Department of the Army
Pamphlet 27–9–1

Legal Services

Military Judges' Benchbook For Trial of Enemy Prisoners of War

Headquarters
Department of the Army
Washington, DC
4 October 2004

UNCLASSIFIED

SUMMARY of CHANGE

DA PAM 27–9–1
Military Judges' Benchbook for Trial of Enemy Prisoners of War

This is a new Department of the Army Pamphlet specifically tailored for trials of enemy prisoners of war (EPWs) for either pre-capture offenses, which arise under the law of war, or post-capture offenses, which arise under the Uniform Code of Military Justice. This Pamphlet incorporates the provisions of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GC III), Chapter 3, Penal and Disciplinary Sanctions, into the substantive and procedural requirements found in DA Pam 27-9, Military Judges' Benchbook (15 Sep 2002 edition), and in the Manual for Courts-Martial (2002 edition). This Pamphlet also includes decisions of international, military, and higher courts; and comments and opinions of individual legal specialists on international and criminal law. Below are some of the highlights of this Benchbook:

o Adds the substantive and procedural provisions of GC III, Chapter 3:

--Provides instruction on the use of an interpreter, if necessary, in the accused's preparation of trial and at the trial.

--Provides instruction on the notification and service requirements under GC III in both a case not referred capital and in a case referred capital.

--Provides instruction on the accused's rights to a qualified advocate or counsel IAW the GC III.

--Provides instruction on the types of punishments applicable to EPWs.

--Provides instruction on post-trial and appellate rights advice.

o Adds references to GC III, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (GC IV), and relevant criminal trials of EPWs.

o Adds pre-capture criminal offenses for law of war violations.

--Provides pattern instructions for offenses derived from the offenses listed in Military Commission Instruction No. 2 (30 Apr. 2003). See Military Order of 13 November 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (16 Nov. 2001); Military Commission Order No. 1 (21 Mar. 2002).

--Provides pattern instructions for offenses derived from the law of war.

o Adds defenses under the laws of war that may apply to pre-capture offenses.

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By order of the Secretary of the Army:

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General, United States Army
Chief of Staff

Official:

JOEL B. HUDSON
Administrative Assistant to the Secretary of the Army

History. This publication is a new Department of the Army Pamphlet.

Summary. This pamphlet sets forth pattern instructions and suggested procedures applicable to trials of enemy prisoners of war by general and special court-martial. It has been prepared primarily to meet the needs of military judges. It is also intended as a practical guide for counsel, staff judge advocates, commanders, legal specialists, and others engaged in the administration of military justice.

Applicability. This pamphlet applies to the Active Army, the Army National Guard of the United States, and the U.S. Army Reserve.

Proponent and exception authority. The proponent of this pamphlet is The Judge Advocate General. The proponent has the authority to approve exceptions or waivers to this regulation that are consistent with controlling law and regulations. The proponent may delegate this approval authority, in writing, to a division chief within the proponent agency or a direct reporting unit or field operating agency of the proponent agency in the grade of colonel or the civilian equivalent. Activities may request a waiver to this regulation by providing justification that includes a full analysis of the expected benefits and must include formal review by the activity's senior legal officer. All waiver requests will be endorsed by the commander or senior leader of the requesting activity and forwarded through their higher headquarters to the policy proponent. Refer to Army Regulation 25–30 for specific guidance.

Suggested improvements. Users are invited to send comments and suggested improvements to this pamphlet on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to the Office of the Chief Trial Judge, U.S. Army Legal Services Agency, ATTN: JALS–TJ, 901 N. Stuart St., Arlington, VA 22203.

Distribution. This publication is intended for the Active Army, the Army National Guard of the United States, and the U.S. Army Reserve.

Department of the Army Pamphlet 27–9–1
Military Judges' Benchbook for the Trial of Enemy Prisoners of War

Chapter 1

INTRODUCTION

1–1. Purpose and scope.

A. *Purpose*. This Military Judges' Benchbook for Trial of Enemy Prisoners of War (EPWs)[1] sets forth certain procedural steps required in the trial by court-martial of persons protected by the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GC III), including certain civilian personnel protected by the GC III. Under Article 102, GC III, EPWs can be validly sentenced only if they are sentenced under (1) the same court system and (2) the same procedures as members of the armed forces of the Detaining Power (DP) AND if (3) the court follows the provisions of Chapter 3, Penal & Disciplinary Sanctions, GC III. This Benchbook modifies DA Pam 27-9, Military Judges' Benchbook, to incorporate the provisions of Chapter 3, GC III.

This Benchbook does not purport to discuss or resolve the substantive questions which may arise in the trial by court-martial of EPWs nor does it purport to exhaust all of the procedural issues which may arise in such a trial. Pertinent provisions of the GC III and authoritative precedents should be consulted before the trial of EPWs. Under Article 11, GC III, if the parties disagree "as to the application or interpretation" of the GC III, the Protecting Power (PP) "shall lend their good offices with a view to settling the disagreement." Procedural requirements under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (GCC), particularly Articles 64-78, for persons not protected under the GC III are not included herein.

[1] For purposes of this Benchbook, the accused is a person detained by the U.S. armed forces who is classified as an "enemy prisoner of war" (EPW). An EPW is a person entitled to prisoner of war (POW) status as defined in Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GC III).

B. *Application of the GC III*. Article 102, GC III, provides that EPWs "can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter [III, Penal and Disciplinary Sanctions, GC III,] have been observed." This Benchbook does not resolve the substantive question of which is the proper forum (military court or federal or state court) to try EPWs, but it operates on the presumption that EPWs will be tried by court-martial for an offense of which a member of the U.S. armed forces would likely be tried by court-martial. Therefore, this Benchbook would apply to an accused who is classified as an EPW by an Article 5, GC III, tribunal and who is tried by court-martial.

(1) Procedures. This Benchbook incorporates certain additional safeguards provided by the GC III that must be scrupulously observed whenever EPWs are tried by court-martial. See FM 27-10, The Law of Land Warfare, paragraphs 158-184, citing Articles 82-108, GC III.

(2) Substantive offenses.

(a) LOW offense: EPWs may be prosecuted for pre-capture criminal offenses under the law of war (LOW), i.e., war crimes (as opposed to warlike acts covered by combatant immunity).

(b) UCMJ violation. EPWs may be prosecuted for post-capture criminal offenses under the Uniform Code of Military Justice (UCMJ). Article 82, GC III, provides that EPWs are "subject to the laws, regulations, and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary [e.g., nonjudicial punishment] measures in respect of any offense committed by a prisoner of war against such laws, regulations or orders….If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only." Likewise, Article 2(9), UCMJ, specifically provides that EPWs are subject to the UCMJ, and thus may be tried for post-capture criminal offenses under the UCMJ as well as under the LOW (Part I, para. 1-2, Manual for Courts-Martial, United States, 2002 Edition (MCM)).

(3) Types of court-martial.

(a) LOW offense:[2] A LOW offense must be tried by a general court-martial. Art. 18, UCMJ; RCM 201(f)(1)(B) and 202(b). See RCM 307(c)(2), Discussion, for drafting of charges under LOW.

(b) UCMJ violation. EPWs may be tried by the same levels of courts-martial under the UCMJ (e.g., general, special, or summary courts-martial) as members of the U.S.

[2] There is a debate whether the procedural requirements of Article 102, GC III, apply to pre-capture criminal offenses. See Howard S. Levie, Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War, 7 USAFA J. Leg. Stud. 37, 41-42 (1996-1997). As noted earlier, this Benchbook does not address the substantive question of which is the proper forum, but presumes that a policy decision has been made subjecting EPWs to trial by court-martial for pre-capture offenses.

armed forces. Art. 2(9), UCMJ; Art. 102, GC III. In addition, AR 27-10, paragraph 5-3c, contemplates that EPWs may be tried by special courts-martial. Although this Benchbook is primarily designed for general and special courts-martial, a summary court-martial should include the procedures of this Benchbook that incorporate the provisions of Chapter 3, GC III.

1-2 Military Judges

A. *Obligations, duties, and essential characteristics of military judges.* Although the primary purpose of this Benchbook is to assist military judges in the preparation of trial instructions in courts-martial concerning EPWs, military judges must constantly be mindful of their judicial responsibilities in and out of the courtroom. In this regard, additional guidance may be found in publications of such organizations as the American Bar Association, American Judicature Society, and National Conference of State Trial Judges. Particular attention should be given to the Code of Judicial Conduct and Standards for the Administration of Criminal Justice pertaining to the Special Functions of the Trial Judge as promulgated by The American Bar Association. The Code of Judicial Conduct for Army Trial and Appellate Judges applies to military judges presiding over trials of EPWs.

A military judge must maintain a thorough knowledge of military law, including all its latest developments, by careful analysis of the decisions of military appellate tribunals, the United States Court of Appeals for the Armed Forces, and pertinent decisions of other federal courts. The military judge should also be familiar with the LOW and, in particular, the GC III.

B. ***Primary objective.*** This Benchbook is primarily designed to assist military judges of courts-martial concerning EPWs in the drafting of necessary instructions to courts. Because instructional requirements vary in each case, the pattern instructions are intended only as guides from which the actual instructions are to be drafted. In addition, this publication is designed to suggest workable solutions for many specific problems which may arise at a trial and to guide the military judge past certain pitfalls which might otherwise result in error. Specific examples of situations with which the military judge may have to deal are set forth, and in many instances actual language which may be employed in meeting these situations is suggested.

1–3. Necessity for tailoring.

No standardized set of instructions can cover every situation arising in courts-martial concerning EPWs. Special circumstances will invariably be presented, requiring instructions not dealt with in this Benchbook, or adaptation of one or more of these instructions to the facts of a case. These instructions are not intended to be a substitute for the ingenuity, resourcefulness, and research skill of the military judge. They will be of maximum value when used as a guide to carefully tailored instructions to be given to court members. The tailoring of instructions to the particular facts of a case contemplates the affirmative submission of the respective theories, both of the Government and of the accused, to the members of courts, with lucid guideposts, to the end that they may knowledgeably apply the law to the facts as they find them.

1–4. Elements of offenses.

A. Each pattern instruction contained in Chapter 3 bears the same number as the corresponding paragraph in Part IV, MCM. In addition, Chapter 3 contains subchapters 3-A, 3-B, 3-C, and 3-D, which include offenses under the LOW that are incorporated as customary international law. For most punitive offenses, if there are two or more methods by which the punitive article can be violated, the instructions are set forth separately, and are numbered with a –2, –3, –4, and so forth. Each instruction includes the form specification, which may be slightly different from the MCM form specification; the elements of the offense; definitions of terms; and required or desirable supplementary instructions. In a trial by court-martial of EPWs, the court is not bound to apply any specified maximum punishment, and the military judge must instruct the court accordingly. Article 87, GC III. If an instruction includes a term having a special legal connotation (term of art), the term should be defined for the benefit of the court, and ordinarily appears in the "DEFINITIONS AND OTHER INSTRUCTIONS" section of each instruction. Each pattern instruction set out in Chapter 3 should be prefaced by the language found in Chapters 2 (2–5–9) or 8 (8–3–8), PREFATORY INSTRUCTIONS ON FINDINGS. In the body of the instructions, that is, the elements and definitions sections, language found in parentheses is ordinarily not required in each case, but may be in a particular case, depending on the pleadings, the facts, and the contentions of the parties. Language set forth in brackets denotes elements which are alternative means of committing an offense, or aggravating factors which are not required to be instructed upon in each case, unless pled in the specification. For example, Article 3-B-2-1 may be violated by killing or inflicting bodily harm on a person; thus, the form

specification and elements for terrorism are found in one set of brackets, and those for destroying property are set forth in a second set of brackets.

B. Notes are used extensively throughout the instructions in Chapter 3. When an instruction follows a note in the "DEFINITIONS AND OTHER INSTRUCTIONS" section, that instruction should be given only if the subject matter of the note applies to the facts and circumstances of that case. Notes in other portions of Chapter 3 are intended to explain the applicability of the instruction generally, or to alert the trial judge to optional elements or unusual applications of the instruction.

1–5. Other Instructions.

A. When court members are to determine findings in a case involving a plea of not guilty, the military judge should instruct as to the elements of each offense charged and all lesser included offenses, any special or other defense in issue, and other supplementary matters, bearing in mind the need for tailoring such instructions to the facts of the case. These instructions should conclude with mandatory advice concerning the burden of proof, reasonable doubt, and presumption of innocence, and guidance concerning procedures to follow in deliberations and voting in closed session found in Chapter 2. When court members are to determine a sentence, instructions must be tailored to the law and evidence just as in the case of pre-findings advice.

B. Defenses. As in Chapter 3, instructional language in Chapter 5 and Subchapter 5-A which follows a note is to be given only when the note applies to the facts and circumstances of the offense.

(1) Instructions in Chapter 5 cover general and special defenses that are applicable in a trial by court-martial of members of the U.S. armed forces. The defenses in Chapter 5 are also applicable in a trial by court-martial of EPWs for post-capture criminal offenses under the UCMJ. See Arts. 85 and 102.

(2) Instructions in Subchapter 5-A are defenses under the LOW and may be applicable in a trial by general court-martial of EPWs for pre-capture criminal offenses under the LOW.

C. Chapter 7 includes common evidentiary instructions. As in Chapter 3, instructional language which follows a note is to be given only when the note applies to the facts and circumstances of the offense.

1–6. References.

A. Paragraph numbers in Chapter 3 conform to the paragraph numbers in the MCM. Therefore, no MCM citations are listed at paragraph e, "Reference." GC III citations, if applicable, are included at paragraph e, "Reference." Absent other citations, paragraph e is omitted.

B. References:

1. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, *reprinted in* DEP'T OF THE ARMY PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE (1956) [hereinafter DA PAM 27-1]. *See* http://www.unhchr.ch/html/menu3/b/91.htm.
2. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *reprinted in* DA PAM 27-1.
3. Department of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, p. 422 (12 April 2001, as amended through 5 June 2003).

Chapter 2

TRIAL PROCEDURE AND INSTRUCTIONS

This procedural guide modifies the Guide for General and Special Courts-Martial in Appendix 8, MCM. This guide is intended for use in any general or special court-martial case concerning an EPW to which a military judge (MJ) has been detailed in accordance with Article 26, UCMJ. In addition to serving as a procedural guide for contested and uncontested trials, this chapter provides the majority of standard, non-evidentiary instructions on findings and sentencing. The order in which the guide and instructions appear generally corresponds with the point in the trial when the particular wording or instruction is needed or is otherwise appropriate.

Section I

Initial Session Through Arraignment

2–1. PROCEDURAL GUIDE FOR ARTICLE 39(a) SESSION

MJ: Please be seated. This Article 39(a) session is called to order.

> ***NOTE: Use of an interpreter. The accused is entitled to the services of a competent interpreter, if necessary, in preparation for trial and at the trial. Art. 105, GC III. The military judge should proceed at a pace that allows the interpreter to translate the proceedings to the accused and to translate the accused's responses back to the court. Frequent pauses for translation will thus be necessary. If the accused requires a translator in order to communicate with counsel, an interpreter must be designated a member of the defense team.***
>
> ***NOTE: The GC III and UCMJ do not indicate who selects the interpreter. Presumably, the prosecution assigns an interpreter, and the interpreter may be regarded as a***

member of the accused's defense team. Cf. Yamashita transcript, Vol. I, at 4 (The prosecution assigned an interpreter, but the accused requested his own personal interpreter because he did not understand the assigned interpreter. The tribunal kept the assigned interpreter, but also allowed the accused's translator to be a part of the accused's defense team to provide a personal translation to the accused.).

(TC: The accused in this proceeding is entitled to the services of a competent interpreter [because (he)(she) (is not a native English speaker) (*state the reason, if any*)]). The prosecution requests that the proceedings be translated from English to _____ (*state accused's native language*) by _____ (*state the name of the interpreter(s)*).

MJ: The proceedings will be so translated. The interpreter(s) will now be sworn.

TC: Do you (swear) (affirm) that you will faithfully perform all the duties of interpreter in the case now in hearing (so help you God)?"

INT(S): (Respond.)

TC: This court-martial is convened by Court-Martial Convening Order Number _____, Headquarters _____, dated _____, (as amended by Court-Martial Convening Order Number _____, same Headquarters, dated _____,) copies of which have been furnished the military judge, counsel, and the accused, (which is in a language that (he)(she) understands,) and which will be inserted at this point in the record.

NOTE: The military judge should examine the convening order(s) and any amendments for accuracy. IF A CAPITAL CASE, GO TO CHAPTER 8, TRIAL PROCEDURE AND INSTRUCTIONS FOR A CAPITAL CASE.

NOTE: Article 105, GC III, entitles the accused to a copy of documents in the language which he understands.

(TC: The following corrections are noted in the convening orders: _____.)

NOTE: Only minor changes may be made at trial to the convening orders. Any correction that affects the identity of the individual concerned must be made by an amending or correcting order.

TC: The charges have been properly referred to this court for trial and were served on the accused (on _____ (*enter the date of service*)), (on) _____ (*enter the name of the Protecting Power*) (on _____ (*enter the date of service*)), and (on) the prisoners' representative on _____ (*enter the date of service*)). The prosecution is ready to proceed (with the arraignment) in the case of United States v. _____ (*state accused's name and rank, if applicable*).

NOTE: Protecting Power (PP). Generally, the PP would be designated pursuant to Article 8, GC III. Under certain circumstances (e.g., unwillingness to request or to accept a PP, or during a period of occupation), however, there may not be a PP and a substitute organization such as a humanitarian organization (e.g., International Committee of the Red Cross), may be used. See Art. 10, GC III. The military judge should be mindful of any specific guidance that the Department of Defense (DoD) or the Department of State (DoS) may issue regarding the PP and proceed accordingly.

NOTE: Detaining Power. Under the GC III, the DP is responsible for satisfying various procedural functions. However, the GC III does not indicate whether such functions may be delegated to the prosecution. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding the delegation of the DP's functions and proceed accordingly.

NOTE: Charge sheet. EPW trials should use the same Charge Sheet (DD Form 458) used in trials of members of the U.S. armed forces. RCM 307. See Major Charles J. Baldree, War Crimes Trials: Procedural Due Process 29 (April 1967) (unpublished graduate course thesis, The Judge Advocate General's School, U.S. Army) (on file with U.S. Army Trial Judiciary).

NOTE: Date of service. The military judge must pay attention to the date of service. (When computing the days, do not count the day of service or day of trial).

a. Unlike the MCM, the GC III does not explicitly provide for an EPW accused's waiver of the service requirement. Cf. US v Garcia, 10 MJ 631, 633 (ACMR 1980) (date of service is not a bar to trial within the specified period, but merely provides a ground for the accused to secure a continuance); US v Callahan, 1990 CMR Lexis 1216.

b. Article 104, GC III, states that the DP must "properly notify" the accused, the PP, and the prisoners' representative that it has decided to institute judicial proceedings against the accused at least THREE weeks before the opening session of trial. In this regard, the military judge should be mindful of any specific guidance that DoD or DoS may issue concerning the procedure for the DP to notify the PP and

proceed accordingly. Article 104 provides that the notification must contain the following:

(1) EPW's surname and first name, rank, army regimental, serial number, date of birth, and profession or trade, if any;

(2) Place of internment or confinement;

(3) Specification of the charge or charges on which the EPW is to be arraigned, giving the legal provisions applicable; and

(4) Designation of the court which will try the case, likewise the date and place fixed for the opening of the trial.

A copy of the Staff Judge Advocate's (SJA) pre-trial advice (as required by Article 34, UCMJ) (i.e., a written and signed statement advising: (1) whether each specification on the charge sheet alleges an offense under the UCMJ; (2) whether each allegation is warranted by the evidence indicated in the report of investigation, if any;(3) whether a court-martial would have jurisdiction over the accused and the offense(s); and (4) what action to be taken by the convening authority) may satisfy the notice requirement.

c. Unless the prosecution presents satisfactory evidence of timely receipt of the required notice by the accused, the Protecting Power, and the prisoners' representative, the military judge must adjourn the trial (Art. 104, GC III) and report the matter to the convening authority.

