTVA ROSSIISKOI FEDERATSII (SZ RF) (official gazette), 2001, No. 52(1), tem 4921.

² SZ RF, 1997, No 12, Item 1106.

II. Codification of Article 3 Provisions

The exact wording of Common Article 3 of the Geneva Conventions is not included in any Russian legal act. However, the basic provisions of Article 3 are included in Chapter II of the Russian Constitution, entitled *Human and Civil Rights and Freedoms*. The Constitution provides that Russia recognizes and guarantees that universally acknowledged principles and rules of international law and international obligations become a part of Russia's domestic legislation (art. 17). The Constitution provides for the equality of all individuals before the law and the court, regardless of sex, race, religion, or place of birth (art. 19). The protection of human dignity, together with the prohibition against subjecting an individual to torture, violence, or other cruel or degrading treatment or punishment, is declared in article 21. Article 47 of the Constitution provides that no one can be deprived of the right to have a case examined in the court or by the judge to whose jurisdiction it is referred by law. No other institution except a court established according to the law can judge a person.

These constitutional provisions are detailed in the Russian Federation Code of Criminal Procedure, which provides that justice can only be conducted by a court of law, and a person can be considered guilty of committing a crime only upon a ruling of a court of law (art. 8). Article 9 of the Code is dedicated to the protection of human dignity. It explicitly bans actions or decisions which could humiliate one of the participants in a criminal trial, and prohibits treatment which is degrading or dangerous to one's health and life. According to this article, those who are to be tried cannot be subjected to violence, torture, and other cruel treatment.

On December 25, 2009, the Federal Assembly (legislature) of the Russian Federation passed amendments to the Russian Code of Criminal Procedure³ which establish that all terrorism related cases, and cases where classified information is brought as evidence may not be tried by jurors. For such cases, special panels of judges who possess clearance and were approved by the Federal Security Service will be created. Because of strong public opposition to this measure, the President of Russia has postponed signing this bill.

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³ ROSSIISKAIA GAZETA (government owned daily newspaper, official publication) Dec. 26, 2008, at 3.

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UNITED KINGDOM

**COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS AND THE DEFENDANT'S
RIGHT TO REVIEW CLASSIFIED EVIDENCE**

Executive Summary

The United Kingdom is party to numerous international conventions, including the Geneva Conventions, prohibiting the use of torture and other cruel and unusual interrogation techniques. These prohibitions are followed by the military and have been expanded upon by the government, which has detailed a number of interrogation methods that it considers to be torture and has thus specifically prohibited. The use of sensitive evidence in courts in England and Wales is subject to a number of rules relating to disclosure. In certain circumstances, evidence can be withheld from defendants where it is in the public interest to do so.

I. Introduction

Common Article 3 of the Geneva Conventions applies to armed conflicts that are not of an international character and occur in the territory of a signatory to the Convention. Domestic rules that regulate interrogation techniques in the United Kingdom (UK) are in accordance with the numerous conventions¹ to which the UK is a signatory that reject torture and other degrading treatment of prisoners, including the Geneva Conventions, and the United Nations (UN) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As such, the British government follows Common Article 3 of the Geneva Convention, which prohibits violence; murder; mutilation; cruel treatment and torture; the taking of hostages; and outrages upon personal dignity, in particular, humiliating and degrading treatment, when detaining and questioning captured terrorist suspects. The use of regularly constituted courts with judicial guarantees recognized by civilized people to pass sentences has been slightly altered in the UK, and is discussed further below.

II. Classified Information in Court

¹ Those conventions include the United Nations' Universal Declaration of Human Rights G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948); the Geneva Conventions (including the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Aug. 15, 1977, UN Doc. A/32/144; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Aug. 15, 1977, UN Doc. A/32/144), which cover the conduct of military action including war and armed conflict; the International Covenant on Civil and Political Rights Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368; the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 465 U.N.T.S. 85; and the European Convention on Human Rights and Fundamental Freedoms, November 1950, 213 U.N.T.S. 222, Eur. T.S. No. 5.