TC: The accused and the following persons detailed to this court are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel;) ((and) _____, Defense Counsel) ((and) _____, Assistant Defense Counsel) ((and) _____, Civilian Defense Counsel) ((and) _____ (*state name of selected prisoner comrade*), Defense Assistant)

((and) _____ (*state name of selected advocate*), (Assistant) (Associate) Defense Advocate). The members (and the following person(s) detailed to this court are absent: _____.

NOTE: Security concerns may necessitate an alteration of the usual requirement of announcement in open court of the names of court members and the parties. An appellate exhibit containing their names may be substituted.

TC: _____ has been detailed reporter for this court and (has been previously sworn) (will now be sworn).

NOTE: Court reporter responsibilities. When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of the opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.

NOTE: Oath for reporter. If the reporter was not previously sworn, the following oath, as appropriate, will be administered by the trial counsel:

"Do you (swear) (affirm) that you will faithfully perform all the duties of court reporter in the case now in hearing (so help you God)?"

TC: (I) (All members of the prosecution) have been detailed to this court-martial by _____. (I am) (All members of the prosecution are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner which might tend to disqualify (me) (us) in this court-martial.

NOTE: <u>Oaths for counsel</u>. When counsel for either side, including any advocate, associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the military judge:

"Do you (swear) (affirm) that you will faithfully perform all the duties of [(trial) (assistant trial) counsel] [(associate) (assistant) defense (counsel) (advocate)] in the case now in hearing (so help you God)?"

2-1-1. RIGHTS OF THE ACCUSED

MJ: (*<u>addressing the accused</u>*) You have certain rights that are afforded to you under Article 105 of the Geneva Convention Relative to the Treatment of Prisoners of War. For example, Article 105 provides you with certain rights regarding representation by counsel. Has (*<u>state name of detaining power</u>*) advised you of these rights prior to this proceeding?

ACC: (Responds.)

NOTE: Article 105, GC III, states that the DP shall advise the accused of these rights, which are summarized in the following notes, "in due time" before trial. It does not, however, address the consequences if the DP fails to do so. In that instance, the MJ may wish to consider granting a continuance.

MJ: I will (again) discuss these rights with you now.

NOTE*: *Rights to counsel*. *See Articles 99 and 105, GC III.

a. Procedurally, the accused first has the right to the assistance of one of his prisoner comrades and to representation by a "qualified advocate or counsel" of his own choice. *See* Article, 105, GC III (requiring, ostensibly, that accused be represented and apparently giving him both the right to assistance by prisoner comrade AND representation by qualified counsel).

b. If the accused fails to select a qualified advocate or counsel, then the Protecting Power shall appoint an "advocate or counsel" to represent the accused.

c. If the Protecting Power does not appoint an advocate or counsel to represent the accused, then the Detaining Power shall appoint a "competent advocate or counsel" to represent the accused.

d. The advocate or counsel selected to represent the accused shall have at least two weeks before the opening of trial to prepare for the defense of the accused.

NOTE: "Qualified" advocate or counsel. Although the language of Article 105, GC III, uses different terms with reference to "advocate or counsel" (e.g., (1) the accused is entitled to representation by a "qualified" advocate or counsel; (2) the PP shall select an advocate or counsel; and (3) the DP shall appoint a "competent" advocate or counsel), the designated advocate or counsel should nonetheless be "qualified". Such an interpretation would be consistent with the tenor of Article 99, GC III ("No prisoner of war may be convicted without having had an opportunity to present his defense and the assistance of a qualified advocate or counsel"). The GC III, however, fails to define the term "qualified." On the one hand, these terms may have the same meaning in different jurisdictions. On the other hand, these terms may distinguish between a person with a license to practice law and a person without a license to practice law, but

familiar with the legal process. In the court-martial context, Article 38(b), UCMJ, permits the accused to be represented by civilian or military counsel. Notwithstanding, RCM 502(d)(3) requires that the civilian counsel be "(A) a member of the bar of a Federal court or of the bar of the highest court of a State; or (B) If not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial." If the purported "advocate or counsel" fails to satisfy this requirement, he may not be permitted to represent an accused in a court-martial. See Soriano v. Hosken, 9 MJ 221, 222 (1980) (citing US v. Nichols, 8 USCMA 119, 125 (1957))(acknowledging that a member of a local bar in a foreign country may be qualified to represent a military accused depending on his or her ability to demonstrate a fair standard of professional competence). Apart from failing to define "qualified," the GC III likewise does not address who would determine whether the advocate or counsel is qualified in the first instance. Finally, it should be noted that security grounds may justify not allowing a "selected" advocate/counsel to participate if other qualified advocates or /counsel are available to assist the accused.

NOTE: Pro se representation. Unlike the MCM, the GC III does not contemplate pro se representation. Cf. US v. Moussaoui, 2002 US Dist. LEXIS 11135 (14 June 2002) (defendant's motion to proceed pro se granted).

NOTE: Change in representation. The GC III does not address whether the accused may change representation during the trial, e.g., accused changes his mind later that

he wants the assistance/representation of his own prisoner comrade, advocate, or counsel; accused does not want the advocate or counsel selected/appointed by the Protecting Power or the Detaining Power. Because the accused may not proceed pro se, it appears that he must accept the selected/appointed advocate/counsel. However, the accused may be able to request a replacement advocate/counsel for good cause. This issue should be resolved by the Detaining Power before trial, or if this occurs at trial and for good cause, the court may grant a delay for the accused to obtain new representation.

MJ: If you do not _____, you have the right to select one of your prisoner comrades to assist you in your defense. You also have the right to select a qualified advocate or counsel of your choice to represent you. He/She would be provided to you at no expense to you.

NOTE: The GC III does not discuss costs of "representation". Reasoning, however, that EPWs would have the same procedural rights under a GCM, it would seem that EPWs would only receive free military representation and incur their own costs for civilian (or non-military) representation. Notwithstanding, the GC III appears to place the financial burden on the DP for any representation. In contrast, that would be giving EPWs more rights than US military who bear their own costs for non-military representation. However, under 10 USC § 1037, US may pay counsel costs of U.S. military before foreign tribunals. Thus, arguably the same process for EPWs.

If you do not select a qualified advocate or counsel of your choice, _____ (*enter the name of the Protecting Power*) shall find a qualified advocate or counsel to represent you at no expense to you. _____ (*enter the name of the Protecting Power*) shall have at least one week at its

disposal to find a qualified advocate or counsel to represent you. _____ (*enter the name of the Protecting Power*) may select a qualified advocate or counsel from a list of qualified persons submitted by _____ (*enter the name of the Detaining Power*), if so requested by _____ (*enter the name of the Protecting Power*).

If _____ (*enter the name of the Protecting Power*) does not appoint a qualified advocate or counsel to represent you within one week of its notification to appoint a qualified advocate or counsel, then _____ (*enter the name of the Detaining Power*) shall detail a military defense counsel to represent you at no expense to you.

(_____ (*state name of the appointed advocate or counsel*) has been appointed to represent you.)

> ***NOTE: The MCM affords the accused the right to select a different military lawyer. The GC III, however, does not address whether an EPW accused is able to request a different advocate or counsel who was appointed by the PP or DP. Arguably, the accused should be able to request a different advocate or counsel for good cause. Presumably, this issue should be resolved by the DP before trial begins, or if this occurs at trial and the accused presents good cause, the court may grant a delay for the accused to obtain a different advocate or counsel. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding a request for a different advocate or counsel and proceed accordingly.***

MJ: You also have the right to request a different military lawyer to represent you. If the person you request is reasonably available, he/she would be appointed to represent you free of charge.

If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are entitled only to one military lawyer. You may ask his/her superiors to let you keep your detailed counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would have to be provided by you at (no expense to _____ (*enter the name of the Detaining Power*). If you are represented by a civilian lawyer, you can also keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer.

Do you understand your rights to counsel?

ACC: (Responds.)

MJ: Do you have any questions about your rights to counsel?

ACC: (Responds.)

MJ: In addition, the qualified advocate or counsel selected to represent you shall have at least two weeks before the opening of trial to prepare for trial. He/She shall also have available the necessary facilities to prepare your defense.

> ***NOTE: Article 105, GC III, provides that the accused's advocate or counsel is entitled to the necessary facilities to prepare the accused's defense, to freely visit the accused and interview him in private, and to confer with witnesses for the defense including EPWs. See generally Zacarias Moussaoui case, U.S. District Court for the Eastern***

District of Virginia, Alexandria Division, Criminal Case No. 01-455-A (involving several pro se motions regarding defendant's rights to adequately prepare his defense, e.g., defendant's motion requesting access to witnesses held at Guantanamo Bay granted, but the government refused to follow the Court's order). Cf. Military Commission Order No. 1 (provides limited trial procedures to the accused).

MJ: You are also entitled to the services of a competent interpreter in preparation for trial and at the trial.

Lastly, representatives of _____ (*enter the name of the Protecting Power*) are entitled to attend the trial unless, in the interest of security, the sessions are to be closed. If the sessions are to be closed, _____ (*enter the name of the Detaining Power*) shall notify _____ (*enter the name of the Protecting Power*) accordingly that the sessions are to be held in camera.

NOTE: Article 74, GCC. See Instruction 7-23, "Closed Trial Session", Impermissible Inference of Guilt, and RCM 804 and MRE 505 and 506.

MJ: Do you understand these rights?

ACC: (Responds.)

MJ: By whom will you be represented?

ACC: (Responds.)

MJ: By whom was your (advocate) (counsel) selected or appointed?

ACC: (Responds.)

NOTE: <u>Appointment of a qualified advocate or counsel by the Protecting Power</u>. The military judge must pay attention to the date the Protecting Power appoints a qualified advocate or counsel. If less than ONE week has elapsed from notification to the Protecting Power to appoint a qualified advocate or counsel to the date of appointment, the military judge must inquire. (When computing the days, do not count the day of service or day of trial.) If less than ONE week has elapsed, the military judge must grant a continuance.

NOTE: <u>Opportunity to prepare for trial</u>. The military judge must pay attention to the time period the advocate or counsel has to prepare for trial. If less than TWO weeks have elapsed from the time of appointment, the military judge must inquire. (When computing the days, do not count the day of service or day of trial.) If less than TWO weeks has elapsed, the military judge must grant a continuance. Art. 105, GC III.

MJ: When was the date of your selection or appointment?

DC: (Responds.)

MJ: Do you wish to be represented by (him/her) (them) alone?

ACC: (Responds.)

NOTE: <u>Conflict of interest</u>. The military judge must be aware of any possible conflict of interest by counsel and, if a conflict exists, the military judge must obtain a waiver from the accused or order new counsel appointed for the accused. See applicable inquiry at INSTRUCTION 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.

MJ: Defense counsel will announce by whom (he/she) (they) (was) (were) detailed and (his/her) (their) qualifications.

DC: (I) (All detailed members of the defense) have been detailed to this court-martial by _____. (I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense has) acted in any manner which might tend to disqualify (me) (us) in this court-martial.

Civilian DC: I am an attorney and licensed to practice law in the (state(s)) (country) of _____. (I am a member in good standing of the (_____) bar(s)). I have not acted in any manner which might tend to disqualify me in this court-martial.

(OATH FOR CIVILIAN COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?

CDC: (Responds.)

MJ: I have been properly certified and sworn, and detailed (myself) (by _____) to this court-martial. Counsel for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn. Trial counsel will announce the general nature of the charge(s).

NOTE: Charges should allege nationality of accused, victim, accused's position, and that accused "violated the Law of Armed Conflict" or other codal provisions, if applicable. RCM 307(c)(2), Discussion, and 307(d).

TC: The general nature of the charge(s) in this case is _____. The charge(s) (was) (were) preferred by _____, (and) forwarded with recommendations as to disposition by _____; (and investigated by _____). (The Article 32 investigation was waived.)

NOTE: If the accused waived the Article 32 investigation, the military judge should inquire to ensure that it was a knowing and voluntary waiver. The script at INSTRUCTION 2-7-8, PRETRIAL AGREEMENT: ARTICLE 32 WAIVER, may be used, but, if the waiver was not IAW a pretrial agreement the first sentence of the first question should be omitted. If the waiver was part of a pre-trial agreement, the military judge can defer this inquiry until discussion of the pretrial agreement, INSTRUCTION 2-2-6, PRETRIAL AGREEMENT (JUDGE ALONE).

TC: Your Honor, are you aware of any matter which might be a ground for challenge against you?

MJ: (I am not.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Responds.)

2–1–2. FORUM RIGHTS

MJ: _____, you have a right to be tried by a court consisting of at least (three) (five) officer members (that is, a court composed of commissioned and/or warrant officers).

(IF ACCUSED IS ENLISTED:) MJ: Also, if you request it, you would be tried by a court consisting of at least one-third enlisted members.

You are also advised that no member of the court would be junior in rank to you. Do you understand what I have said so far?

ACC: (Responds.)

MJ: Now, if you are tried by court members, the members will vote by secret, written ballot and two-thirds of the members must agree before you could be found guilty of any offense. If you were found guilty, then two-thirds must also agree in voting on a sentence (and if that sentence included confinement for more than 10 years, then three-fourths would have to agree).

> ***NOTE: IF CAPITAL CASE, use procedural guide in Chapter 8, TRIAL PROCEDURE AND INSTRUCTIONS FOR A CAPITAL CASE. In a capital case, there is no right to request trial by judge alone.***

(IN NON-CAPITAL CASES:) MJ: You also have the right to request a trial by military judge alone, and if approved there will be no court members and the judge alone will decide whether you are guilty or not guilty, and if found guilty, the judge alone will determine your sentence. Do you understand the difference between trial before members and trial before military judge alone?

ACC: (Responds.)

MJ: Do you understand the choices that you have?

ACC: (Responds.)

MJ: By what type of court do you wish to be tried?

ACC: (Responds.)

NOTE: If accused elects enlisted court members and the request is written, mark it as an appellate exhibit and GO TO INSTRUCTION 2-1-3, ARRAIGNMENT. If accused elects officer members, GO TO INSTRUCTION 2-1-3, ARRAIGNMENT. If accused elects trial by judge alone, continue below:

MJ: Is there a written request for trial by military judge alone?

DC: There is (not).

MJ: Does the accused have a copy in front of (him)(her)?

DC: (Responds.)

MJ: _____, Appellate Exhibit ___, is a request for trial by military judge alone. Is this your signature on this exhibit?

ACC: (Responds.)

MJ: At the time you signed this request, did you know I would be the military judge in your case?

ACC: (Responds.)

MJ: Is your request a voluntary one? By that, I mean are you making this request of your own free will?

ACC: (Responds.)

MJ: If I approve your request for trial by me alone, you give up your right to be tried by a court composed of members. Do you understand that?

ACC: (Responds.)

MJ: Do you still wish to be tried by me alone?

ACC: (Responds.)

MJ: Your request is approved.

> ***NOTE: If the military judge approves the request, the military judge should indicate so by signing and dating the written request, if one exists. If the military judge disapproves the request, the military judge should develop the facts surrounding the denial, require argument from counsel, and state reasons for denying the request.***

MJ: The court is assembled.

2–1–3. ARRAIGNMENT

MJ: The accused will now be arraigned.

TC: All parties to the trial have been furnished with a copy of the charge(s). Does the accused want (it) (them) read?

NOTE: Article 105, GC III, entitles accused to a copy of documents in the language which he understands.

DC: The accused (waives the reading of the charge(s)) (wants the charge(s) read).

MJ: (The reading may be omitted.) (Trial counsel will read the charge(s).)

TC: The charge(s) (is) (are) signed by _____, a person subject to the code, as accuser; (is) (are) properly sworn to before a commissioned officer of the armed forces authorized to administer oaths; and (is) (are) properly referred to this court for trial by _____, the Convening Authority.

MJ: Accused and Defense Counsel please rise.

ACC/DC: (Complies)

MJ: (___) (*state rank of accused, if applicable*) _____, how do you plead? Before receiving your plea, I advise you that any motions to dismiss or to grant other appropriate relief should be made at this time. Your defense counsel will speak for you.

DC: The defense (has (no) (the following) motions.) (requests to defer motions at this time.)

NOTE: Whenever factual issues are involved in ruling on a motion, the military judge shall state essential findings of fact. If the trial counsel gives notice that the government desires a continuance to file an appeal under Article 62 (see RCM 908), the military judge should note the time on the record so that the 72 hour period may be accurately calculated.

NOTE: The military judge must ensure that pleas are entered after all motions are litigated.

DC: The accused, _____, pleads as follows:

NOTE: IF GUILTY PLEA, GO TO INSTRUCTION 2-2-1, GUILTY PLEA INTRODUCTION. IF NOT GUILTY (JUDGE ALONE), GO TO SECTION III, JUDGE ALONE (CONTESTED FINDINGS). IF NOT GUILTY (MEMBERS), mark the Flyer as an Appellate Exhibit; ensure each court member packet contains copies of the flyer, convening orders, note paper, and witness question forms; then GO TO SECTION V, COURT MEMBERS (CONTESTED).

Section II

Guilty Plea Inquiry

2–2–1. GUILTY PLEA INTRODUCTION

MJ: _____, your counsel has entered a plea of guilty for you to ((the) (all) (several) charge(s) and specification(s)) (_____). Your plea of guilty will not be accepted unless you understand its meaning and effect. I am going to discuss your plea of guilty with you. You may wish to consult with your defense counsel prior to answering any of my questions. If at any time you have questions, feel free to ask them.

A plea of guilty is equivalent to a conviction and is the strongest form of proof known to the law. On your plea alone, and without receiving any evidence, this court can find you guilty of the offense(s) to which you have pled guilty. Your plea will not be accepted unless you realize that, by your plea, you admit every act or omission, and element of the offense(s) to which you have pled guilty, and that you are pleading guilty because you actually are, in fact, guilty. If you do not believe that you are guilty, then you should not for any reason plead guilty. Do you understand what I have said so far?

ACC: (Responds.)

MJ: By your plea of guilty, you give up three important rights, but you give up these rights solely with respect to the offenses to which you have pled guilty.

First, the right against self-incrimination; that is, the right to say nothing at all.

Second, the right to a trial of the facts by this court; that is, your right to have this court-martial decide whether or not you are guilty based upon evidence the prosecution would present, and on any evidence you may introduce.

Third, the right to be confronted by and to cross-examine any witness called against you.

Do you have any questions about any of these rights?

ACC: (Responds.)

MJ: Do you understand that by pleading guilty you no longer have these rights?

ACC: (Responds.)

MJ: If you continue with your guilty plea, you will be placed under oath and I will question you to determine whether you are, in fact, guilty. Anything you tell me may be used against you in the sentencing portion of the trial. Do you understand this?

ACC: (Responds.)

MJ: If you tell me anything that is untrue, your statements may be used against you later for charges of perjury or making false statements. Do you understand this?

ACC: (Responds.)

(MJ: Your plea of guilty to a lesser included offense may also be used to establish certain elements of the charged offense, if the government decides to proceed on the charged offense. Do you understand this?

ACC: (Responds.)

MJ: Trial Counsel, please place the accused under oath.

TC: _____, please stand and face me.

ACC: (Complies.)

TC: Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: (Responds.)

MJ: Is there a stipulation of fact?

TC: (Yes) (No), Your Honor.

> ***NOTE: If no stipulation exists, GO TO INSTRUCTION 2-2-3, GUILTY PLEA FACTUAL BASIS. If a stipulation exists, continue below.***

2–2–2. STIPULATION OF FACT INQUIRY

MJ: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure the accused has a copy.

TC: (Complies.)

MJ: _____ (*state name of accused*), I have before me Prosecution Exhibit ___ for Identification, a stipulation of fact. Did you sign this stipulation?

ACC: (Responds.)

MJ: Did you read this document thoroughly before you signed it?

ACC: (Responds.)

> ***NOTE: If the rules permit an "advocate" to present the defense, the military judge may use an alternative phrase such as "Do both sides…."***

MJ: Do both counsel agree to the stipulation and that your signatures appear on the document?

TC/DC: (Responds.)

MJ: _____, a stipulation of fact is an agreement among the trial counsel, your defense counsel, and you that the contents of the stipulation are true, and, if entered into evidence, are uncontradicted facts in this case. No one can be forced to enter into a stipulation, so you should enter into it only if you truly want to do so. Do you understand this?

ACC: (Responds.)

MJ: Are you voluntarily entering into this stipulation because you believe it is in your best interest to do so?

ACC: (Responds.)

MJ: If I admit this stipulation into evidence it will be used in two ways.

First, I will use it to determine if you are, in fact, guilty of the offense(s) to which you have pled guilty.

(IF JUDGE ALONE TRIAL): Second, I will use it to determine an appropriate sentence for you.

(IF MEMBERS TRIAL): Second, the trial counsel may read it to the court members and they will have it with them when they decide upon your sentence.

Do you understand and agree to these uses of the stipulation?

ACC: (Responds.)

MJ: Do counsel also agree to these uses?

TC/DC: (Responds.)

MJ: _____, a stipulation of fact ordinarily cannot be contradicted. If it should be contradicted after I have accepted your guilty plea, I will reopen this inquiry. You should, therefore, let me know if there is anything whatsoever in this stipulation that you disagree with or feel is untrue. Do you understand that?

ACC: (Responds.)

MJ: At this time, I want you to read your copy of the stipulation silently to yourself as I read it to myself.

> ***NOTE: The military judge should read the stipulation and be alert to resolve inconsistencies between what is stated in the stipulation and what the accused says during the providence inquiry.***

MJ: Have you finished reading it?

ACC: (Responds.)

MJ: _____, is everything in the stipulation true?

ACC: (Responds.)

MJ: Is there anything in the stipulation that you do not wish to admit is true?

ACC: (Responds.)

MJ: Do you agree under oath that the matters contained in the stipulation are true and correct to the best of your knowledge and belief?

ACC: (Responds.)

MJ: Defense Counsel, do you have any objections to Prosecution Exhibit ___ for Identification?

DC: (Responds.)

MJ: Prosecution Exhibit ___ for Identification is admitted into evidence subject to my acceptance of the accused's guilty plea.

2–2–3. GUILTY PLEA FACTUAL BASIS

MJ: _____, I am going to explain the elements of the offense(s) to which you have pled guilty. By "elements," I mean those facts which the prosecution would have to prove beyond a reasonable doubt before you could be found guilty if you had pled not guilty. When I state each element, ask yourself two things: First, is the element true, and, second, whether you wish to admit that it is true. After I list the elements for you, be prepared to talk to me about the facts regarding the offense(s). Do you have a copy of the charge sheet(s) in front of you?

ACC: (Responds.)

NOTE: For each specification to which the accused pled guilty, proceed as follows:

MJ: Please look at (the) Specification (___) of (the) Charge (___), (in violation of Article _____ of the Uniform Code of Military Justice) (in violation of the Law of Armed Conflict, specifically _____ (*state the article and Convention*)). The elements of the offense of _____ (*state the offense*) are:

NOTE: List elements and explain appropriate definitions using applicable language from Chapter 3.

MJ: Do you understand the elements (and definitions) as I have read them to you?

ACC: (Responds.)

MJ: Do you have any questions about any of them?

ACC: (Responds.)

MJ: Do you understand that your plea of guilty admits that these elements accurately describe what you did?

ACC: (Responds.)

MJ: Do you believe and admit that the elements (and definitions, taken together,) correctly describe what you did?

ACC: (Responds.)

MJ: At this time, I want you to tell me why you are guilty of the offense listed in (the) specification (___) of (the) charge (___). Tell me what happened.

ACC: (Responds.)

> ***NOTE: The military judge must elicit the facts leading to the guilty plea by conducting a direct and personal examination of the accused as to the circumstances of the alleged offense(s). The military judge must do more than elicit legal conclusions. The military judge's questions should be aimed at developing the accused's version of what happened in the accused's own words, and determining if the acts or omissions encompass each and every element of the offense(s) to which the guilty plea relates. The military judge must be alert to the existence of any inconsistencies or possible defenses raised by the stipulation or the accused's testimony and, if they arise, the military judge must discuss them thoroughly with the accused. The military judge must resolve them or declare the plea improvident to the applicable specification(s).***

NOTE: After obtaining the factual basis from the accused, the military judge should secure the accused's specific admission as to each element of the offense, e.g., as follows:

MJ: Do you admit that you (killed _____) (_____)?

ACC: (Responds.)

MJ: Do you admit that you (intended to kill _____) (_____)?

ACC: (Responds.)

MJ: Do you admit that you (knew or should have known that _____ was a person protected under the law of armed conflict) (_____)?

ACC: (Responds.)

MJ: And that (the killing took place in the context of and was associated with armed conflict) (_____)?

ACC: (Responds.)

NOTE: After covering all offenses to which the accused pled guilty, the military judge continues as follows:

MJ: Do counsel believe any further inquiry is required?

TC/DC: (Respond.)

2–2–4. MAXIMUM PUNISHMENT INQUIRY

NOTE: Under Article 87, GC III, the accused may not be sentenced to any penalties except those "provided for in respect of members of the armed forces of the said Power who have committed the same acts." See Appendix 12, Maximum Punishment Chart, MCM.

MJ: Trial Counsel, what do you calculate to be the maximum punishment authorized in this case based solely on the accused's guilty plea?

TC: (Responds.)

NOTE: <u>Mandatory punishment</u>. Under the MCM, the offenses of premeditated murder (Article 118(1), UCMJ) and felony murder (Article 118(4), UCMJ) have a mandatory minimum punishment of life imprisonment with the eligibility for parole, and the offense of spying (Article 106, UCMJ) has a mandatory punishment of death. However, under the provisions of Article 87, GC III, the court is not required to apply the mandatory punishment prescribed.

MJ: Defense Counsel, do you agree?

DC: (Responds.)

MJ: _____, the maximum punishment authorized in this case based solely on your guilty plea is _____.

NOTE: <u>Pecuniary punishment</u>. Pecuniary punishment, e.g., fine and/or forfeiture of pay and allowances, appears applicable to EPWs under the provision that EPWs are subject to the same punishment authorized against members of the U.S. armed forces for the same offense. Art. 87, GC III. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding pecuniary punishment and proceed accordingly.

a. <u>Fine</u>. See R.C.M. 1003(b)(3). Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. Special and summary courts-martial, however, may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. Before total forfeitures and a fine can be approved resulting from a guilty plea at a GCM, the accused must be advised that the pecuniary loss could exceed total forfeitures. Moreover, to have any fine approved, the military judge must advise the accused of the possibility of a fine during the providence inquiry.

b. <u>Forfeiture of pay and allowances</u>. See R.C.M. 1003(b)(2); Appendix 12. EPWs only receive a nominal amount of monies during internment such as a monthly advance of pay (Art. 60, GC III) and, if applicable, working pay (Art. 62, GC III). It is unclear whether such monies constitute "pay" and/or "allowances" for purposes of adjudging a forfeiture as punishment. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding forfeiture of pay and allowances and proceed accordingly.

NOTE: <u>Discharge or reduction in rank</u>. EPWs may not be discharged or reduced in rank. Specifically, Article 87, GC III, prohibits the DP from depriving an EPW of his rank. These actions are a matter between an EPW and his state.

MJ: The court may not adjudge a discharge or a reduction in rank as part of your sentence.

MJ: On your plea of guilty alone, this court could sentence you to the maximum punishment which I just stated. Do you understand that?

ACC: (Responds.)

NOTE: <u>Sentencing instruction</u>. The military judge is required by Articles 87 and 100, GC III, to advise the accused as follows:

In determining a legal, appropriate, and adequate punishment, this court will bear in mind that you, not being a national of the United States, are not bound to the United States by any duty of allegiance and that you are in the power of the United States as a result of circumstances independent of your own will. As such, under Article 87 of the Geneva Convention Relative to the Treatment of Prisoners of War, this court is not bound to apply the maximum punishment and is at liberty to arrive at a lesser legal sentence, to include no punishment. Do you understand that?

ACC: (Responds.)

MJ: Do you have any questions as to the sentence that could be imposed as a result of your guilty plea?

ACC: (Responds.)

MJ: Trial Counsel, is there a pretrial agreement in this case?

TC: (Responds.)

NOTE: If no pretrial agreement exists, continue below. If a pretrial agreement exists and trial is by Judge Alone GO TO INSTRUCTION 2-2-6, PRETRIAL AGREEMENT (JUDGE ALONE). If a pretrial agreement exists and trial is with court members, GO TO INSTRUCTION 2-2-7, PRETRIAL AGREEMENT (MEMBERS).

2–2–5. IF NO PRETRIAL AGREEMENT EXISTS

MJ: Counsel, even though there is no formal pretrial agreement, are there any unwritten agreements or understandings in this case?

TC/DC: (Respond.)

MJ: _____, has anyone made any agreements with you or promises to you to get you to plead guilty?

ACC: (Responds.)

NOTE: GO TO INSTRUCTION 2-2-8, ACCEPTANCE OF GUILTY PLEA

2–2–6. PRETRIAL AGREEMENT (JUDGE ALONE)

MJ: Trial Counsel, have both the offer portion and the quantum portion marked as separate appellate exhibits and then hand me only the offer portion. Also, ensure that the accused has a copy of the entire agreement in front of (him)(her).

TC: (Complies.)

NOTE: Article 105, GC III, entitles accused to a copy of documents in the language which he understands.

MJ: _____, I have before me what has been marked as Appellate Exhibit ___, which is the offer portion of your pretrial agreement, and your defense counsel is showing to you Appellate Exhibit ___, the quantum portion of your pretrial agreement. Did you sign this pretrial agreement?

ACC: (Responds.)

MJ: Did you read it thoroughly before you signed it?

ACC: (Responds.)

MJ: Do you understand the contents of your pretrial agreement?

ACC: (Responds.)

MJ: _____, did anyone force you in any way to enter into this agreement?

ACC: (Responds.)

MJ: _____, does this agreement contain all the understandings or agreements that you have in this case?

ACC: (Responds.)

MJ: Has anyone made any promises to you that are not written into this agreement in an attempt to get you to plead guilty?

ACC: (Responds.)

MJ: Counsel, are Appellate Exhibits ___ and ___ the full and complete agreement in this case and are you satisfied that there are no other agreements?

TC/DC: (Responds.)

MJ: Basically, a pretrial agreement means you agree to plead guilty and in return, the convening authority agrees to take some favorable action in your case, usually in the form of limiting the sentence that he/she will approve. Do you understand that?

ACC: (Responds.)

MJ: The law requires that I discuss the conditions of your agreement with you. Let's look at Appellate Exhibit ___, the offer portion of your agreement.

> ***NOTE: <u>Pretrial Agreement Terms</u>. The military judge must discuss each provision in a pretrial agreement with the accused and obtain the accused's understanding of the agreement. Special attention must be given to terms that purport to waive motions. R.C.M. 705(c) prohibits any term in a pretrial agreement to which the accused did not freely and voluntarily agree or any term which deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in pretrial agreements, they have voided pretrial agreement terms which require the accused to waive all motions, or to waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues***

during the accusatory phase of the court-martial. The pretrial agreement cannot make a trial an empty ritual. See SECTION VII, MISCELLANEOUS PROCEDURAL GUIDE, for scripts for the following clauses that may appear in pretrial agreements:

Dismissal of charge: INSTRUCTION 2-7-4

Testify truthfully in another case: INSTRUCTION 2-7-5

Waiver of Article 32 investigation: INSTRUCTION 2-7-8

Waiver of members: INSTRUCTION 2-7-9

Waiver of certain motions: INSTRUCTIONS 2-7-10 and 2-7-11

MJ: I am not going to look at Appellate Exhibit ___, the quantum portion, until after I announce the sentence in your case. But, I want you to now look at the quantum portion and read it to yourself. Does that document correctly state what you and the convening authority agreed to?

ACC: (Responds.)

MJ: Counsel, are there any conditions or terms in the quantum portion other than a limitation on sentence?

TC/DC: (Responds.)

NOTE: If other conditions exist, the military judge should cover the conditions without discussing the sentence limitation.

MJ: _____, you get the benefit of whichever is less, each element of the sentence of the court or that contained in your pretrial agreement. If the sentence adjudged by this court is greater than the one provided in the pretrial agreement, the convening authority must reduce the

sentence to one no more severe than the one in your pretrial agreement. On the other hand, if the sentence of this court is less than the one in your agreement, the convening authority cannot increase the sentence adjudged. Do you understand that?

ACC: (Responds.)

MJ: _____, have you had enough time to discuss this agreement with your defense counsel?

ACC: (Responds.)

MJ: Are you satisfied with your defense counsel's advice concerning this pretrial agreement?

ACC: (Responds.)

MJ: Did you enter the agreement of your own free will?

ACC: (Responds.)

MJ: Has anyone tried to force you to make this pretrial agreement?

ACC: (Responds.)

MJ: Do you have any questions about your pretrial agreement?

ACC: (Responds.)

MJ: Do you fully understand all the terms of the pretrial agreement and how they affect your case?

ACC: (Responds.)

MJ: _____, are you pleading guilty not only because you hope to receive a lighter sentence, but also because you are convinced that you are, in fact, guilty?

ACC: (Responds.)

MJ: Do counsel for both sides agree with the court's interpretation of the pretrial agreement?

TC/DC: (Respond.)

NOTE: GO TO INSTRUCTION 2-2-8, ACCEPTANCE OF GUILTY PLEA.

2–2–7. PRETRIAL AGREEMENT (MEMBERS)

MJ: Trial Counsel, have both the offer portion and the quantum portion of the pretrial agreement marked as separate appellate exhibits, ensure that the accused has a copy in front of (him)(her), and then hand them to me.

TC: (Complies.)

> ***NOTE: Article 105, GC III, entitles accused to a copy of documents in the language which he understands.***

MJ: _____, I have before me Appellate Exhibit ___, the offer portion, and Appellate Exhibit ___, the quantum portion, of your pretrial agreement. Did you sign these documents?

ACC: (Responds.)

MJ: Did you read them thoroughly before you signed them?

ACC: (Responds.)

MJ: Do you understand the contents of your pretrial agreement?

ACC: (Responds.)

MJ: _____, did anyone force you in any way to enter into this agreement?

ACC: (Responds.)

MJ: _____, does this agreement contain all the understandings or agreements that you have in this case?

ACC: (Responds.)

MJ: Has anyone made any promises to you that are not written into this agreement in an attempt to get you to plead guilty?

ACC: (Responds.)

MJ: Counsel, are Appellate Exhibits ___ the full and complete agreement in this case and are you satisfied that there are no other agreements?

TC/DC: (Respond.)

MJ: Basically, a pretrial agreement means you agree to plead guilty and in return the convening authority agrees to take some favorable action in your case, usually in the form of limiting the sentence that he/she will approve. Do you understand that?

ACC: (Responds.)

MJ: The law requires that I discuss the conditions of your agreement with you. Let's look at the offer portion of your agreement.

> ***NOTE: <u>Pretrial Agreement Terms</u>. The military judge must discuss each provision in a pretrial agreement with the accused and obtain the accused's understanding of the agreement. Special attention must be given to terms that purport to waive motions. R.C.M. 705(c) prohibits any term in a pretrial agreement to which the accused did not freely and voluntarily agree or any term which deprives the accused of the right to***

counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in pretrial agreements, they have voided pretrial agreement terms which require the accused to waive all motions, or to waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues during the accusatory phase of the court-martial. The pretrial agreement cannot make a trial an empty ritual. See SECTION VII, MISCELLANEOUS PROCEDURAL GUIDE, for scripts for the following clauses that may appear in pretrial agreements:

Dismissal of charge: INSTRUCTION 2-7-4

Testify truthfully in another case: INSTRUCTION 2-7-5

Waiver of Article 32 investigation: INSTRUCTION 2-7-8

Waiver of members: INSTRUCTION 2-7-9

Waiver of certain motions: INSTRUCTIONS 2-7-10 and 2-7-11

MJ: Appellate Exhibit ___, the quantum portion of your pretrial agreement states: _____. Is that a correct statement of what you and the convening authority agreed to?

ACC: (Responds.)

MJ: _____, you get the benefit of whichever is less, each element of the sentence of the court or that contained in your pretrial agreement. If the sentence adjudged by this court is greater than the one provided in the pretrial agreement, the convening authority must reduce the sentence to one no more severe than the one in your pretrial agreement. On the other hand, if the

sentence of this court is less than the one in your agreement, the convening authority cannot increase the sentence adjudged. Do you understand that?

ACC: (Responds.)

MJ: _____, have you had enough time to discuss this agreement with your defense counsel?

ACC: (Responds.)

MJ: Are you satisfied with your defense counsel's advice concerning this pretrial agreement?

ACC: (Responds.)

MJ: Did you enter the agreement of your own free will?

ACC: (Responds.)

MJ: Has anyone tried to force you to make this pretrial agreement?

ACC: (Responds.)

MJ: Do you have any questions about your pretrial agreement?

ACC: (Responds.)

MJ: Do you fully understand all the terms of the pretrial agreement and how they affect your case?

ACC: (Responds.)

MJ: _____, are you pleading guilty not only because you hope to receive a lighter sentence, but because you are convinced that you are, in fact, guilty?

ACC: (Responds.)

MJ: Do counsel for both sides agree with the court's interpretation of the pretrial agreement?

TC/DC: (Respond.)

NOTE: GO TO INSTRUCTION 2-2-8, ACCEPTANCE OF GUILTY PLEA.

2–2–8. ACCEPTANCE OF GUILTY PLEA

MJ: Defense Counsel, have you had enough time and opportunity to discuss this case with (_____)?

DC: (Responds.)

MJ: _____, have you had enough time and opportunity to discuss this case with your defense counsel?

ACC: (Responds.)

MJ: _____, have you, in fact, consulted fully with your defense counsel and received the full benefit of his/her/their advice?

ACC: (Responds.)

MJ: Are you satisfied that your defense counsel's advice is in your best interest?

ACC: (Responds.)

MJ: And are you satisfied with your defense counsel?

ACC: (Responds.)

MJ: Are you pleading guilty voluntarily and of your own free will?

ACC: (Responds.)

MJ: Has anyone made any threat or tried in any way to force you to plead guilty?

ACC: (Responds.)

MJ: Do you have any questions as to the meaning and effect of a plea of guilty?

ACC: (Responds.)

MJ: Do you fully understand the meaning and effect of your plea of guilty?

ACC: (Responds.)

MJ: Do you understand that even though you believe you are guilty, you have the legal and moral right to plead not guilty and to place upon the government the burden of proving your guilt beyond a reasonable doubt?

ACC: (Responds.)

MJ: Take a moment now and consult again with your defense counsel, and then tell me whether you still want to plead guilty?

(Pause.) MJ: Do you still want to plead guilty?

ACC: (Responds.)

MJ: _____, I find that your plea of guilty is made voluntarily and with full knowledge of its meaning and effect. I further find that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against you. Accordingly, your plea of guilty is provident and is accepted. However, I advise you that you may request to withdraw your guilty plea at any time before the sentence is announced and, if you have a good reason for your request, I will grant it.

NOTE: If the accused has pled guilty to only some of the charges and specifications, or, has pled guilty to lesser included offenses (LIO), ask the trial counsel if the government is going forward on the offenses to which the accused has pled not guilty. If the government is going forward on any offense, do not enter findings, except to those offenses to which the accused pled guilty as charged in a members' trial (i.e., if the plea was to a LIO or by exceptions and substitutions, and the government is going forward as charged, do not enter findings).

NOTE: If issues of guilt remain, in a judge alone (contest), GO TO SECTION III JUDGE ALONE (CONTESTED FINDINGS) and in a court members (contest), GO TO SECTION V, COURT MEMBERS (CONTESTED). The military judge should not inform the court members of plea and findings of guilty prior to presentation of the evidence on another specification to which the accused pled not guilty, unless the accused requests it or the guilty plea was to a LIO and the prosecution intends to prove

the greater offense. Unless one of these two exceptions exists, the flyer should not have any specifications/charges which reflect provident guilty pleas if other offenses are being contested.