Common Article 3 of the Geneva Convention prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Individuals charged in the UK generally face trial through the open criminal justice system in the Crown Courts, although there are two methods by which defendants may not view all the evidence held against them. The first method applies in the case of suspected terrorists subject to control orders,² who face the prospect of a trial in which they, or their representative, may not personally view some of the evidence presented by the Crown. This procedure was established to balance the rights of the defendants and the need to prevent disclosure of information that would be contrary to the public interest or compromise intelligence sources or techniques. To achieve this measure, the government inserted a safeguard to ensure that detainees received adequate representation but would not pose a threat to national security. Special Advocates³ were appointed with special security clearances to act on behalf of the detainees.⁴ The use of Special Advocates is modeled on the system that was previously used in the preventive detention regime and follows a Canadian precedent.⁵ Special Advocates are not responsible to the parties of the case, can only interact with the defendant in limited circumstances, and cannot question or discuss with defendants the closed materials of the case.⁶

The second method is through the doctrine of public interest immunity, “which prevents material from being disclosed and adduced ... whenever it is held that the public interest in non-disclosure outweighs the public interest that, in the administration of justice, the courts should have the fullest possible access to all relevant material.”⁷ There is not a complete list of categories of information that can be protected under the doctrine of public interest immunity, although it often occurs in relation to information that covers state interests, the prevention, detection and investigation of crime, financial irregularity, children, and the judicial process.⁸

It is the prosecutors’ responsibility to apply for an order of non-disclosure to the courts, which has then to study the materials over which the public interest immunity has been asserted.⁹ The courts must then address a series of questions that was established in a decision of the House of Lords. The questions include whether the material has an impact on the strength of the prosecutions case – if yes, the material should be ordered unless there is a real risk of serious prejudice to an important public interest and the interests of the defendant can be protected

² Control orders are a system of controversial, stringent, bail-like, conditions that are imposed on individuals that are suspected of being terrorists who often cannot be tried in courts for practical reasons.

³ Detailed information about Special Advocates and their role is contained in TREASURY SOLICITOR, SPECIAL ADVOCATES: A GUIDE TO THE ROLE OF SPECIAL ADVOCATES AND THE SPECIAL ADVOCATES SUPPORT OFFICE: OPEN MANUAL 4-5 (Nov. 2006), available at http://www.attorneygeneral.gov.uk/attachments/Special_Advocates.pdf (last visited Feb. 6, 2009).

⁴ The Civil Procedure (Amendment No. 2) Rules 2005, SI 656/2005; The Prevention of Terrorism Act 2005, c. 2; and The Civil Procedure Rules, part 76.

⁵ TREASURY SOLICITOR, *supra* note 3, at 4 ¶ 5.

⁶ TREASURY SOLICITOR, *supra* note 3.

⁷ ARCHBOLD: CRIMINAL PLEADING EVIDENCE AND PRACTICE ¶ 12-26 (P.J. Richardson et al., eds., 2006 ed.).

⁸ *Id.*; see also *D v. NSPCC* [1978] AC 230.

⁹ Criminal Procedure Rules 2005, SI 384/2005.

without full disclosure.¹⁰ The courts can either order non-disclosure of the material under the doctrine of public interest immunity, full disclosure, or partial disclosure. There is no specific rule as to whether the accused should have representation in any case where a judge is to rule on a claim of public interest immunity. The House of Lords has noted that to provide a specific rule would be “to place the trial judge in a straitjacket” and, in keeping with the practice of the House of Lords, stated that the principle should be applied on a case-by-case basis.¹¹

An example of instances where public interest immunity is frequently used is with prosecutions that involve evidence obtained by the Security Service. The relaxation of restrictions regarding the involvement of the Security Service (MI5) in the prevention and detection of serious crime in the UK has resulted in a greater involvement of the Security Service in the criminal justice process. To pave the foundations for a successful prosecution, the Security Service and law enforcement work to “ensure that operations are properly coordinated with a view to the possible use of the resulting intelligence as evidence in court.”¹² A delicate balance has to be achieved to ensure that intelligence methods and future operations are not compromised, yet the right to a fair trial is not impinged. Prosecutors work closely with MI5 when reviewing records of cases they are to prosecute and consider what may be disclosed to the defense. If information may be required to be disclosed, but to do so would damage the public interest by revealing an undercover agent’s identity or a sensitive investigative technique, then the prosecutor can apply to the judge to withhold the material, claiming public interest immunity.¹³ Claims for public interest immunity in relation to material gathered by the Security Service are made:

on the basis of a certificate signed by the Secretary of State [who] ... in deciding whether a claim is appropriate ... carries out a careful balancing exercise between the competing public interests in the due administration of justice and the protection of national security ... taking account of detailed advice from prosecuting Counsel [However] it is the courts, not the Service or the Government, that ultimately decide what must be disclosed in a particular case. If a claim is accepted, the judge will continue to keep the decision under review throughout the proceedings.¹⁴

III. Interrogation Techniques

The UK’s Foreign and Commonwealth Office has made international action against torture one of its top human rights priorities¹⁵ and the government further considers that “the prohibition against torture is absolute ... [and] unreservedly condemns it.”¹⁶ The UK government has consistently stated that it is emphatically and vehemently opposed to torture as a

¹⁰ R v. H [2004] 2 AC 134 (HL).

¹¹ *Id.*

¹² MI5, *Evidence and Disclosure*, <http://www.mi5.gov.uk/output/evidence-and-disclosure.html> (last visited Feb. 5, 2009).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 402 PARL. DEB., (6th ser.) H.C. (2003) 74W.

¹⁶ Douglas Alexander, UK Minister of State for Europe, Statement during the European Parliament plenary debate on the presumed use of European countries by the CIA for the transportation and illegal detention of prisoners (Dec. 14, 2005), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP/TEXT+CRE+20051214+ITEM-014+DOC+XML+V0//EN&language=EN>.

matter of fundamental principle,¹⁷ and its prohibition has been placed on an absolute statutory basis by the incorporation of the European Convention on Human Rights into the national law of the UK.¹⁸

While interrogation techniques have recently once again been brought to the forefront of public attention due to a number of high profile scandals connected with the war against terrorism, the UK addressed this issue in 1972 when the Prime Minister made a speech in the House of Commons stating: “techniques of hooding, wall standing, sleep deprivation, food deprivation and white noise would “not be used in future as an aid to interrogation.”¹⁹ The Intelligence Services maintain “coercive interrogation techniques are alien to both security services’ [the UK’s domestic and overseas intelligence agencies] general ethics, methodology and training.”²⁰ Intelligence professionals that were permitted to interview UK nationals detained at Guantanamo Bay were orally briefed beforehand that they were only permitted to interview those that had agreed to speak with them, and that the “interviews must be free from pressure or coercion, must not include inhumane or degrading treatment, and that staff should withdraw if they considered the interview regime to be unacceptably harsh or unreasonable.”²¹ In addition to the requirement that intelligence officers act in accordance with the rules established for interrogation, individuals acting in an official capacity overseas as a Crown Servant are bound by the Criminal Justice Act 1948, which provides that official acts conducted abroad would incur criminal liability as if they were conducted in the UK.²²

Military personnel are subject to, and receive training on, the Law of Armed Conflict.²³ Additionally, the Joint Services Intelligence Organisation has specifically provided in its training that the following acts are prohibited: “Physical punishment of any sort (beatings etc.); the use of stress positions; Intentional sleep deprivation; Withdrawal of food, water or medical treatment; Degrading treatment (sexual embarrassment, religious taunting etc.); The use of ‘white noise’; [and] Torture methods such as thumb screws etc.”²⁴

More comprehensive guidelines were made public with the publication of the amended Standard Operating Instructions on the Police for Apprehending, Handling and Processing Detainees and Internees that was issued by the UK Commander Joint Operations in September 2003 to all military commands, in response to a Parliamentary question in the House of Commons. The Instructions provide:

¹⁷ Oral Evidence from the Under Secretary of State Bill Rammell to the Foreign Affairs Committee, House of Commons, Jan. 11, 2005, at 31.

¹⁸ Human Rights Act 1998, c. 42.

¹⁹ Intelligence and Security Committee, *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq*, 2005, CM 6469 ¶ 26 (citing Hansard, 2 March 1972, columns 743–744).