NOTE: If no issues of guilt remain, continue below:

MJ: Accused and counsel please rise.

DC/ACC: (Comply.)

MJ: _____, in accordance with your plea of guilty, this court finds you: _____.

NOTE: For judge alone (sentencing), GO TO SECTION IV, JUDGE ALONE (SENTENCING) and for court members (sentencing only), after marking the flyer, GO TO SECTION VI, COURT MEMBERS (SENTENCING ONLY).

Section III

Judge Alone (Contested Findings)

MJ: Does the government have an opening statement?

TC: (Responds.)

MJ: Does the defense have an opening statement or do you wish to reserve?

DC: (Responds.)

MJ: Trial Counsel, you may call your first witness.

2–3–1. TRIAL PROCEEDS WITH GOVERNMENT CASE

NOTE: The trial counsel administers the oath/affirmation to all witnesses. After a witness testifies, the military judge should instruct the witness along the following lines:

MJ: You are excused (permanently) (temporarily). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within ____ minutes) (_____).

TC: The Government rests.

NOTE: This is the time that the defense may make motions for a finding of not guilty. The military judge's standard for ruling on the motion is at RCM 917. The evidence

shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

2–3–2. TRIAL RESUMES WITH THE DEFENSE CASE, IF ANY

MJ: Defense Counsel, you may proceed.

DC: (Responds.)

NOTE: If the defense reserved opening statement, the military judge should ask if the defense counsel wishes now to make an opening statement.

DC: The defense rests.

2–3–3. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Trial Counsel, you may present argument.

TC: (Argument)

MJ: Defense, you may present argument.

DC: (Argument)

MJ: Trial Counsel, rebuttal argument?

TC: (Responds.)

MJ: The court is closed.

2–3–4. ANNOUNCEMENT OF FINDINGS

MJ: _____, this court finds you: _____.

NOTE: If accused is found guilty of any offense, GO TO SECTION IV, JUDGE ALONE (SENTENCING). If accused is found guilty of any offense and sentencing is by court members, GO TO SECTION VI, COURT MEMBERS (SENTENCING ONLY). If completely acquitted, adjourn the court.

Section IV

Judge Alone (Sentencing)

MJ: _____, we now enter the sentencing phase of the trial where you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself, which you want me to consider in deciding your sentence. In addition to testimony of witnesses and the offering of documentary evidence, you may, yourself, testify under oath as to these matters, or you may remain silent, in which case I will not draw any adverse inference from your silence. On the other hand, if you desire, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross-examined on it; however, the Government may offer evidence to rebut any statement of fact contained in an unsworn statement. An unsworn statement may be made orally, in writing, or both. It may be made by you, by your counsel on your behalf, or by both. Do you understand these rights?

ACC: (Responds.)

MJ: Is the personal data on the front page of the charge sheet correct?

TC/DC: (Respond.)

MJ: Defense Counsel, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13, UCMJ?

DC: (Responds.)

NOTE: <u>Illegal pretrial punishment</u>. Article 82, GC III, provides that EPWs are subject to the laws of the DP, and, therefore, Article 13, UCMJ, credit would be equally

applicable to EPWs who suffer illegal pretrial punishment. A punishment or penalty imposed on an EPW while being held for trial that exceeds the limitations specified in the GC III may constitute Article 13 punishment. See Arts. 87 and 103, GC III. By analogy, a punishment or penalty imposed on the accused while being held for trial (which are not the result of disciplinary action (i.e., nonjudicial punishment) (see Note below)) that exceeds the limitations for "disciplinary sanctions" under Articles 89 and 90, GC III, may also constitute Article 13 punishment. The applicable disciplinary punishments, which may not exceed 30 days, are the following:

(1) Fine: 50 percent of advance pay and working pay;

(2) Discontinuance of privileges granted over and above the treatment provided by the GC III;

(3) Fatigue duty not exceeding two hours daily; and

(4) Confinement.

(See Arts. 87, 89-90, and 97-98, GC III.)

The accused's time in internment under Article 21, GC III, does not constitute illegal pretrial punishment.

NOTE: Disciplinary sanctions (e.g., nonjudicial punishment) and double jeopardy. Article 86, GC III, provides that "No prisoner of war may be punished more than once for the same act or on the same charge." Disciplinary sanctions imposed IAW Article 89-98, GC III, would bar subsequent punishment for the same act. If evidence of disciplinary sanctions was admitted at trial which reflects that the accused received punishment or a penalty for the same offense, which the accused was also convicted at the court-martial, the military judge must dismiss the specification or portion of the specification involved.

MJ: _____, is that correct?

ACC: (Responds.)

NOTE: <u>Pretrial confinement credit</u>. If the accused was confined while awaiting trial, Article 103, GC III, requires that such time "shall be deducted from any sentence of imprisonment passed upon him." The accused's time in internment under Article 21, GC III, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

MJ: Under the provisions of Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War, any period of time spent by you in confinement while you were awaiting trial shall be deducted from any sentence of confinement and taken into account by the court when deliberating and fixing your sentence. However, the period during which you were interned as an enemy prisoner of war under Article 21, GC III, will not be considered when deliberating your sentence. Do you understand that?

ACC: (Responds.)

MJ: Counsel, based on the information on the charge sheet, the accused is to be credited with ___ days of pretrial confinement credit. Is that the correct amount?

TC/DC: (Respond.)

MJ: Trial Counsel, do you have other evidence to present at this time?

TC: (Responds.)

MJ: Defense Counsel, do you have any evidence to present at this time?

DC: (Responds.)

MJ: Trial Counsel, do you have rebuttal evidence to offer?

TC: (Responds.)

MJ: Trial Counsel, you may present argument.

TC: (Argues.)

MJ: Defense Counsel, you may present argument.

DC: (Argues.)

MJ: The court is closed.

2–4–1. ANNOUNCEMENT OF SENTENCE

MJ: The court is called to order.

TC: All parties present when the court closed are again present.

MJ: Accused and defense counsel please rise. _____, this court sentences you to: _____. (The accused will be credited with ___ days of pretrial confinement against the accused's term of confinement.)

NOTE: If a pretrial agreement exists, continue below. If a pretrial agreement does NOT exist GO TO INSTRUCTION 2-4-2, POST-TRIAL AND APPELLATE RIGHTS.

MJ: Please hand me Appellate Exhibit ___, the quantum portion of the agreement. Appellate Exhibit ___ states that the convening authority agrees to _____. _____, have I correctly stated the sentence agreement that you have with the convening authority?

ACC: (Responds.)

MJ: Counsel, do you agree?

TC/DC: (Respond.)

MJ: My understanding of the effect of the pretrial agreement on the sentence is that the convening authority may approve _____. Do counsel agree with my interpretation?

TC/DC: (Responds.)

MJ: _____, is that also your understanding?

ACC: (Responds.)

NOTE: The military judge must ensure that all parties have the same understanding concerning the operation of the quantum portion on the sentence of the court; otherwise the plea may be improvident.

2–4–2. POST-TRIAL AND APPELLATE RIGHTS ADVICE

NOTE: <u>Right of appeal</u>. Article 106, GC III, provides: "Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully

informed of his right to appeal or petition and of the time limit within which he may do so." This appears to require an inquiry on the record that the accused is "fully informed" of his appellate rights.

MJ: _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights, you have the right to the advice and assistance of counsel.

After the record of trial is prepared, it will be forwarded to the convening authority for action. The convening authority may approve the findings and the sentence (within the limits of the pretrial agreement, if any), or he/she may disapprove the findings or the sentence in whole or in part. The convening authority may reduce the sentence adjudged by the court-martial, but he/she cannot increase it. The convening authority can disapprove a finding of guilty, but cannot change a finding of not guilty. Although the convening authority is not required to review the case for legal errors, he/she may take action to correct legal errors.

[MJ: After ACCA (IF GCM OR SPCM ADJUDGED CONFINEMENT OF ONE YEAR OR MORE:) In addition, the staff judge advocate will prepare a post-trial recommendation. That recommendation will be served on you or your defense counsel before the convening authority takes action on your case.]

Before the convening authority takes action, you have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case (including a response to the staff judge advocate's post-trial recommendation, if any). Such matters must be submitted within 10 days after a copy of the authenticated record of trial (and the recommendation of the staff judge advocate) (is) (are)

served on you or your counsel. You may request up to an additional 20 days and, for good cause, the convening authority may approve the request.

[(IF APPROVED SENTENCE IS CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the convening authority approves confinement for one year or more, your case will be reviewed by the Army Court of Criminal Appeals (ACCA). You are entitled to be represented by counsel before that court. If you request, military counsel will be appointed to represent you at no expense to you. Also, if you choose, you may retain a civilian counsel to represent you at no cost to the United States by notifying the Clerk of Court.

NOTE: The GC III does not cover the type or costs of appellate counsel. The Note on costs of representation, supra, equally applies in this situation.

After ACCA completes its review, you may request the Court of Appeals for the Armed Forces (CAAF) to review your case. If CAAF grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA.

After CAAF completes its review, you may request review by the Supreme Court of the United States. If that court grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA and CAAF.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the convening authority approves a sentence that does not include death or confinement for one year or more, your case will be examined in the Office of the Judge Advocate General for legal sufficiency and to

determine if the sentence is appropriate. The Judge Advocate General may take corrective action as appropriate. This mandatory review under Article 69(a), UCMJ, will constitute the final action in your case unless The Judge Advocate General refers your case to ACCA for further review.]

[(IF APPROVED SENTENCE IN GCM DOES NOT INCLUDE DEATH OR IN SPCM INCLUDES CONFINEMENT FOR ONE YEAR OR MORE:) You also have the right to waive or withdraw review at any time before completion of the review. If you waive or withdraw review, your decision is final and you cannot change your mind. A judge advocate will review your case and send it to the convening authority for final action. Within two years after final action is taken on your case, you may apply to The Judge Advocate General to take corrective action. The Judge Advocate General may modify the findings or sentence on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over you or the offense(s), error prejudicial to your substantial rights, or the appropriateness of the sentence.]

Do you understand your post-trial and appellate rights?

ACC: (Responds.)

MJ: Do you have any questions?

ACC: (Responds.)

(IF MORE THAN ONE DEFENSE COUNSEL:) MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the staff judge advocate's post-trial recommendation to be served?

DC: (Responds.)

MJ: Are there other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

Section V

Court Members (Contested)

2–5. PRELIMINARY INSTRUCTIONS

MJ: Bailiff, call the court members.

NOTE: Whenever the members enter the courtroom, all persons except the military judge and the reporter shall rise. The members are seated alternately to the right and left of the president according to rank.

MJ: You may be seated. The court is called to order.

TC: The court is convened by Court-Martial Convening Order Number _____, Headquarters _____ dated _____, (as amended by Court-Martial Convening Order Number _____, same Headquarters, dated _____,) copies of which have been furnished to each member of the court.

The accused and the following persons detailed to this court-martial are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel); _____, Defense Counsel) (_____, Assistant Defense Counsel) (_____, Civilian Defense Counsel) (_____, (*state name of selected prisoner comrade*), Defense Assistant). _____ (*state name of selected advocate*), (Assistant) (Associate) Defense Advocate); and _____, _____, _____, and_____, court members. (The following person(s) detailed to this court (is) (are) absent: _____)

NOTE: Security concerns may necessitate an alteration of the usual requirement of announcement in open court of the names of court members and the parties. An appellate exhibit containing their names may be substituted.

NOTE: Members who have been relieved (viced) by orders need not be mentioned.

The prosecution is ready to proceed with trial in the case of the United States v. (*state accused's name and rank, if applicable*).

MJ: The members of the court will now be sworn. All persons in the courtroom please rise.

TC: Do you (swear) (affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so in the due course of law (so help you God)?

MBRS: (Respond.)

MJ: Please be seated. The court is assembled.

Members of the court, it is appropriate that I give you some preliminary instructions. My duty as military judge is to ensure this trial is conducted in a fair, orderly, and impartial manner according to the law. I preside over open sessions, rule upon objections, and instruct you on the law applicable to this case. You are required to follow my instructions on the law and may not consult any other source as to the law pertaining to this case unless it is admitted into evidence.

This rule applies throughout the trial, including closed sessions and periods of recess and adjournment. Any questions you have of me should be asked in open court.

As court members, it is your duty to hear the evidence and to determine whether the accused is guilty or not guilty and, if you find (him)(her) guilty, to adjudge an appropriate sentence.

Under the law, the accused is presumed to be innocent of the offense(s). The government has the burden of proving the accused's guilt by legal and competent evidence beyond a reasonable doubt. A reasonable doubt is an honest, conscientious doubt, suggested by the material evidence, or lack of it, in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt. The fact that charges have been preferred against this accused and referred to this court for trial does not permit any inference of guilt. You must determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court and upon the instructions I will give you. Because you cannot properly make that determination until you have heard all the evidence and received the instructions, it is of vital importance that you keep an open mind until all the evidence has been presented and the instructions have been given. I will instruct you fully before you begin your deliberations. In so doing, I may repeat some of the instructions which I will give now or, possibly, during the trial. Bear in mind that all of these instructions are designed to help you in performing your duties as court members.

The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you. You have the duty to determine the believability of the witnesses. In performing this duty, you must consider each witness' intelligence and ability to observe and

accurately remember, in addition to the witness' sincerity and conduct in court, friendships, prejudices and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict. In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth. The believability of each witness' testimony should be your guide in evaluating testimony, rather than the number of witnesses called.

Counsel soon will be given an opportunity to ask you questions and exercise challenges. With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so. Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement.

Some of the grounds for challenge would be if you were the accuser in the case, if you had investigated any offense charged, if you have formed or expressed an opinion as to the guilt or innocence of the accused, or any matter that may affect your impartiality. To determine if any grounds for challenge exist, counsel for both sides are given an opportunity to question you. These questions are not intended to embarrass you. They are not an attack upon your integrity. They are asked merely to determine whether a basis for challenge exists.

It is no adverse reflection upon a court member to be excused from a particular case. You may be questioned either individually or collectively, but, in either event, you should indicate an

individual response to the question asked. Unless I indicate otherwise, you are required to answer all questions.

You must keep an open mind throughout the trial. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to whether the accused is guilty or not guilty, or as to an appropriate sentence if the accused is found guilty of (any) (this) offense. With regard to sentencing, should that become necessary, you may not have a preconceived idea or formula as to either the type or the amount of punishment that should be imposed if the accused were to be convicted.

Counsel are given an opportunity to question all witnesses. When counsel have finished, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so (at the close of evidence) (prior to any witness being permanently excused). The way we handle that is to require you to write out the question and sign legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked because your questions, like the questions of counsel, are subject to objection. (There are forms provided to you for your use if you desire to question any witness.) I will conduct any needed examination. There are a couple of things you need to keep in mind concerning questioning.

First, you cannot attempt to help either the government or the defense.

Second, counsel have interviewed the witnesses and know more about the case than we do. Very often, they do not ask what may appear to us to be an obvious question because they are aware that this particular witness has no knowledge on the subject.

Rules of evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial, when I sustain an objection, disregard the question and answer. If I overrule an objection, you may consider both the question and answer.

During any recess or adjournment, you may not discuss the case with anyone, not even among yourselves. You must not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in the case. You must hold your discussion of the case until you are all together in your closed session deliberations so that all of the panel members have the benefit of your discussion. Do not purposely visit the scene of any incident alleged in the specification(s) or involved in the trial. You must also avoid contact with witnesses or potential witnesses in this case. If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every break or recess, but keep them in mind throughout the trial.

We will try to estimate the time needed for recesses or hearings out of your presence. Frequently, their duration is extended by consideration of new issues arising in such hearings. Your patience and understanding regarding these matters will contribute greatly to an atmosphere consistent with the fair administration of justice.

While you are in your closed session deliberations, only the members will be present. You must remain together and you may not allow any unauthorized intrusion into your deliberations.

Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. However, in addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations and will speak for the court in announcing the results.

This general order of events can be expected at this court-martial: questioning of court members, challenges and excusals, opening statements by counsel, presentation of evidence, substantive instructions on the law to you, closing argument by counsel, procedural instructions on voting, your deliberations, and announcement of the findings. If the accused is convicted of any offense, there will also be sentencing proceedings.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If it becomes too hot or too cold in the courtroom, or if you need a break because of drowsiness or for comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

Each of you may take notes if you desire and use them to refresh your memory during deliberations, but they may not be read or shown to other members. At the time of any recess or adjournment, you may (take your notes with you for safe keeping until the next session) (leave your notes in the courtroom).

One other administrative matter: if during the course of the trial it is necessary that you make any statement, if you would preface the statement by stating your name, that will make it clear on the record which member is speaking.

Are there any questions?

MBRS: (Respond.)

MJ: (Apparently not.) Please take a moment to read the charge(s) on the flyer provided to you and to ensure that your name is correctly reflected on the convening order. If it is not, please let me know.

(Pause.) MJ: Trial Counsel, you may announce the general nature of the charge(s).

TC: The general nature of the charge(s) in this case is _____. The charge(s) (was) (were) preferred by _____; forwarded with recommendation as to disposition by _____(; and investigated by _____).

The records of this case disclose (no grounds for challenge) (grounds for challenge of _____ for the following reason(s): _____).

If any member of the court is aware of any matter which he/she believes may be a ground for challenge by either side, such matter should now be stated.

MEMBER(S): (Respond.) or

TC: (Negative response from the court members.) (_____.)

2–5–1. VOIR DIRE

MJ: Before counsel ask you any questions, I will ask a few preliminary questions. If any member has an affirmative response to any question, please raise your hand.

NOTE: The military judge should indicate for the record the members' response to the following questions, i.e., [Negative response from (all members) (state name(s) or if the names are not disclosed in open court, a number assigned to that member).] [Positive response from (all members) (state name of member(s)).]

1. Does anyone know the accused?

2. (If appropriate) Does anyone know any person named in any of the specifications?

3. Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?

4. Does anyone have any prior knowledge of the facts or events in this case?

(5. Members, this case has received attention in the (local) (and) (national) media. Is there any member who has seen or heard any mention of this case in the media?

NOTE: To the members who have seen or heard mention of this case in the media, continue with Questions 6-11; if none, go to Question 12.

6. Is there any member who has participated in a military operation that received press coverage?

7. To those who have been in operations that received press coverage: did any member find that the press coverage was 100 percent accurate and complete?

8. Is there any member who believes that, merely because the press reports something, it is, in fact, the truth?

9. Do all members agree with the proposition that press reports of military affairs or about any kind of event may be incorrect or inaccurate?

10. Is there, then, any member who believes that the reports that he (or she) received from the media about this case are completely accurate and truthful?

11. For any member who has seen mention of this case in the media, will you put aside all the matters which you have heard, read, or seen in the media and decide this case, based solely upon the evidence you receive in this court and the law as I instruct you?)

12. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

13. (If appropriate) Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?

14. If so, will that experience influence the performance of your duties as a court member in this case in any way?

> ***NOTE*: *If Question 14 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the presence of the other members.***

15. How many of you have previously served as court members?

16. (As to those members) Can each of you put aside anything you may have heard in any previous proceeding and decide this case solely on the basis of the evidence and the instructions as to the applicable law?

17. The accused has pled not guilty to (all charges and specifications) (_____), and is presumed to be innocent until (his)(her) guilt is established by legal and competent evidence beyond a reasonable doubt. Does anyone disagree with this rule of law?

18. Can each of you apply this rule of law and vote for a finding of not guilty unless you are convinced beyond a reasonable doubt that the accused is guilty?

19. You are all basically familiar with the military justice system, and you know that the accused has been charged and (his)(her) charges have been forwarded to the convening authority and referred to trial. None of this warrants any inference of guilt. Can each of you follow this instruction and not infer that the accused is guilty of anything merely because the charges have been referred to trial?

20. On the other hand, can each of you vote for a finding of guilty if you are convinced that, under the law, the accused's guilt has been proved by legal and competent evidence beyond a reasonable doubt?

21. Does each member understand that the burden of proof to establish the accused's guilt rests solely upon the prosecution and the burden never shifts to the defense to establish the accused's innocence?