²⁰ *Id.* ¶ 39 (citing Memorandum to the Intelligence and Security Committee from the Cabinet Office, 7 September 2004).

²¹ *Id.* ¶ 60 (citing Memorandum to the Intelligence and Security Committee from the Cabinet Office, 7 September 2004).

²² Criminal Justice Act 1948, 11 & 12 Geo. 6, c. 58, § 31.

²³ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004, ¶¶ 8.28-29.

²⁴ Intelligence and Security Committee, *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq*, 2005, CM 6469, ¶ 29 (citing Joint Services Intelligence Organisation).

Apprehended individuals are to be treated at all times fairly, humanely and with respect for his or her personal dignity; Apprehended individuals are to be protected from dangers and the elements; Apprehended individuals are not to be kept in direct sunlight for long periods; Medical care is to be provided if required; Food and water are to be provided as necessary, having regard to any national, ethnic or religious dietary requirements; Physical and mental torture, corporal punishment, humiliating or degrading treatment, or the threat of such, is prohibited; The use of hooding and stress positions are prohibited; Females are to be separated from males. Juveniles (under 15) are to be segregated from other apprehended individuals unless to do so would impose solitary confinement on the individual; [and] It is a command responsibility to ensure that all apprehended individuals are treated in accordance with these principles.²⁵

Despite the International Conventions to which the UK is a party and its adherence to customary international law, the country faced allegations that its officials had used torture during the interrogation of detainees in Iraq, Afghanistan, and Guantanamo Bay. These allegations were simultaneous with the publication of photographs depicting U.S. troops abusing detainees at Abu Ghraib in Iraq. Reports from British detainees released from the United States' Guantanamo Bay compounded concerns that unlawful methods of interrogation were being utilized. One former detainee stated that, upon his capture in Afghanistan, he was interrogated by officials claiming to be from MI5 and the Foreign Office, with one of these alleged officials standing on the back of his legs as he knelt and the other holding a gun to his head.²⁶ In the face of these allegations the Intelligence and Security Committee²⁷ investigated these issues and published a report in March 2005 that detailed "the contact between detainees and the SIS, Security Service, both civilian and military DIS staff and military intelligence personnel in Afghanistan, Guantanamo Bay and Iraq."²⁸ It found that in over two thousand interviews of detainees in these countries by UK intelligence personnel, there were "fewer than fifteen occasions when UK intelligence personnel reported actual or potential breaches of UK policy or the international Conventions."²⁹

One notable issue that is prevalent throughout the report and in the press release announcing the publication of the report is the consistent emphasis on the difficulties of the operation as, "personnel were required to operate in very difficult and unusual conditions to fulfill the UK intelligence community's duty to obtain intelligence for the purpose of protecting the UK from terrorist threats."³⁰ Furthermore, the fact that access to detainees and additional

²⁵ 423 PARL. DEB., (6th ser.) H.C. (2004) 721W.

²⁶ Tania Branigan, *Ministers face new action over Camp Delta Britons*, GUARDIAN (London), Mar. 15, 2004, <http://www.guardian.co.uk/politics/2004/mar/15/uk.september11>

²⁷ The Intelligence and Security Committee was "established under the Intelligence Services Act 1994 to examine the policy, administration and expenditure of the Security Service, Secret Intelligence Service (SIS) and Government Communications Headquarters (GCHQ). The Committee has developed its oversight remit, with the Government's agreement, to include examination of the work of the Joint Intelligence Committee (JIC), the Intelligence and Security Secretariat, which includes the Assessments Staff in the Cabinet Office, and the Defence Intelligence Staff (DIS) – part of the Ministry of Defence (MoD)." Intelligence and Security Committee, *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq*, 2005, CM 6469 at iv.

²⁸ *Id.* ¶ 1.

²⁹ *Id.* ¶ 110.

³⁰ Press Release, Cabinet Office, Publication of report on the handling of detainees by UK Intelligence personnel in Afghanistan, Guantanamo Bay and Iraq (Mar. 10, 2005), available at http://www.cabinetoffice.gov.uk/newsroom/news_releases/2005/050310_detainees.aspx.

intelligence were “provided on a privileged basis [by the U.S.], which could have been withdrawn,”³¹ was compounded by the importance of the interrogations, which have facilitated countering threats from Islamic extremist terrorist activity and helped identify key terrorist organizations.³²

The Intelligence and Security Committee Report reported that interrogations conducted or observed by UK intelligence personnel,³³ with few limited exceptions, have been conducted in accordance with the principles of the Geneva Convention, and found no evidence of deliberate abuse of detainees.³⁴ The exceptions were specified in the report as involving two intelligence personnel who interviewed a hooded and shackled detainee held by the U.S. in Iraq and did not remove the hood, which is a breach of UK policy. The report noted that this event was due to the intelligence personnel’s lack of sufficient training and knowledge of the UK’s prohibition on certain interrogation techniques.³⁵ It concluded that Ministers should consult with intelligence personnel prior to detainee interviews and be informed immediately about any concerns of abuses of detainees.³⁶

While intelligence professionals are prohibited from utilizing the interrogation techniques mentioned, the government has noted that these individuals do not have an obligation to intervene and prevent mistreatment of prisoners that is outside the standards of the Geneva Conventions if such prisoners are not within the UK’s custody or control.³⁷ This note was made in the context of an intelligence professional’s observations of American-held prisoners and resulted in a response from the Intelligence and Security Committee that stated:

HMG’s commitment to human rights makes it important that the Americans understand that we cannot be party to such ill treatment nor can we be seen to condone it. In no case should they be coerced during or in conjunction with an SIS interview of them. If circumstances allow, you should consider drawing this to the attention of a suitably senior U.S. official locally.³⁸

With the developing scandals, this wording was later altered so that witnesses to such abuse are now instructed to report incidences of detainees being treated in an inhumane or degrading manner.³⁹ Furthermore, in response to these concerns, the Iraq Survey Group Joint Interrogation and Debriefing Cell now receives “in-theatre training on interrogation techniques and the Geneva Conventions.”⁴⁰

³¹ Intelligence and Security Committee, *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq*, 2005, CM 6469, ¶ 112.

³² *Id.* at 3.

³³ The term intelligence personnel refers to “professional intelligence officers in the Security Service and the SIS, as well as the military and civilian intelligence personnel in the DIS and in the Armed Forces.” *Id.* ¶ 10.

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ *Id.* ¶ 110.

³⁷ *Id.* ¶ 47.

³⁸ *Id.*

³⁹ *Id.* ¶ 123.

⁴⁰ *Id.* ¶ 89.

Despite this strongly worded conclusion and the government's consistent condemnation of torture,⁴¹ it has taken the conflicting position that the use of intelligence obtained in such a manner is still open:

for debate as to whether intelligence, which may have been obtained by other countries through torture, or through cruel or inhumane treatment, should be rejected as a matter of principle, or whether it is a Government's overriding duty to preserve the safety of its citizens and thus any intelligence – however obtained – should be evaluated and acted upon as necessary. There are separate questions as to whether intelligence obtained under torture is likely to be reliable, and whether principled refusal would deter those who might use such methods.⁴²

In November 2004, the Foreign Secretary gave evidence regarding the use of intelligence that may have possibly been obtained through torture. He stated:

there are certainly circumstances where we may get intelligence from a liaison partner where we know, not least through our own Human Rights monitoring, that their practices are well below the line ... [This] is a real area of moral hazard ... torture is completely unacceptable ... but you cannot ignore it if the price of ignoring it is 3,000 people dead.⁴³

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Addendum – Interrogation Techniques

In 2008, the Joint Committee on Human Rights published a report addressing the issue of discrepancies between evidence given to it by Lieutenant General R. V. Brim, Commander Field Army and the Minister of State for the Armed Forces for a separate report in 2006 on the use of interrogation techniques in Iraq and what was actually occurring on the ground. The evidence given in 2006 by Lieutenant General Brim was that while British soldiers may not be able to name the five prohibited interrogation techniques (also referred to as “conditioning techniques”) which include hooding, wall standing, sleep deprivation, food deprivation, and white noise, if told what they were they would know they should not do them.⁴⁴ The evidence given by the Minister of State for the Armed Forces was that “the training given to those Service personnel in appointments which could require them to conduct interrogation of captured enemy personnel takes full account of this directive, of the Geneva Convention and of the Laws of Armed Conflict.”⁴⁵

⁴¹ House of Commons, Foreign Affairs Committee, Sixth Report, Foreign Policy Aspects of the War Against Terrorism, Response of the Secretary of State for Foreign and Commonwealth Affairs, 2004-5, CM 6590.