22. Does each member understand, therefore, that the defense has no obligation to present any evidence or to disprove the elements of the offenses(s)?

23. Has anyone had any legal training or experience other than that generally received by soldiers of your rank or position?

24. Has anyone had any specialized law enforcement training or experience, to include duties as a military police officer, off-duty security guard, civilian police officer, corrections officer, or comparable duties other than the general law enforcement duties common to military personnel of your rank and position?

25. I have previously advised you that it is your duty as court members to weigh the evidence and to resolve controverted questions of fact. If the evidence is in conflict, you will necessarily be required to give more weight to some evidence than to other evidence. The weight, if any, to be given to all of the evidence in this case is solely within your discretion. However, you should use the same standards in weighing and evaluating all of the evidence, and the testimony of each witness, and that you should not give more or less weight to the testimony of a particular witness merely because of that witness' status, position, or station in life. Will each of you use the same standards in weighing and evaluating the testimony of each witness?

26. Is any member of the court in the rating chain, supervisory chain, or chain of command of any other member?

NOTE: If Question 26 is answered in the affirmative, the military judge may want to ask questions 27 and 28 outside the presence of the other members.

27. (To junior members:) Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, because another member holds a position of authority over you?

28. (To senior members:) Will you be embarrassed or restrained in any way in performing your duties as a court member if a member over whom you hold a position of authority should disagree with you?

29. Has anyone had any dealings with any of the parties to the trial, to include me and counsel, which might affect your performance of duty as a court member in any way?

30. Does anyone know of anything of either a personal or professional nature which would cause you to be unable to give your full attention to these proceedings throughout the trial?

31. It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime(s) for which the accused is to be sentenced if found guilty. What that means, Members, is that you believe that the commission of "Crime X" must always result in "Punishment Y." Does any member, having read the charge(s)

and specification(s), believe that you would be compelled to vote for any particular punishment, if the accused is found guilty, solely because of the nature of the charge(s)?

32. If sentencing proceedings are required, you will be instructed in detail before you begin your deliberations. I will instruct you on the full range of punishments from no punishment up to the maximum punishment. You should consider all forms of punishment within that range. Consider does not necessarily mean that you would vote for that particular punishment. Consider means that you think about and choose an appropriate punishment within that range. Each member must keep an open mind and neither make a choice, nor foreclose from consideration any possible sentence, until the closed session for deliberations and voting on the sentence. Can each of you follow this instruction?

33. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence, if called upon to do so in this case?

34. Can each of you reach a decision on sentence, if required to do so, on an individual basis in this particular case and not solely upon the nature of the offense(s) of which the accused may be convicted?

35. Is any member aware of any matter which might raise a substantial question concerning your participation in this trial as a court member?

MJ: Do counsel desire to question the court members?

TC/DC: (Respond.)

NOTE: Trial counsel and defense counsel will conduct voir dire if desired and individual voir dire will be conducted, if required.

2–5–2. INDIVIDUAL VOIR DIRE

MJ: Members of the court, there are some matters that we must now consider outside of your presence. Please return to the deliberation room. Some of you may be recalled, however, for individual questioning.

MBRS: (Comply.)

MJ: All the members are absent. All other parties are present. Trial Counsel, do you request individual voir dire and, if so, state the member and your reason(s).

TC: (Responds.)

MJ: Defense Counsel, do you request individual voir dire and, if so, state the member and your reason(s).

DC: (Responds.)

2–5–3. CHALLENGES

NOTE: Challenges are to be made outside the presence of the court members. This may occur at a side bar conference or at an Article 39(a) session. What follows is a suggested procedure for an Article 39(a) session.

MJ: Members of the court, there are some matters that we must now take up outside of your presence. Please return to the deliberation room.

MBRS: (Comply.)

MJ: All the members are absent. All other parties are present. Trial Counsel, do you have any challenges for cause?

TC: (Responds.)

MJ: Defense Counsel, do you have any challenges for cause?

DC: (Responds.)

MJ: Trial Counsel, do you have a peremptory challenge?

TC: (Responds.)

MJ: Defense Counsel, do you have a peremptory challenge?

DC: (Responds.)

> ***NOTE: The military judge will verify that a quorum remains and, if enlisted members are detailed, at least one-third are enlisted. If any member is excused as a result of a challenge, the member will be informed that he/she has been excused, and the remaining members will be rearranged.***

MJ: Call the members.

2–5–4. ANNOUNCEMENT OF PLEA

TC: All parties are present as before, to now include the court members (with the exception of _____, who (has) (have) been excused).

NOTE: If the accused has pled not guilty to all charges and specifications, or if the accused has pled guilty to only some specifications, and has specifically requested members be advised of those guilty pleas, announce the following:

MJ: Court members, at an earlier session, the accused pled (not guilty to all charges and specifications) (not guilty to Charge ___, Specification ___, but guilty to charge ___, Specification ___).

NOTE: If the accused has pled guilty to lesser included offenses and the prosecution is going forward on the greater offense, continue below; if not, GO TO INSTRUCTION 2-5-5, TRIAL ON MERITS.

MJ: The accused has pled guilty to the lesser included offense of (_____), which constitutes a judicial admission of some of the elements of the offense charged in (_____). These elements have therefore been established by the accused's plea without the necessity of further proof. However, the plea of guilty to this lesser included offense provides no basis for a conviction of the offense alleged as there remains in issue the element(s) of: _____.

The court is instructed that no inference of guilt of such remaining element(s) arises from any admission involved in the accused's plea, and to permit a conviction of the alleged offense, the

prosecution must successfully meet its burden of establishing such element(s) beyond a reasonable doubt by legal and competent evidence. Consequently, when you close to deliberate, unless you are satisfied beyond a reasonable doubt that the prosecution has satisfied this burden of proof, you must find the accused not guilty of _____, but the plea of guilty to the lesser included offense of _____ will require a finding of guilty of that lesser offense without further proof.

> ***NOTE: If mixed pleas were entered and the accused requests that the members be informed of the accused's guilty pleas, the military judge should continue below; if not, GO TO INSTRUCTION 2-5-5, TRIAL ON MERITS.***

MJ: The court is advised that findings by the court members will not be required regarding the charge(s) and specification(s) of which the accused has already been found guilty pursuant to (his)(her) plea. I inquired into the providence of the plea(s) of guilty, found (it) (them) to be provident, accepted (it) (them) and entered findings of guilty. Findings will be required, however, as to the charge(s) and specifications(s) to which the accused has pled not guilty.

2–5–5. TRIAL ON MERITS

MJ: I advise you that opening statements are not evidence; rather, they are what counsel expect the evidence will show in the case. Does the government have an opening statement?

TC: (Responds.)

MJ: Does the defense have an opening statement or do you wish to reserve opening statement?

DC: (Responds.)

MJ: Trial Counsel, you may proceed.

NOTE: The trial counsel administers the oath/affirmation to all witnesses.

NOTE: When questioning is finished, the military judge should instruct the witness along the following lines:

MJ: _____, you are excused (temporarily) (permanently). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within ___ minutes) (_____).

TC: The government rests.

NOTE: This is the time that the defense may make motions for a finding of not guilty. (The motions should be made outside the presence of the court members.) The military judge's standard for ruling on the motion is at RCM 917. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. (If the motion is made before the court members and is denied, give INSTRUCTION 2-7-13, MOTION FOR FINDING OF NOT GUILTY.)

2–5–6. TRIAL RESUMES WITH DEFENSE CASE, IF ANY

MJ: Defense Counsel, you may proceed.

NOTE: If the defense reserved opening statement, the military judge shall ask if the defense counsel wishes to make an opening statement at this time.

DC: The defense rests.

2–5–7. REBUTTAL AND SURREBUTTAL, IF ANY

NOTE: If members have not previously been allowed to ask questions, the military judge should ask:

MJ: Does any court member have questions of any witness?

MBRS: (Respond.)

NOTE: If the members have questions, the trial counsel or bailiff will collect the written questions, have them marked as appellate exhibits, examine them, show them to the defense counsel, and present them to the military judge so that the military judge may ask the witness the questions.

MJ: Court members, you have now heard all of the evidence. At this time, we need to have a hearing outside of your presence to discuss the instructions. You are excused until approximately _____.

MBRS: (Comply.)

2–5–8. DISCUSSION OF FINDINGS INSTRUCTIONS

MJ: All parties are present with the exception of the court members. Counsel, which exhibits go to the court members?

TC/DC: (Respond.)

MJ: Counsel, do you see any lesser included offenses that are in issue in this case?

TC/DC: (Respond.)

(IF THE ACCUSED ELECTED NOT TO TESTIFY:) MJ: Defense, do you wish for me to instruct on the fact that the accused did not testify?

DC: (Responds.)

MJ: I intend to give the following instructions: _____. Does either side have any objection to those instructions?

TC/DC: (Respond.)

MJ: What other instructions do the parties request?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Findings Worksheet as Appellate Exhibit ___, show it to the defense and present it to me.

TC: (Complies.)

MJ: Defense Counsel, do you have any objections to the Findings Worksheet?

DC: (Responds.)

MJ: Is there anything else that needs to be taken up before the members are called?

TC/DC: (Respond.)

MJ: Call the court members.

2–5–9. PREFATORY INSTRUCTIONS ON FINDINGS

MJ: The court is called to order. All parties are again present as before to include the court members.

> ***NOTE: RCM 920(b) provides that instructions on findings shall be given before or after arguments by counsel or at both times. What follows is the giving of preliminary instructions prior to argument with procedural instructions given after argument.***

MJ: Members of the court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions that I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused. The law presumes the accused to be innocent of the charge(s) against (him)(her).

You will hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you.

During the trial, some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for the record of trial.

I will advise you of the elements of each offense alleged. In (the) Specification (____) of (the) Charge (____), the accused is charged with the offense of (*specify the offense*). To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

NOTE: List the elements of the offense(s) using Chapter 3 of the Benchbook.

NOTE: If lesser included offenses are in issue, continue below; if no lesser included offenses are in issue, GO TO INSTRUCTION 2-5-11, OTHER APPROPRIATE INSTRUCTIONS.

2–5–10. LESSER INCLUDED OFFENSE(S)

NOTE: After instructions on the elements of an offense alleged, the members of the court must be advised of all lesser included offenses raised by the evidence and within the scope of the pleadings. The members should be advised, in order of diminishing severity, of the elements of each lesser included offense, and its differences from the principal offense and other lesser offenses, if any. The members will not be instructed on lesser offenses that are barred by the statute of limitations unless the accused waives the bar. These instructions may be stated substantially as follows:

2-5-10a. LIO Introduction

MJ: The offense(s) of _____ (is) (are) (a) lesser included offense(s) of the offense set forth in (the) Specification (___) (of) (the) Charge ___. When you vote, if you find the accused not guilty of the offense charged, that is _____, then you should next consider the lesser included offense of _____, in violation of (Article ___, UCMJ) (the Law of Armed Conflict). To find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

NOTE: List the elements of the LIO using Chapter 3 of the Benchbook.

2-5-10b. LIO Differences

MJ: The offense charged, _____, and the lesser included offense of _____ differ primarily (in that the offense charged requires, as (an) essential element(s), that you be convinced beyond a reasonable doubt that (*state the element(s) applicable only to the greater offense*), whereas the lesser offense of _____ does not include such (an) element(s) (but it does require that you be satisfied beyond a reasonable doubt that (*state any different element(s) applicable only to the lesser offense*).

2-5-10c. Other LIOs Within the Same Specification

MJ: Another lesser included offense of the offense alleged in (the) Specification _____ (of) (the) Charge ___, is the offense of _____ in violation of (Article ___, UCMJ) (the Law of

Armed Conflict). To find the accused guilty of this lesser offense, you must be convinced beyond a reasonable doubt of the following elements: (*list the elements*).

This lesser included offense differs from the lesser included offense I discussed with you previously in that this offense does not require, as (an) essential element(s), that the accused (*state the element(s) applicable only to the greater offense*) but it does require that you be satisfied beyond a reasonable doubt that (*state any different element(s) applicable only to the lesser offense*)).

NOTE: Repeat the above as necessary to cover all LIOs and then continue below.

2–5–11. OTHER APPROPRIATE INSTRUCTIONS

NOTE: For other instructions which may be appropriate in a particular case, see Chapter 4, "Confessions and Admissions," Chapter 5, "Special and Other Defenses," Chapter 6, "Mental Responsibility," and Chapter 7, "Evidentiary Instructions." Generally, instructions on credibility of witnesses (see INSTRUCTION 7-7) and circumstantial evidence (see INSTRUCTION 7-3) are typical in most cases and should be given prior to proceeding to the following instructions.

2–5–12. CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS

MJ: You are further advised:

First, that the accused is presumed to be innocent until (his)(her) guilt is established by legal and competent evidence beyond a reasonable doubt;

Second, if there is a reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and (he)(she) must be acquitted;

Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in favor of the lower degree of guilt as to which there is no reasonable doubt; and

Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of (each) (the) offense.

By "reasonable doubt" is not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense(s), although each particular fact advanced by the prosecution, which does not amount to an element, need not be established beyond a reasonable doubt. However, if, on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence, you are expected to use your own common sense and your knowledge of human nature and the ways of the world. In light of all the circumstances in the

case, you should consider the inherent probability or improbability of the evidence. Bear in mind that you may properly believe one witness and disbelieve several other witnesses whose testimony conflicts with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

You must disregard any comment, statement, or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty because you alone have the responsibility to make that determination. Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience.

2–5–13. FINDINGS ARGUMENT

MJ: At this time, you will hear argument by counsel. As the government has the burden of proof, trial counsel may open and close. Trial Counsel, you may proceed.

TC: (Argument)

MJ: Defense, you may present findings argument.

DC: (Argument)

MJ: Trial Counsel, rebuttal argument?

TC: (Respond.)

MJ: Counsel have referred to instructions that I gave you and if there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct.

2–5–14. PROCEDURAL INSTRUCTIONS ON FINDINGS

MJ: The following procedural rules will apply to your deliberations and must be observed:

The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should include a full and free discussion of all of the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote.

(The order in which the (several) charges and specifications are to be voted on should be determined by the President subject to objection by a majority of the members.) You vote on the specification(s) under the charge before you vote on the charge.

If you find the accused guilty of any specification under a charge, the finding as to that charge must be guilty. The junior member will collect and count the votes. The count will then be checked by the President, who will immediately announce the result of the ballot to the members.

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding of guilty. Because we have ___ members, that means ___ members must concur in any finding of guilty.

Table 2–1
Votes Needed for a Finding of Guilty

No. of Members	Two-thirds
3	2
4	3
5	4
6	4
7	5
8	6
9	6
10	7
11	8
12	8

NOTE: The MJ must be alert to a charge under Article 106, UCMJ (Espionage), and the MJ may need to modify the instruction, e.g., the court may base findings on evidence introduced on issue of guilt, evidence introduced during sentencing proceeding, or all such evidence.

If you have at least ___ votes of guilty of any offense, then that will result in a finding of guilty for that offense. If fewer than ___ members vote for a finding of guilty, then your ballot resulted in a finding of not guilty (bearing in mind the instructions I just gave you about voting on the lesser included offense(s)).

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the President should announce only that reconsideration of a finding has been proposed. Do not state: (1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or (2) which specification (and charge) is involved. I will then give you specific further instructions on the procedure for reconsideration.

NOTE: See INSTRUCTION 2-7-14, RECONSIDERATION INSTRUCTION (FINDINGS).

MJ: As soon as the court has reached its findings and I have examined the Findings Worksheet, the findings will be announced by the President in the presence of all parties. As an aid in putting your findings in proper form and making a proper announcement of the findings, you may use Appellate Exhibit ___, the Findings Worksheet (which the (Trial Counsel) (Bailiff) will now hand to the President).

TC/BAILIFF: (Complies.)

NOTE: The military judge may explain how the Findings Worksheet should be used. Appendix B contains sample Findings Worksheet. A suggested approach follows:

MJ: (COL) (___) _____, as indicated on Appellate Exhibit(s) ___, the first portion will be used if the accused is completely acquitted of (the) (all) charge(s) and specifications(s). The second part will be used if the accused is convicted, as charged, of (the) (all) charge(s) and specification(s); (and the third portion will be used if the accused is convicted of some but not all of the offenses).

(The next page of Appellate Exhibit ___ would be used if you find the accused guilty of the lesser included offense of _____ [by exceptions (and substitutions)]. This was (one of) (the) lesser included offense(s) I instructed you on.)

Once you have finished filling in what is applicable, please line out or cross out everything that is not applicable so that, when I check your findings, I can ensure that they are in proper form.

You will note that the Findings Worksheet has been modified to reflect the words that would be deleted (as well as the words that would be substituted therefor) if you found the accused guilty of the lesser included offense(s). (These) (This) modification(s) of the worksheet in no way indicate(s) (an) opinion(s) by me or counsel concerning any degree of guilt of this accused. (They are) (This is) merely included to aid you in understanding what findings might be made in the case and for no other purpose whatsoever. The worksheet is provided only as an aid in finalizing your decision.

Any questions about the Findings Worksheet?

MBRS: (Respond.)

MJ: If, during your deliberations, you have any questions, notify the Bailiff, we will open the court and I will assist you. The Uniform Code of Military Justice prohibits me and everyone else from entering your closed session deliberations. As I mentioned at the beginning of the trial, you must all remain together in the deliberation room during deliberations. While in your closed session deliberations, you may not make communications to or receive communications from anyone outside the deliberation room, by telephone or otherwise. If you have need of a recess, if you have a question, or when you have reached findings, you may notify the Bailiff, who will then notify me that you desire to return to open court to make your desires or findings known. Further, during your deliberations, you may not consult the Manual for Courts-Martial, the Geneva Convention Relative to the Treatment of Prisoners of War, or any other publication or writing unless it has been admitted into evidence.

Do counsel object to the instructions given or request additional instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions concerning these instructions?

MBRS: (Respond.)

MJ: If it is necessary (and I mention this because there is no latrine immediately adjacent to your deliberation room), your deliberations may be interrupted by a recess. However, before you may leave your closed session deliberations, you must notify us, we must come into the courtroom, formally convene and then recess the court; and, after the recess, we must reconvene the court and formally close again for your deliberations. So, with that in mind, (COL) (___) _____, do you desire to take a brief recess before you begin your deliberations, or would you like to begin immediately?

PRES: (Respond.)

MJ: (Trial Counsel) (Bailiff) please hand to the President of the court Prosecution Exhibits(s) ___ and (Defense Exhibit(s) ___) for use during the court's deliberations.

TC/BAILIFF: (Complies.)

MJ: (COL) (___) _____, please do not mark on any of the exhibits, except the Findings Worksheet (and please bring all the exhibits with you when you return to announce your findings).

The court is closed.

2–5–15. PRESENTENCING SESSION

NOTE: When the members close to deliberate, the military judge may convene an Article 39(a) session to cover pre-sentencing matters, or may wait until after findings.

MJ: This Article 39(a) session is called to order. All parties are present, except the court members.

_____ (*state name of accused*), when the members return from their deliberations, if you are acquitted of all charges and specifications, that will terminate the trial. On the other hand, if you are convicted of any offense, then the court will determine your sentence. During that part of the trial, you (will) have the opportunity to present evidence in extenuation and mitigation of the offenses of which you have been found guilty, that is, matters about the offense(s) or yourself, which you want the court to consider in deciding your sentence. In addition to the testimony of witnesses and the offering of documentary evidence, you may, yourself, testify under oath as to these matters, or you may remain silent, in which case the court will not draw any adverse inference from your silence. On the other hand, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross-examined on it. However, the government may offer evidence to rebut any statement of fact contained in an unsworn statement. The unsworn statement may be made orally or in writing, or both. It may be made by you or by your counsel on your behalf, or by both you and your counsel. Do you understand these rights that you have?

ACC: (Responds.)

MJ: Counsel, is the personal data on the first page of the charge sheet correct?

TC/DC: (Respond.)

MJ: Defense Counsel, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13, UCMJ?

DC: (Responds.)

NOTE: Illegal pretrial punishment. Article 82, GC III, provides that EPWs are subject to the laws of the DP, and, therefore, Article 13, UCMJ, credit would be equally applicable to EPWs who suffer illegal pretrial punishment. A punishment imposed on an EPW while awaiting trial that exceeds the limitations specified in the GC III may constitute Article 13 punishment. See Arts. 87 and 103, GC III. By analogy, a punishment or penalty imposed on the accused while being held for trial (which are not the result of disciplinary action (i.e., nonjudicial punishment) (see Note below)) that exceeds the limitations for "disciplinary sanctions" under Articles 89 and 90, GC III, may also constitute Article 13 punishment. The applicable disciplinary punishments, which may not exceed 30 days, are the following:

(1) Fine: 50 percent of advance pay and working pay;

(2) Discontinuance of privileges granted over and above the treatment provided by the GC III;

(3) Fatigue duty not exceeding two hours daily; and

(4) Confinement.

(Arts. 87, 89-90, and 97-98, GC III.)

The accused's time in internment under Article 21, GC III, does not constitute illegal pretrial punishment.

NOTE: Disciplinary sanctions (e.g., nonjudicial punishment) and double jeopardy. Article 86, GC III, provides that "No prisoner of war may be punished more than once

for the same act or on the same charge." Disciplinary sanctions imposed IAW Article 89-98, GC III, would bar subsequent punishment for the same act. If evidence of disciplinary sanctions was admitted at trial which reflects that the accused received punishment for the same offense, which the accused was also convicted at the court-martial, the military judge must dismiss the charge.

MJ: _____, is that correct?

ACC: (Responds.)

NOTE: <u>Pretrial confinement credit</u>. If the accused was confined while awaiting trial, other than internment as a prisoner of war, Article 103, GC III, requires that such time "shall be deducted from any sentence of imprisonment passed upon him." The accused's time in internment under Article 21, GC III, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

MJ: Under the provisions of Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War, any period of time spent by you in confinement while you were awaiting trial shall be deducted from any sentence of confinement and taken into account by the court when deliberating and fixing your sentence. However, the period during which you were interned as an enemy prisoner of war under Article 21, GC III, will not be considered when deliberating your sentence. Do you understand that?

ACC: (Responds.)

MJ: Counsel, based on the information on the charge sheet, the accused is to be credited with ___ day(s) of pretrial confinement credit. Is that the correct amount?

TC/DC: (Respond.)

MJ: Counsel, do you have any documentary evidence on sentencing which could be marked and offered at this time?

TC/DC: (Comply.)

MJ: Is there anything else by either side?

TC/DC: (Respond.)

MJ: This Article 39(a) session is terminated to await the members' findings.

2–5–16. FINDINGS

MJ: The court is called to order. All parties are again present as before to include the court members. (COL) (___) _____, has the court reached findings?

PRES: (Responds.)

MJ: Are the findings reflected on the Findings Worksheet?

PRES: (Responds.)

MJ: Please fold the worksheet and give it to the (Bailiff) (Trial Counsel) so that I may examine it.

TC/BAILIFF: (Complies)

NOTE: If a possible error exists on the Findings Worksheet, the military judge must take corrective action. All advice or suggestions to the court from the military judge must occur in open session. In a complex matter, it may be helpful to hold an Article 39(a) session to secure suggestions and agreement on the advice to be given to the court. Occasionally, corrective action by the court involves reconsideration of a finding and, in that situation, instructions on the reconsideration procedure are required (see INSTRUCTION 2-7-14, RECONSIDERATION INSTRUCTION (FINDINGS)).

MJ: I have reviewed the Findings Worksheet and (the findings appear to be in proper form) (_____). (Bailiff) (Trial Counsel), please return the Findings Worksheet to the President.

TC/BAILIFF: (Complies.)

MJ: Defense Counsel and accused please rise.

ACC/DC: (Comply.)

MJ: (COL) (___) _____, please announce the findings of the court.

PRES: (Complies.)

MJ: Counsel and accused may be seated.

DC/ACC: (Comply.)

MJ: (Trial Counsel) (Bailiff) please retrieve all exhibits from the President.

TC/BAILIFF: (Complies.)

NOTE: If there are findings of guilty, GO TO INSTRUCTION 2-5-17, SENTENCING PROCEEDINGS; if acquitted, continue below.

MJ: Members of the court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations of what happened in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service.

This court-martial is adjourned.

2–5–17. SENTENCING PROCEEDINGS

NOTE: If the military judge has not previously advised the accused of his allocution rights at the beginning of Section IV, JUDGE ALONE (SENTENCING), the military judge must do so at this time outside the presence of the court members. If there were findings of guilty of which the members had not previously been informed, they should be advised of such now. An amended flyer containing the other offenses is appropriate.

MJ: Members of the court, at this time, we will enter into the sentencing phase of the trial. (Before doing so, would the members like to take a recess?)

PRES/MBRS: (Respond.)

MJ: Trial Counsel, you may read the personal data concerning the accused as shown on the charge sheet.

TC: The first page of the charge sheet shows the following personal data concerning the accused: (*Reads the data*).

MJ: Members of the court, I have previously admitted into evidence (Prosecution Exhibit(s) ___, which (is) (are) _____) (and) (Defense Exhibit(s) ___, which (is) (are) _____). You will have (this) (these) exhibit(s) available to you during your deliberations.

Trial Counsel do you have anything else to present at this time?

TC: (Responds and presents case on sentencing.)

TC: The government rests.

MJ: Defense Counsel, you may proceed.

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

2–5–18. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Members of the court, you have now heard all of the evidence in this case. At this time, we need to have a hearing outside of your presence to go over the instructions that I will give you. I expect that you will be required to be present again at _____.

MBRS: (The members withdraw from the courtroom.)

2–5–19. DISCUSSION OF SENTENCING INSTRUCTIONS

MJ: All parties are present, except the court members who are absent.

Counsel, what do you calculate the maximum sentence to be based upon the findings of the court?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Sentence Worksheet as Appellate Exhibit ___, show it to the defense, and present it to me.

TC: (Complies.)

> ***NOTE. <u>Listing of punishments</u>. Only those punishments on which an instruction will be given should ordinarily be listed on the Sentence Worksheet.***

MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?

DC: (Responds.)

MJ: Counsel, I intend to give the standard sentencing instructions. Do counsel have any requests for any special instructions?

TC/DC: (Respond.)

(IF THE ACCUSED ELECTED NOT TO TESTIFY:) MJ: Defense, do you wish for me to instruct on the fact that the accused did not testify?

DC: (Responds.)

NOTE: Unsworn statement instruction within discretion of military judge. See United States v. Breese, 11 M.J. 17 (C.M.A. 1981).

MJ: Call the members. (The members are called and reenter the courtroom.)

2–5–20. SENTENCING ARGUMENTS

MJ: The court is called to order.

TC: All parties, to include the members, are present.

MJ: Trial Counsel, you may present argument.

TC: (Complies.)

MJ: Defense Counsel, you may present argument.

DC: (Complies.)

2–5–21. SENTENCING INSTRUCTIONS

MJ: Members of the court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as to those in aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he)(she) has been found guilty.

(IF OFFENSES ARE ONE FOR SENTENCING PURPOSES:) MJ: The offenses charged in _____ and _____ are one offense for sentencing purposes. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense.

You must not adjudge an excessive sentence in reliance upon possible mitigating action by the Convening or higher Authority. (A single sentence shall be adjudged for all offenses of which the accused has been found guilty.) (A separate sentence must be adjudged for each accused.)

NOTE: Sentencing instruction. The military judge is required by Articles 87, GC III, to instruct the court substantially as follows:

In determining a legal, appropriate, and adequate punishment, this court will bear in mind that the accused, not being a national of the United States, is not bound to the United States by any duty of allegiance and that (he)(she) is in the power of the United States as a result of circumstances independent of (his)(her) own will. As such, under Article 87 of the Geneva Convention Relative to the Treatment of Prisoners of War, this court is not bound to apply the maximum punishment, and it is at liberty to adjudge a lesser legal sentence to include no punishment.

NOTE: Under Article 87, GC III, the accused may not be sentenced to any penalties except those "provided for in respect of members of the armed forces of the said Power who have committed the same acts." See Appendix 12, Maximum Punishment Chart, MCM.

NOTE: <u>Mandatory punishment</u>. Under the MCM, the offenses of premeditated murder (Article 118(1), UCMJ) and felony murder (Article 118(4), UCMJ) have a mandatory minimum punishment of life imprisonment with the eligibility for parole, and the offense of spies (Article 106, UCMJ) has a mandatory punishment of death. However, under Article 87, GC III, the court is not required to apply the mandatory punishment prescribed.

(MAXIMUM PUNISHMENT:) MJ: The maximum punishment that may be adjudged in this case is confinement for _____.

The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence.

In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are a few matters which each member should consider in determining an appropriate sentence. First, bear in mind that there are several principal reasons for the sentence of those who violate the law. These reasons include: punishment of the wrongdoer, protection of society from the wrongdoer, and deterrence of the wrongdoer and those who know of (his)(her) crime(s) and (his)(her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion. Next, you should be aware of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

2–5–22. TYPES OF PUNISHMENT

NOTE: The following specific instructions on each type of punishment are optional but recommended. The instruction on the maximum punishment and the use by the members of a legally sufficient sentence worksheet listing the full range of punishments will suffice. However, the military judge must instruct on the effect of pretrial confinement credit, if applicable.

(RESTRICTION:) MJ: This court may adjudge restriction to limits for a maximum period not exceeding two months. For such a penalty, it is necessary for the court to specify the limits of the restriction and the period it is to run.

(HARD LABOR WITHOUT CONFINEMENT:) MJ: This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.

NOTE: If the maximum authorized confinement is one month, the maximum hard labor without confinement that can be adjudged is 45 days. Article 87, GC III, prohibits imprisonment in premises without daylight.

(CONFINEMENT:) MJ: As I have already indicated, this court may sentence the accused to confinement for ((life without eligibility for parole) (life) (a maximum of _____ (years) (months)). (Unless confinement for life without eligibility for parole or confinement for life is adjudged,) (A) sentence to confinement should be adjudged in either full days (or) full months (or full years);

fractions (such as one-half or one-third) should not be employed. (So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.)

NOTE: If confinement for life without eligibility for parole is an available punishment, instruct further as follows:

(A sentence to "confinement for life without eligibility for parole" means that the accused will be confined for the remainder of (his)(her) life and will not be eligible for parole by any official, but it does not preclude clemency action which might convert the sentence to one which allows parole. A sentence to "confinement for life" or any lesser confinement term, by comparison, means that the accused will have the possibility of earning parole from such confinement under such circumstances as are or may be provided by law or regulations for enemy prisoners of war. "Parole" is a form of conditional release of a prisoner from actual incarceration, before (his)(her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility of return to incarceration to complete (his)(her) sentence of confinement if the conditions of parole are violated. In determining whether to adjudge, if either, "confinement for life without eligibility for parole" or "confinement for life" in the sentence, bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole action by the Convening Authority or any other appropriate authority.)

NOTE: <u>Pecuniary punishment</u>. Pecuniary punishment, e.g., fine and/or forfeiture of pay and allowances, appears applicable to EPWs under the provision that EPWs are subject to the same punishment authorized against members of the U.S. armed forces

for the same offense. Art. 87, GC III. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding pecuniary punishment and proceed accordingly.

a. <u>Fine</u>. See R.C.M. 1003(b)(3). Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. Special and summary courts-martial, however, may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. Before total forfeitures and a fine can be approved resulting from a guilty plea at a GCM, the accused must be advised that the pecuniary loss could exceed total forfeitures. Moreover, to have any fine approved, the military judge must advise the accused of the possibility of a fine during the providence inquiry.

b. <u>Forfeiture of pay and allowances</u>. See R.C.M. 1003(b)(2); Appendix 12. EPWs only receive a nominal amount of monies during internment such as a monthly advance of pay (Art. 60, GC III) and, if applicable, working pay (Art. 62, GC III). It is unclear whether such monies constitute "pay" and/or "allowances" for purposes of adjudging a forfeiture as punishment. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding forfeiture of pay and allowances and proceed accordingly.

NOTE: <u>Discharge or reduction in rank</u>. EPWs may not be discharged or reduced in rank. Specifically, Article 87, GC III, prohibits the DP from depriving an EPW of his rank. These actions are a matter between an EPW and his state.

NOTE: <u>Pretrial confinement credit</u>. If the accused was confined while awaiting trial, Article 103, GC III, requires that such time "shall be deducted from any sentence of imprisonment passed upon him." The accused's time in internment under Article 21, GC III, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

(PRETRIAL CONFINEMENT CREDIT, IF APPLICABLE:) MJ: Under the provisions of Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War, any period of time spent by the accused in confinement while (he)(she) was awaiting trial shall be taken into account by the court when deliberating and fixing the sentence. However, the period during which the accused was interned as an enemy prisoner of war under Article 21, GC III, will not be considered when deliberating (his)(her) sentence.

In determining an appropriate sentence in this case, you should consider the fact that the accused has spent ___day(s) in pretrial confinement. If you adjudge confinement as part of your sentence, the day(s) the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve (his)(her) confinement, and will be given on a day-for-day basis.

(NO PUNISHMENT:) MJ: Finally, if you wish, this court may sentence the accused to no punishment.

2–5–23. OTHER INSTRUCTIONS

MJ: In selecting a sentence, you should consider all matters in extenuation and mitigation as well as those in aggravation, (whether introduced before or after your findings). (Thus, all the evidence you have heard in this case is relevant on the subject of sentencing.)

(ACCUSED'S NOT TESTIFYING:) MJ: The court will not draw any adverse inference from the fact that the accused elected not to testify.

(ACCUSED'S NOT TESTIFYING UNDER OATH:) MJ: The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by the court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement was not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

NOTE: Scope of Accused's Unsworn Statement. The scope of an accused's unsworn statement is broad. If the accused addresses the treatment or sentence of others, command options, or other matters that would be inadmissible but for their being

presented in an unsworn statement, the instruction below may be appropriate. In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused's unsworn statement.

(MJ: The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (_____). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted.)

(For example, it is not your duty (to determine relative blame worthiness of) (and whether appropriate disciplinary action has been taken against) others who might have committed an offense, (whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused's chain of command or other authorities) (_____).)

(Your duty is to adjudge an appropriate sentence for this accused that you regard as fair and just when it is imposed and not one whose fairness depends upon actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases).)

(PLEA OF GUILTY:) MJ: A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.

(MENDACITY:) MJ: The evidence presented (and the sentencing argument of Trial Counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints.

First, this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did testify falsely under oath to this court.

Second, such false testimony must have been, in your view, willful and material, meaning important, before it can be considered in your deliberations.

Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

(ARGUMENT FOR A SPECIFIC SENTENCE:) MJ: During argument, (Trial Counsel) (and) (Defense Counsel) recommended that you consider a specific sentence in this case. The arguments of counsel and their recommendations are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.

2–5–24. CONCLUDING SENTENCING INSTRUCTIONS

MJ: When you close to deliberate and vote, only the members will be present. I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make

communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your deliberations should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment. When you have completed your discussion, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain. Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is two-thirds or ___ members. (A sentence which includes (confinement for life without eligibility for parole, or confinement for life, or) confinement in excess of ten years requires the concurrence of three-fourths or _____ members.)

Table 2–2
Votes Needed for Sentencing

No. of Members	Two-thirds	Three-fourths
3	2	*
4	3	*
5	4	4
6	4	5
7	5	6
8	6	6
9	6	7
10	7	8
11	8	9
12	8	9

The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you may then repeat the process of discussion, proposal of sentences and voting. But once a proposal has been agreed to by the required concurrence, then that is your sentence.

You may reconsider your sentence at any time prior to its being announced in open court. If after you determine your sentence, any member suggests you reconsider the sentence, open the court and the president should announce that reconsideration has been proposed without reference to whether the proposed reballot concerns increasing or decreasing the sentence. I will give you specific instructions on the procedure for reconsideration.

NOTE: See INSTRUCTION 2-7-19, RECONSIDERATION INSTRUCTION (SENTENCE).

MJ: As an aid in putting the sentence in proper form, the court will have the use of the Sentence Worksheet marked Appellate Exhibit ___, which the (Trial Counsel) (Bailiff) will now hand to the President.

TC/BAILIFF: (Comply.)

MJ: Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-

Martial, the Geneva Convention Relative to the Treatment of Prisoners of War, or any other publication or writing not properly admitted or received during this trial.

These instructions must not be interpreted as indicating an opinion as to the sentence which should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of adherence to the laws and customs of war in general, punishment of the accused, and the protection of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. When the court returns, I will examine the Sentence Worksheet and the President will then announce the sentence.

Do counsel object to the instructions as given or request other instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions?

MBR: (Responds.)

MJ: (COL) (___) _____, if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?

PRES: (Responds.)

MJ: (Trial Counsel) (Bailiff), please give the President Prosecution Exhibit(s) ___ (and Defense Exhibit(s) ___).

TC/BAILIFF: (Complies.)

MJ: (COL) (___) _____, please do not mark on any of the exhibits, except the Sentence Worksheet, and please bring all of the exhibits with you when you return to announce the sentence.

The court is closed.

2–5–25. ANNOUNCEMENT OF SENTENCE

MJ: The court is called to order.

TC: All parties to include the court members are present as before.

MJ: (President), have you reached a sentence?

PRES: (Responds.)

> ***NOTE: If the president indicates that the members are unable to agree on a sentence, the military judge should give INSTRUCTION 2-7-18, "HUNG JURY" INSTRUCTION.***

MJ: (President), is the sentence reflected on the Sentence Worksheet?

PRES: (Respond.)

MJ: (President), please fold the Sentence Worksheet and give it to the (Trial Counsel) (Bailiff) so that I can examine it.

PRES/TC/BAILIFF: (Complies.)

MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (_____). (Bailiff) (Trial Counsel), you may return it to the President.

TC/BAILIFF/PRES: (Complies.)

MJ: Defense Counsel and accused, please rise.

ACC/DC: (Comply.)

MJ: (President), please announce the sentence of the court.

PRES: (Complies.)

> ***NOTE: Article 107, GC III, requires the Detaining Power to immediately notify the Protecting Power and the prisoners' representative of the accused's judgment, sentence, and appellate rights. The Detaining Power must provide a "detailed communication containing: (1) the precise wording of the finding and sentence; (2) a summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and the defense; (3) notification, where applicable, of the establishment where the sentence will be served."***

MJ: Please be seated.

DC/ACC: (Comply.)

MJ: (Trial Counsel) (Bailiff), please retrieve the exhibit(s) from the President.

TC/BAILIFF: (Complies.)

MJ: Members of the court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, the oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations of what happened in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused. Counsel and the accused will remain.

MBRS: (Withdraw.)

MJ: The members have withdrawn from the courtroom. All other parties are present.

(PRETRIAL CONFINEMENT CREDIT:) MJ: The accused will be credited with ___ days of pretrial confinement against the accused's term of confinement.

> ***NOTE: If there was no pretrial agreement, GO TO INSTRUCTION 2-6-14, POST-TRIAL AND APPELLATE RIGHTS ADVICE; if there was a pretrial agreement continue below:***

MJ: After ACCA _____, we are now going to discuss the operation of your pretrial agreement on the sentence of the court.

It is my understanding that the effect of the pretrial agreement on the sentence is that the Convening Authority may approve _____. Do you agree with that interpretation?

ACC: (Responds.)

MJ: Do counsel also agree with that interpretation?

TC/DC: (Respond.)

2–5–26. POST-TRIAL AND APPELLATE RIGHTS ADVICE

NOTE: <u>Right of appeal</u>. Article 106, GC III, provides: "Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so." This appears to require an inquiry on the record that the accused is "fully informed" of his appellate rights.

MJ: _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights, you have the right to the advice and assistance of counsel.