⁴² Intelligence and Security Committee, The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq, 2005, CM 6469, ¶¶ 32-33.

⁴³ *Id.* ¶ 33 (citing Evidence from the Foreign Secretary, 11 November 2004).

⁴⁴ JOINT COMMITTEE ON HUMAN RIGHTS, NINETEENTH REPORT, THE UN CONVENTION AGAINST TORTURE (UNCAT), (2005-2006) H.C. 701 (Minutes of Evidence, Qq 238-9).

⁴⁵ *Id.*, App. 3.

Evidence was brought to the attention of the Joint Committee on Human Rights, during a court martial involving the death of an Iraqi civilian, that the British Army was in fact using these techniques to maintain the “ ‘shock of capture’ in advance of technical questioning.”⁴⁶ The court martial heard evidence that these techniques were authorized by the “Brigade headquarters and its legal officer. There was also evidence about advice given by the Attorney General on the applicability of the ECHR in detention facilities in Iraq, which appeared to some to suggest that he had advised that the ECHR did not apply.”⁴⁷ One person was found guilty of inhumane treatment during this court martial and at its conclusion the general head of the British Army issued a statement that the Iraqi civilian who had been killed:

was subjected to a conditioning process that was unlawful It has always been our policy that all British military personnel deployed on operations must be in no doubt about their duty to behave in accordance with the law. It now appears that this duty was forgotten or overlooked in this case.⁴⁸

The Joint Committee concluded that one of the reasons for the use of these techniques could be that:

the prohibition on the use of conditioning techniques may have been interpreted narrowly, as only applying to interrogation personnel and to operations in Northern Ireland; the prohibition on the use of conditioning techniques was not as clearly articulated to troops in Iraq as it might, and indeed should, have been; even as late as January 2008 the prohibition on the use of conditioning techniques was not clearly articulated to service personnel other than those responsible for interrogation; and until 2005, interrogation personnel were trained in proscribed techniques, if only to demonstrate the techniques to which they might be subject if captured.⁴⁹

One of the responses by the Ministry of Defence was to alter the training system for soldiers. Prior to 2005, completion of the course *Conduct After Capture* qualified a soldier to conduct Interrogation and Tactical Questioning (I&TQ). The *Conduct After Capture* course exposed soldiers to treatment they may receive at the hands of the enemy that would not comply with international humanitarian law, thus introducing them to illegal interrogation methods. The current policy is that soldiers subject to *Conduct After Capture* training cannot be I&TQ specialists without “revalidation via appropriate I&TQ training.”⁵⁰

⁴⁶ JOINT COMMITTEE ON HUMAN RIGHTS, TWENTY EIGHTH REPORT, UN CONVENTION AGAINST TORTURE: DISCREPANCIES IN EVIDENCE GIVEN TO THE COMMITTEE ABOUT THE USE OF PROHIBITED INTERROGATION TECHNIQUES IN IRAQ (2007-2008) H.C. 527, ¶ 6.

⁴⁷ *Id.* ¶ 5.

⁴⁸ Ministry of Defence, *General Dannatt speaks after close of Cpl Payne Court Martial*, Apr. 30, 2007, <http://www.mod.uk/defenceinternet/defencenews/defencepolicyandbusiness/generaldannattspeaksaftercloseofcplpaynecourt martial.htm>.

⁴⁹ JOINT COMMITTEE ON HUMAN RIGHTS, TWENTY EIGHTH REPORT, *supra* note 46, ¶ 13.

⁵⁰ HER MAJESTY’S ARMY, THE AITKEN REPORT: AN INVESTIGATION INTO CASES OF DELIBERATE ABUSE AND UNLAWFUL KILLING IN IRAQ IN 2003 AND 2004 (2008), ¶ 22.

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