After the record of trial is prepared, it will be forwarded to the Convening Authority for action. The Convening Authority may approve the findings and the sentence (within the limits of the pretrial agreement, if any), or he/she may disapprove the findings or the sentence in whole or in part. The Convening Authority may reduce the sentence adjudged by the court-martial, but he/she cannot increase it. The Convening Authority can disapprove a finding of guilty, but cannot change a finding of not guilty. Although the Convening Authority is not required to review the case for legal errors, he/she may take action to correct legal errors.

[(IF GCM OR SPCM ADJUDGED CONFINEMENT OF ONE YEAR OR MORE:) In addition, the Staff Judge Advocate will prepare a post-trial recommendation. That recommendation will be served on you or your defense counsel before the Convening Authority takes action on your case.]

Before the Convening Authority takes action, you have the right to submit any matters you wish him or her to consider in deciding whether to approve all, part, or any of the findings and sentence in your case (including a response to the Staff Judge Advocate's post-trial recommendation, if any). Such matters must be submitted within 10 days after a copy of the authenticated record of trial (and the recommendation of the Staff Judge Advocate) (is) (are) served on you or your counsel. You may request up to an additional 20 days and, for good cause, the Convening Authority may approve the request.

[(IF APPROVED SENTENCE IS DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the Convening Authority approves (death) (confinement for one year or more), your case will be reviewed by the Army Court of Criminal Appeals (ACCA). You are entitled to be represented by counsel before that court. If you request, military counsel will be appointed to represent you at no expense to you. Also, if you choose, you may retain a civilian counsel to represent you at no cost to the United States by notifying the Clerk of Court.

NOTE: The GC III does not cover the type or costs of appellate counsel. The Note on costs of representation, supra, equally applies in this situation.

After ACCA completes its review, you may request the Court of Appeals for the Armed Forces (CAAF) to review your case. If CAAF grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA.

After CAAF completes its review, you may request review by the Supreme Court of the United States. If that court grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA and CAAF.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the Convening Authority approves a sentence that does not include death or confinement for one year or more, your case will be examined in the Office of the Judge Advocate General for legal sufficiency and to determine if the sentence is appropriate. The Judge Advocate General may take corrective action as appropriate. This mandatory review under Article 69(a), UCMJ, will constitute the final action in your case unless The Judge Advocate General refers your case to ACCA for further review.]

[(IF APPROVED SENTENCE IN GCM DOES NOT INCLUDE DEATH OR IN SPCM INCLUDES CONFINEMENT FOR ONE YEAR OR MORE:) You also have the right to waive or withdraw review at any time before completion of the review. If you waive or withdraw review, your decision is final and you cannot change your mind. A judge advocate will review your case and send it to the Convening Authority for final action. Within two years after final action is taken on your case, you may apply to The Judge Advocate General to take corrective action. The Judge Advocate General may modify the findings or sentence on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over you or the offense(s), error prejudicial to your substantial rights, or the appropriateness of the sentence.]

Do you understand your post-trial and appellate rights?

ACC: (Responds.)

Do you have any questions?

ACC: (Responds.)

(IF MORE THAN ONE DEFENSE COUNSEL:) MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the Staff Judge Advocate's post-trial recommendation to be served?

DC: (Responds.)

MJ: Are there other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

Section VI

Court Members (Sentencing Only)

MJ: _____, we now enter into the sentencing phase of the trial where you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself, which you want the court to consider in deciding your sentence. In addition to the testimony of witnesses and the offering of documentary evidence, you may, yourself, testify under oath as to these matters, or you may remain silent, in which case the court members may not draw any adverse inference from your silence. On the other hand, if you desire, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross-examined on it; however, the Government may offer evidence to rebut any statement of fact contained in any unsworn statement. An unsworn statement may be made orally, in writing, or both. It may be made by you, by your counsel on your behalf, or by both. Do you understand these rights?

ACC: (Responds.)

MJ: Counsel, is the personal data on the first page of the charge sheet correct?

TC/DC: (Respond.)

MJ: Defense Counsel, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13, UCMJ?

DC: (Responds.)

NOTE: Illegal pretrial punishment. Article 82, GC III, provides that EPWs are subject to the laws of the DP, and, therefore, Article 13, UCMJ, credit would be equally

applicable to EPWs who suffer illegal pretrial punishment. A punishment or penalty imposed on an EPW while being held for trial that exceeds the limitations specified in the GC III may constitute Article 13 punishment. See Arts. 87 and 103, GC III. By analogy, a punishment or penalty imposed on the accused while being held for trial (which are not the result of disciplinary action (i.e., nonjudicial punishment) (see Note below)) that exceeds the limitations for "disciplinary sanctions" under Articles 89 and 90, GC III, may also constitute Article 13 punishment. The applicable disciplinary punishments, which may not exceed 30 days, are the following:

(1) Fine: 50 percent of advance pay and working pay;

(2) Discontinuance of privileges granted over and above the treatment provided by the GC III;

(3) Fatigue duty not exceeding two hours daily; and

(4) Confinement.

(Arts. 87, 89-90, and 97-98, GC III.)

The accused's time in internment under Article 21, GC III, does not constitute illegal pretrial punishment.

NOTE: Disciplinary sanctions (e.g., nonjudicial punishment) and double jeopardy. Article 86, GC III, provides that "No prisoner of war may be punished more than once for the same act or on the same charge." Disciplinary sanctions imposed IAW Article 89-98, GC III, would bar subsequent punishment for the same act. If evidence of disciplinary sanctions was admitted at trial which reflects that the accused received punishment or a penalty for the same offense, which the accused was also convicted at the court-martial, the military judge must dismiss the charge.

MJ: _____, is that correct?

ACC: (Responds.)

MJ: Based upon the findings, I calculate the maximum punishment to be _____.

TC/DC: (Respond.)

MJ: Counsel, based on the information on the charge sheet, the accused is to be credited with _____ days of pretrial confinement credit. Is that the correct amount?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Sentence Worksheet as Appellate Exhibit ___, show it to the defense and present it to me.

TC: (Complies.)

> ***NOTE. <u>Listing of punishments</u>. Only those punishments on which an instruction will be given should ordinarily be listed on the Sentence Worksheet.***

MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?

DC: (Responds.)

MJ: Counsel, do you have any documentary evidence on sentencing which could be marked and offered at this time?

TC/DC: (Respond.)

MJ: Is there anything else by either side before we call the members?

TC/DC: (Responds.)

MJ: Bailiff, call the court members.

NOTE: Whenever the members enter the courtroom, all persons except the military judge and reporter shall rise. The members are seated alternately to the right and left of the president according to rank.

MJ: You may be seated. The court is called to order.

TC: The court is convened by Court Martial Convening Order Number _____, Headquarters _____ dated _____ (as amended by Court-Martial Convening Order Number_____, same Headquarters, dated _____), copies of which have been furnished to each member of the court.

The accused and the following persons detailed to this court-martial are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel); _____, (_____, Defense Counsel; (_____, Assistant Defense Counsel;) (_____, Civilian Defense Counsel;) (_____ (*state name of selected prisoner comrade*), Defense Assistant). (_____ (*state name of selected advocate*), (Assistant) (Associate) Defense Advocate; and _____, _____, _____, and _____, court members. The following persons detailed to this court are absent: _____, _____., and _____).

NOTE: Security concerns may necessitate an alteration of the usual requirement of announcement in open court of the names of court members and the parties. An appellate exhibit containing their names may be substituted.

NOTE: Members who have been relieved (viced) by orders need not be mentioned.

TC: The prosecution is ready to proceed with trial in the case of the United States v. (*state name of accused*).

MJ: The members of the court will now be sworn. All persons in the courtroom please rise.

TC: Do you (swear) (affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the sentence unless required to do so in the due course of law, so help you God?

MBRS: (Comply.)

MJ: Please be seated. The court is assembled.

2–6–1. PRELIMINARY INSTRUCTIONS

MJ: Members of the court, it is appropriate that I give you some preliminary instructions. My duty as military judge is to ensure this trial is conducted in a fair, orderly and impartial manner according to the law. I preside over open sessions, rule upon objections, and instruct you on the law applicable to this case. You are required to follow my instructions on the law and may not consult any other source as to the law pertaining to this case unless it is admitted into evidence.

This rule applies throughout the trial including closed sessions and periods of recess and adjournment. Any questions you have of me should be asked in open court.

At a session held earlier, the accused pled guilty to the charge(s) and specification(s) which you have before you. I accepted that plea and entered findings of guilty. Therefore, you will not have to determine whether the accused is guilty or not guilty as that has been established by (his)(her) plea. Your duty is to determine an appropriate sentence. That duty is a grave responsibility requiring the exercise of wise discretion. Your determination must be based upon all the evidence presented and the instructions I will give you as to the applicable law. Since you cannot properly reach your determination until all the evidence has been presented and you have been instructed, it is of vital importance that you keep an open mind until all the evidence and instructions have been presented to you.

Counsel soon will be given an opportunity to ask you questions and exercise challenges. With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so. Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement.

Some of the grounds for challenge would be if you were the accuser in the case, if you have investigated any offense charged, if you have formed a fixed opinion as to what an appropriate punishment would be for this accused, or any matter that may affect your impartiality regarding an appropriate sentence for the accused. To determine if any grounds for challenge exist, counsel for both sides are given an opportunity to question you. These questions are not intended to

embarrass you. They are not an attack upon your integrity. They are asked merely to determine whether a basis for challenge exists.

It is no adverse reflection upon a court member to be excused from a particular case. You may be questioned either individually or collectively, but in either event, you should indicate an individual response to the question asked. Unless I indicate otherwise, you are required to answer all questions.

You must keep an open mind throughout the trial. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to an appropriate sentence, after considering all the alternative punishments of which I will later advise you. You may not have a preconceived idea or formula as to either the type or the amount of punishment which should be imposed, if any.

Counsel are given an opportunity to question all witnesses. When counsel have finished, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so. The way we handle that is to require you to write out the question and sign legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked since your questions, like questions of counsel, are subject to objection. (There are forms provided to you for your use if you desire to question any witness.) I will conduct any needed examination. There are a couple of things you need to keep in mind with regard to questioning.

First, you cannot attempt to help either the government or the defense.

Second, counsel have interviewed the witnesses and know more about the case than we do. Very often they do not ask what may appear to us to be an obvious question because they are aware this particular witness has no knowledge on the subject.

Rules of evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial, when I sustain an objection, disregard the question and answer. If I overrule an objection, you may consider both the question and answer.

During any recess or adjournment, you may not discuss the case with anyone, not even among yourselves. You must not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in the case. You must hold your discussion of the case until you are all together in your closed session deliberations so that all of the members have the benefit of your discussion. Do not purposely visit the scene of any incident alleged in the specification(s) or involved in the trial. You must also avoid contact with witnesses or potential witnesses in this case. If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every break or recess but keep them in mind throughout the trial.

We will try to estimate the time needed for recesses or hearings out of your presence. Frequently their duration is extended by consideration of new issues arising in such hearings. Your patience and understanding regarding these matters will contribute greatly to an atmosphere consistent with the fair administration of justice.

While you are in your closed session deliberations, only the members will be present. You must remain together and you may not allow any unauthorized intrusion into your deliberations. Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. However, in addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations, and will speak for the court in announcing the results.

This general order of events can be expected at this court-martial: Questioning of court members, challenges and excusals, presentation of evidence, closing argument by counsel, instructions on the law, your deliberations, and announcement of the sentence.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If it becomes too (hot) (cold) in the courtroom, or if you need a break because of drowsiness or for comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

Each of you may take notes if you desire and use them to refresh your memory during deliberations, but they may not be read or shown to other members. (At the time of any recess or adjournment, you should (take your notes with you for safe keeping until the next session) (leave your notes in the courtroom).)

(One other administrative matter: if during the course of the trial it is necessary that you make any statement, if you would preface the statement by stating your name, that will make it clear on the record which member is speaking.)

Are there any questions?

MBRS: (Respond.)

MJ: (Apparently not.) Please take a moment to read the charges on the flyer provided to you and to ensure that your name is correctly reflected on the convening order. If it is not, please let me know.

MBRS: (Comply.)

MJ: Trial Counsel, you may announce the general nature of the charge(s).

TC: The general nature of the charge(s) in this case is _____. The charge(s) (was) (were) preferred by _____; forwarded with recommendations as to disposition by _____ (and investigated by _____).

The records of this case disclose (no grounds for challenge) (grounds for challenge of _____ for the following reasons).

If any member of the court is aware of any matter which he (or she) believes may be a ground for challenge by either side, such matter should now be stated.

MBRS: (Respond.)

2–6–2. VOIR DIRE

MJ: Before counsel ask you any questions, I will ask a few preliminary questions. If any member has an affirmative response to any question, please raise your hand.

NOTE: The military judge should indicate for the record the members' response to the following questions, i.e., [Negative response from (all members) (state name(s) or if the names are not disclosed in open court, a number assigned to that member).] [Positive response from (all members) (state name of member(s)).]

1. Does anyone know the accused?

2. Does anyone know any person named in any of the specifications?

3. Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?

4. Does anyone have any prior knowledge of the facts or events in this case?

(5. Members, this case has received attention in the (local) (and) (national) media. Is there any member who has seen or heard any mention of this case in the media?

NOTE: To the members who have seen or heard mention of this case in the media, continue with Questions 6-11; if none, go to Question 12.

6. Is there any member who has participated in a military operation that received press coverage?

7. To those who have been in operations that received press coverage: did any member find that the press coverage was 100 percent accurate and complete?

8. Is there any member who believes that, merely because the press reports something, it is, in fact, the truth?

9. Do all members agree with the proposition that press reports of military affairs or about any kind of event may be incorrect or inaccurate?

10. Is there, then, any member who believes that the reports that he (or she) received from the media about this case are completely accurate and truthful?

11. For any member who has seen mention of this case in the media, will you put aside all the matters which you have heard, read, or seen in the media and decide this case, based solely upon the evidence you receive in this court and the law as I instruct you?)

12. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

13. Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?

14. If so, will that experience influence your performance of duty as a court member in this case in any way?

NOTE: If Question 14 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the hearing of the other members.

15. How many of you have previously served as court members?

16. (As to those members) Can each of you put aside anything you may have heard in any previous proceeding and decide this case solely on the basis of the evidence and my instructions as to the applicable law?

17. Has anyone had any specialized law enforcement training or experience, to include duties as a military police officer, off-duty security guard, civilian police officer, corrections officer, or comparable duties other than the general law enforcement duties common to military personnel of your rank and position?

18. Is any member of the court in the rating chain, supervisory chain, or chain of command, of any other member?

> ***NOTE: If question 18 is answered in the affirmative, the military judge may want to ask questions 19 and 20 outside the presence of the other members.***

19. (To junior) Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, because another member holds a position of authority over you?

20. (To senior) Will you be embarrassed or restrained in any way in the performance of your duties as a court member if a member over whom you hold a position of authority should disagree with you?

21. Has anyone had any dealings with any of the parties to the trial, to include me and counsel, which might affect your performance of duty as a court member in any way?

22. Does anyone know of anything of either a personal or professional nature which would cause you to be unable to give your full attention to these proceedings throughout the trial?

23. It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime(s) for which the accused is to be sentenced. Does any member, having read the charge(s) and specification(s), believe that you would be compelled to vote for any particular punishment solely because of the nature of the charge(s)?

24. You will be instructed in detail before you begin your deliberations. I will instruct you on the full range of punishments (from no punishment) up to the maximum punishment. You should consider all forms of punishment within that range. Consider does not necessarily mean that you would vote for that particular punishment. Consider means that you think about and make a choice in your mind, one way or the other, as to what is an appropriate punishment within that range. Each member must keep an open mind and not make a choice, nor foreclose from consideration any possible sentence, until the closed session for deliberations and voting on the sentence. Can each of you follow this instruction?

25. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence in this case?

26. Can each of you reach a decision on a sentence on an individual basis in this particular case and not solely upon the nature of the offense (or offenses) of which the accused has been convicted?

27. Is any member aware of any matter which might raise a substantial question concerning your participation in this trial as a court member?

Do counsel for either side desire to question the court members?

> ***NOTE: Trial counsel and defense counsel will conduct voir dire if desired, and individual voir dire will be conducted, if required.***

2–6–3. INDIVIDUAL VOIR DIRE

MJ: Members of the court, there are some matters that we must now consider outside of your presence. Please return to the deliberation room. Some of you may be recalled, however, for individual questioning.

MBRS: (Comply.)

MJ: All the members are absent. All other parties are present. Trial Counsel, do you request individual voir dire and if so, state the member and your reason(s).

TC: (Responds.)

MJ: Defense Counsel, do you request individual voir dire and if so, state the member and your reason(s).

DC: (Responds.)

2–6–4. CHALLENGES

NOTE: Challenges are to be made outside the presence of the court members. This may occur at a sidebar conference or at an Article 39(a) session. What follows is a suggested procedure for an Article 39(a) session.

MJ: Members of the court, there are some matters that we must now take up outside of your presence. Please return to the deliberation room.

MBRS: (Comply.)

MJ: All the members are absent, all other parties are present. Trial Counsel, do you have any challenges for cause?

TC: (Responds.)

MJ: Defense Counsel, do you have any challenges for cause?

DC: (Responds.)

MJ: Trial Counsel, do you have a peremptory challenge?

TC: (Responds.)

MJ: Defense Counsel, do you have a peremptory challenge?

DC: (Responds.)

NOTE: The military judge will verify that a quorum remains and, if enlisted members are detailed, at least one-third are enlisted. If any member is excused as a result of a challenge, the military judge should instruct the bailiff to inform the member that he/she has been excused and the remaining members should rearrange themselves in the proper seating order before returning to the courtroom.

MJ: Call the members.

2–6–5. SENTENCING PROCEEDINGS

TC: All parties are present as before, to now include the court members (with the exception of _____, who (has) (have) been excused).

MJ: Court members, at this time we will begin the sentencing phase of this court-martial. Trial Counsel, you may read the personal data concerning the accused as shown on the first page of the charge sheet.

TC: The first page of the charge sheet shows the following personal data concerning the accused: _____.

MJ: Members of the court, I have previously admitted into evidence (Prosecution Exhibit(s) ___, which (is) (are) _____) (and) (Defense Exhibit(s) ___, which (is) (are) _____). You will have (this) (these) exhibit(s) available to you during your deliberations. (Trial Counsel, you

may read the stipulation of fact into evidence.) Trial Counsel, do you have anything else to present at this time?

TC: (Responds and presents case on sentencing.)

NOTE: The trial counsel administers the oath/affirmation for all witnesses. After a witness testifies, the military judge should allow the members to ask questions.

MJ: Does any court member have questions of this witness?

MBRS: (Respond.)

NOTE: If the members have questions, the trial counsel will collect the written questions, have them marked as appellate exhibits, examine them, show them to the defense counsel, and present them to the military judge so that the military judge may ask the witness the questions. When questioning is finished, the military judge should instruct the witness along the following lines:

MJ: _____, you are excused (permanently) (temporarily). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (return to your duties) (go about your business) (be available by telephone to return within ____ minutes) (_____).

TC: The government rests.

MJ: Defense Counsel, you may proceed.

DC: (Responds.)

DC: The defense rests.

2–6–6. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Court members, you have now heard all the evidence. At this time, we need to have a hearing outside of your presence to go over the instructions that I will give you. I expect that you will be required to be present again in about _____.

MBRS: (Comply.)

2–6–7. DISCUSSION OF SENTENCING INSTRUCTIONS

MJ: All parties are present as before, except the court members who are absent. Counsel, I intend to give the standard sentencing instructions. Do counsel have any requests for any special instructions?

TC/DC: (Respond.)

(IF THE ACCUSED ELECTED NOT TO TESTIFY:) MJ: Defense, do you wish for me to instruct on the fact that the accused did not testify?

DC: (Responds.)

NOTE: Unsworn statement instruction: within discretion of military judge.

MJ: Call the members.

2–6–8. SENTENCING ARGUMENTS

MJ: The court is called to order.

TC: All parties, to include the members, are present.

MJ: Trial Counsel, you may present argument.

TC: (Argues.)

MJ: Defense Counsel, you may present argument.

DC: (Argues.)

2–6–9. SENTENCING INSTRUCTIONS

MJ: Members of the court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as to those in aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he)(she) has been found guilty.

(IF OFFENSES ARE ONE FOR SENTENCING PURPOSES:) MJ: The offenses charged in _____ and _____ are one offense for sentencing purposes. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense.

NOTE: Sentencing instruction. The military judge is required by Articles 87 and 100, GC III, to instruct the court substantially as follows:

In determining a legal, appropriate, and adequate punishment, this court will bear in mind that the accused, not being a national of the United States, is not bound to the United States by any duty of allegiance and that (he)(she) is in the power of the United States as a result of circumstances independent of (his)(her) own will. As such, under Article 87 of the Geneva Convention Relative to the Treatment of Prisoners of War, you are not bound to apply the maximum punishment and you are at liberty to arrive at a lesser legal sentence to include no punishment.

You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. (A single sentence shall be adjudged for all offenses of which the accused has been found guilty.) (A separate sentence must be adjudged for each accused.)

NOTE: Under Article 87, GC III, the accused may not be sentenced to any penalties except those "provided for in respect of members of the armed forces of the said Power who have committed the same acts." See Appendix 12, Maximum Punishment Chart, MCM.

NOTE: <u>Mandatory punishment</u>. Under the MCM, the offenses of premeditated murder (Article 118(1), UCMJ) and felony murder (Article 118(4), UCMJ) have a mandatory minimum punishment of life imprisonment with the eligibility for parole, and the offense of spies (Article 106, UCMJ) has a mandatory punishment of death. However, under Article 87, GC III, the court is not required to apply the mandatory punishment prescribed.

(MAXIMUM PUNISHMENT:) MJ: The maximum punishment that may be adjudged in this case is confinement for _____

The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence.

In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are a few matters which each member should consider in determining an appropriate sentence. First, bear in mind that there are several principal reasons for the sentence of those who violate the law. These reasons include: punishment of the wrongdoer, protection of society from the wrongdoer, and deterrence of the wrongdoer and those who know of (his)(her) crime(s) and (his)(her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion. Next, you should be aware of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

2–6–10. TYPES OF PUNISHMENT

NOTE: The following specific instructions on each type of punishment are optional but recommended. The instruction on the maximum punishment and the use by the members of a legally sufficient Sentence Worksheet listing the full range of punishments will suffice. However, the military judge must instruct on the effect of pretrial confinement credit, if applicable.

(RESTRICTION:) MJ: This court may adjudge restriction to limits for a maximum period not exceeding two months. For such a penalty, it is necessary for the court to specify the limits of the restriction and the period it is to run.

(HARD LABOR WITHOUT CONFINEMENT:) MJ: This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.

NOTE: If the maximum authorized confinement is one month, the maximum hard labor without confinement that can be adjudged is 45 days. Article 87, GC III, prohibits imprisonment in premises without daylight.

(CONFINEMENT:) MJ: As I have already indicated, this court may sentence the accused to confinement for ((life without eligibility for parole) (life) (a maximum of _____ (years) (months)). (Unless confinement for life without eligibility for parole or confinement for life is adjudged,) (A) sentence to confinement should be adjudged in either full days (or) full months (or full years); fractions (such as one-half or one-third) should not be employed. (So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.)

NOTE: If confinement for life without eligibility for parole is an available punishment, instruct further as follows:

(You are advised that a sentence to "confinement for life without eligibility for parole" means that the accused will not be eligible for parole by any official, but it does not preclude clemency action which might convert the sentence to one which allows parole. A sentence to "confinement for life" or any lesser confinement term, by comparison, means that the accused will have the possibility of earning parole from confinement under such circumstances as are or may be provided by law or regulations. "Parole" is a form of conditional release of a prisoner from actual incarceration before (his)(her) sentence has been fulfilled on specific conditions and under the possibility of return to incarceration to complete (his)(her) sentence to confinement if the conditions of parole are violated. In determining whether to adjudge "confinement for life without eligibility for parole" or "confinement for life" (if either), you should bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole action by the convening authority or any other authority.)

NOTE: Pecuniary punishment. Pecuniary punishment, e.g., fine and/or forfeiture of pay and allowances, appears applicable to EPWs under the provision that EPWs are subject to the same punishment authorized against members of the U.S. armed forces for the same offense. Art. 87, GC III. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding pecuniary punishment and proceed accordingly.

a. Fine. See R.C.M. 1003(b)(3). Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. Special and summary courts-martial, however, may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. Before total forfeitures and a fine can be approved resulting from a guilty plea at a GCM,

the accused must be advised that the pecuniary loss could exceed total forfeitures. Moreover, to have any fine approved, the military judge must advise the accused of the possibility of a fine during the providence inquiry.

b. <u>Forfeiture of pay and allowances</u>. See R.C.M. 1003(b)(2); Appendix 12. EPWs only receive a nominal amount of monies during internment such as a monthly advance of pay (Art. 60, GC III) and, if applicable, working pay (Art. 62, GC III). It is unclear whether such monies constitute "pay" and/or "allowances" for purposes of adjudging a forfeiture as punishment. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding forfeiture of pay and allowances and proceed accordingly.

NOTE: <u>Discharge or reduction in rank</u>. EPWs may not be discharged or reduced in rank. Specifically, Article 87, GC III, prohibits the DP from depriving an EPW of his rank. These actions are a matter between an EPW and his state.

NOTE: <u>Pretrial confinement credit</u>. If the accused was confined while awaiting trial, Article 103, GC III, requires that such time "shall be deducted from any sentence of imprisonment passed upon him." The accused's time in internment under Article 21, GC III, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

(PRETRIAL CONFINEMENT CREDIT, IF APPLICABLE:) MJ: Under the provisions of Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War, any period of time spent by the accused in confinement while (he)(she) was awaiting trial shall be taken into account

by the court when deliberating and fixing the sentence. However, the period during which the accused was interned as an enemy prisoner of war under Article 21, GC III, will not be considered when deliberating (his)(her) sentence.

In determining an appropriate sentence in this case, you should consider that the accused has spent _____ days in pretrial confinement. If you adjudge confinement as part of your sentence, the days the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve (his)(her) confinement, and will be given on a day-for-day basis.

(NO PUNISHMENT:) MJ: Finally, if you wish, this court may sentence the accused to no punishment.

In selecting a sentence, you should consider all matters in extenuation and mitigation as well as those in aggravation, (whether introduced before or after your findings). (Thus, all the evidence you have heard in this case is relevant on the subject of sentencing.)

2–6–11. OTHER INSTRUCTIONS

(ACCUSED'S NOT TESTIFYING:) MJ: The court will not draw any adverse inference from the fact that the accused did not elect to testify.

(ACCUSED'S NOT TESTIFYING UNDER OATH:) MJ: The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath.

An unsworn statement is an authorized means for an accused to bring information to the attention of the court, and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

> ***NOTE: <u>Scope of Accused's Unsworn Statement</u>. The scope of an accused's unsworn statement is broad. If the accused addresses the treatment or sentence of others, command options, or other matters that would be inadmissible but for their being presented in an unsworn statement, the instruction below may be appropriate. In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused's unsworn statement.***

MJ: The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (_____). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted.

(For example, it is not your duty (to determine relative blame worthiness of) (and whether appropriate disciplinary action has been taken against) others who might have committed an offense, whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused's chain of command or other authorities) (_____).)

(Your duty is to adjudge an appropriate sentence for this accused that you regard as fair and just when it is imposed and not one whose fairness depends upon actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases).)

(PLEA OF GUILTY:) MJ: A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.

(MENDACITY:) MJ: The evidence presented (and the sentencing argument of trial counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints.

First, this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court.

Second, such lies must have been, in your view, willful and material, meaning important, before they can be considered in your deliberations.

Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

(ARGUMENT FOR A SPECIFIC SENTENCE:) MJ: During argument, (trial counsel) (and) (defense counsel) recommended that you consider a specific sentence in this case. You are advised that the arguments of counsel and their recommendations are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.

2–6–12. CONCLUDING SENTENCING INSTRUCTIONS

MJ: When you close to deliberate and vote, only the members will be present. I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your deliberations should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment. When you have completed your discussion, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain. Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is two-thirds or ___ members. A sentence which includes (confinement for life without eligibility for parole, or confinement for life, or) confinement in excess of ten years requires the concurrence of three-fourths or ____ members.)

Table 2–3
Votes Needed for Sentencing

No. of Members	Two-thirds	Three-fourths
3	2	*
4	3	*
5	4	4
6	4	5
7	5	6
8	6	6
9	6	7
10	7	8
11	8	9
12	8	9

The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you may then repeat the process of discussion, proposal of sentences and voting. But once a proposal has been agreed to by the required concurrence, then that is your sentence.

You may reconsider your sentence at any time prior to its being announced in open court. If after you determine your sentence, any member suggests you reconsider the sentence, open the court and the president should announce that reconsideration has been proposed without reference to

whether the proposed reballot concerns increasing or decreasing the sentence. I will then give you specific instructions on the procedure for reconsideration.

NOTE: See INSTRUCTION 2-7-19, RECONSIDERATION INSTRUCTION (SENTENCE).

MJ: As an aid in putting the sentence in proper form, the court may use the Sentence Worksheet marked Appellate Exhibit ___ which the (Trial Counsel) (Bailiff) may now hand to the president.

TC/BAILIFF: (Complies.)

MJ: Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial, the Geneva Convention Relative to the Treatment of Prisoners of War, or any other publication or writing not properly admitted or received during this trial. These instructions must not be interpreted as indicating an opinion as to the sentence which should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of adherence to the laws and customs of war in general, punishment of the accused, and the protection of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. When the court returns, I will examine the Sentence Worksheet. The president will then announce the sentence.

MJ: Do counsel object to the instructions as given or request other instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions?

MBRS: (Respond.)

MJ: (COL) (___) _____, if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?

PRES: (Responds.)

MJ: (Trial Counsel) (Bailiff), please give the president Prosecution Exhibit(s) ___ (and Defense Exhibit(s) ___).

TC/BAILIFF: (Complies.)

MJ: (COL) (___) _____, please do not mark on any of the exhibits, except the Sentence Worksheet, and please bring all the exhibits with you when you return to announce the sentence.

MJ: The court is closed.

2–6–13. ANNOUNCEMENT OF SENTENCE

MJ: The court is called to order.

TC: All parties to include the court members are present as before.

MJ: _____, have you reached a sentence?

PRES: (Responds.)

NOTE: If the president indicates that the members are unable to agree on a sentence, the military judge should give INSTRUCTION 2-7-18, "HUNG JURY" INSTRUCTION.

MJ: _____, is the sentence reflected on the Sentence Worksheet?

PRES: (Responds.)

MJ: _____, please fold the Sentence Worksheet and give it to the (Trial Counsel) (Bailiff) so that I can examine it.

TC/BAILIFF: (Complies.)

MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (_____). (Trial Counsel) (Bailiff), you may return it to the president.

TC/BAILIFF: (Complies.)

MJ: Defense counsel and accused, please rise.

ACC/DC: (Comply.)

MJ: (President), please announce the sentence.

PRES: (Complies.)

MJ: Please be seated. (Trial counsel) (Bailiff), please retrieve the exhibit(s) from the president.

TC/BAILIFF: (Complies.)

MJ: Members of the court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused. Counsel and the accused will remain.

The members have withdrawn from the courtroom. All other parties are present.

(PRETRIAL CONFINEMENT CREDIT:) MJ: The accused will be credited with ___ days of pretrial confinement against the accused's term of confinement.

> ***NOTE: If there was no pretrial agreement, GO TO INSTRUCTION 2-6-14, POST-TRIAL AND APPELLATE RIGHTS ADVICE; if there was a pretrial agreement continue below:***

MJ: _____, we are now going to discuss the operation of your pretrial agreement on the sentence of the court.

It is my understanding of the effect of the pretrial agreement on the sentence is that the convening authority may approve _____. Do you agree with that interpretation?

ACC: (Responds.)

MJ: Do counsel also agree with that interpretation?

TC/DC: (Respond.)

2–6–14. POST-TRIAL AND APPELLATE RIGHTS ADVICE

NOTE: <u>Right of appeal</u>. Article 106, GC III, provides: "Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so." This appears to require an inquiry on the record that the accused is "fully informed" of his appellate rights.

MJ: After ACCA, _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights, you have the right to the advice and assistance of counsel.

After the record of trial is prepared, it will be forwarded to the convening authority for action. The convening authority may approve the findings and the sentence (within the limits of the pretrial agreement, if any), or he/she may disapprove the findings or the sentence in whole or in part. The convening authority may reduce the sentence adjudged by the court-martial, but he/she cannot increase it. The convening authority can disapprove a finding of guilty, but cannot change

a finding of not guilty. Although the convening authority is not required to review the case for legal errors, he/she may take action to correct legal errors.

[(IF GCM OR SPCM ADJUDGED CONFINEMENT OF ONE YEAR OR MORE:) In addition, the staff judge advocate will prepare a post-trial recommendation. That recommendation will be served on you or your defense counsel before the convening authority takes action on your case.]

Before the convening authority takes action, you have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case (including a response to the staff judge advocate's post-trial recommendation, if any). Such matters must be submitted within 10 days after a copy of the authenticated record of trial (and the recommendation of the staff judge advocate) (is) (are) served on you or your counsel. You may request up to an additional 20 days and, for good cause, the convening authority may approve the request.

[(IF APPROVED SENTENCE IS DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the convening authority approves (death) (confinement for one year or more), your case will be reviewed by the Army Court of Criminal Appeals (ACCA). You are entitled to be represented by counsel before that court. If you request, military counsel will be appointed to represent you at no expense to you. Also, if you choose, you may retain a civilian counsel to represent you at no cost to the United States by notifying the Clerk of Court.

NOTE: The GC III does not cover the type or costs of appellate counsel. The Note on costs of representation, supra, equally applies in this situation.

After ACCA completes its review, you may request the Court of Appeals for the Armed Forces (CAAF) to review your case. If CAAF grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA.

After CAAF completes its review, you may request review by the Supreme Court of the United States. If that court grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA and CAAF.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the convening authority approves a sentence that does not include death or confinement for one year or more, your case will be examined in the Office of the Judge Advocate General for legal sufficiency and to determine if the sentence is appropriate. The Judge Advocate General may take corrective action as appropriate. This mandatory review under Article 69(a), UCMJ, will constitute the final action in your case unless The Judge Advocate General refers your case to ACCA for further review.]

[(IF APPROVED SENTENCE IN GCM DOES NOT INCLUDE DEATH OR IN SPCM INCLUDES CONFINEMENT FOR ONE YEAR OR MORE:) You also have the right to waive or withdraw review at any time before completion of the review. If you waive or withdraw review, your decision is final and you cannot change your mind. A judge advocate will review your case and send it to the Convening Authority for final action. Within two years after final action is taken on your case, you may apply to The Judge Advocate General to take corrective action. The Judge Advocate General may modify the findings or sentence on the ground of newly discovered

evidence, fraud on the court, lack of jurisdiction over you or the offense(s), error prejudicial to your substantial rights, or the appropriateness of the sentence.]

Do you understand your post-trial and appellate rights?

ACC: (Responds.)

MJ: Do you have any questions?

ACC: (Responds.)

(IF MORE THAN ONE DEFENSE COUNSEL:) MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the staff judge advocate's post-trial recommendation to be served?

DC: (Responds.)

MJ: Are there other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

Section VII

Miscellaneous Procedural Guides

2–7–3. WAIVER OF CONFLICT-FREE COUNSEL (DEFENSE COUNSEL REPRESENTING MULTIPLE ACCUSED)

MJ: _____, do you understand that you have a right to be represented by counsel who has undivided loyalty to you and your case?

ACC: (Responds.)

MJ: Do you understand that a lawyer ordinarily should not represent more than one client when the representation involves a matter arising out of the same incident?

ACC: (Responds.)

MJ: For a lawyer to represent more than one client concerning a matter arising out of the same incident, you have to consent to that representation. Do you understand that?

ACC: (Responds.)

MJ: Have you discussed this matter with your defense counsel?

ACC: (Responds.)

MJ: After discussing this matter with him/her, did you decide for yourself that you would like to have him/her still represent you?

ACC: (Responds.)

MJ: Do you understand that when a defense counsel represents two or more clients regarding a matter arising out of the same incident, then the lawyer may have divided loyalties, that is, for example, the defense counsel may be put in a position of arguing that one client is more at fault than another client?

ACC: (Responds.)

MJ: Understanding that even if an actual conflict of interest does not presently exist between your defense counsel representing you and his/her other client(s), but that one could possibly develop, do you still desire to be represented by _____?

ACC: (Responds.)

MJ: Do you understand that you are entitled to be represented by another lawyer where no potential conflict of interest would ever arise?

ACC: (Responds.)

MJ: Knowing this, please tell me why you want to give up your right to conflict-free counsel and be represented by _____?

ACC: (Responds.)

MJ: Do you have any questions about your right to conflict-free counsel?

ACC: (Responds.)

MJ: I find that the accused has knowingly and voluntarily waived (his)(her) right to conflict-free counsel and may be represented by _____ at this court-martial.

REFERENCES: United States v. Smith, 36 M.J. 455 (C.M.A. 1993); United States v. Hurtt, 22 M.J. 134 (C.M.A. 1986); and United States v. Breese, 11 M.J. 17 (C.M.A. 1981).

2–7–4. PRETRIAL AGREEMENT: DISMISSAL OF CHARGE CLAUSE

MJ: Your pretrial agreement indicates that the Convening Authority has directed the trial counsel to move to dismiss (the) charge(s) ___ and (its) (their) specification(s) after I accept your plea of guilty. In other words, if I accept your plea of guilty, the Government will not prosecute the remaining charge(s) provided your plea of guilty remains in effect until the imposition of sentence, at which time I would grant the motion. Do you understand that?

ACC: (Responds.)

MJ: However, if for some reason your plea of guilty at any time becomes unacceptable, the trial counsel would be free to proceed on (all) (the) charge(s) and (its) (their) specification(s). Do you understand that?

ACC: (Responds.)

2–7–5. PRETRIAL AGREEMENT: TESTIFY IN ANOTHER CASE

MJ: In your pretrial agreement, you have offered to testify truthfully as to the facts and circumstances of this case, as you know them, in the trial of United States v. (*state name of case*). If you are called as a witness in that case and either refuse to testify or testify untruthfully, the convening authority will no longer be bound by the sentence limitations contained in Appellate Exhibit ___. Do you understand that?

ACC: (Responds.)

2–7–8. PRETRIAL AGREEMENT: ARTICLE 32 WAIVER

MJ: Your pretrial agreement states that you agreed to waive the Article 32 investigation. Have you discussed what an Article 32 investigation is with your defense counsel?

ACC: (Responds.)

MJ: Do you understand that no charge against you may be tried at a general court-martial without first having an Article 32 investigation concerning that charge unless you agree otherwise?

ACC: (Responds.)

MJ: Do you understand that the primary purpose of the Article 32 investigation is to have a fair and impartial hearing officer inquire into the truth of the matters set forth in the charge(s) and to obtain information on which to recommend what disposition should be made of the case?

ACC: (Responds.)

MJ: Do you also understand that you have the right to be present at the Article 32 investigation and to be represented by counsel at the investigation?

ACC: (Responds.)

MJ: Do you understand that you could call witnesses, cross-examine Government witnesses, and present documents for the investigating officer to consider in arriving at his or her recommendations?

ACC: (Responds.)

MJ: Do you understand that you could have provided sworn or unsworn testimony at the Article 32 investigation?

ACC: (Responds.)

MJ: Do you also understand that one possible strategy for you and your counsel at the Article 32 investigation could have been an attempt to have the Article 32 officer recommend a disposition of the charge(s) other than trial by general court-martial?

ACC: (Responds.)

MJ: Did you know about all these rights that you would have at the Article 32 investigation at the time you elected to give up the right to have the Article 32 investigation?

ACC: (Responds.)

MJ: Do you freely and willingly agree to proceed to trial by general court-martial without an Article 32 investigation occurring in your case?

ACC: (Responds.)

MJ: Defense Counsel, if the accused's plea of guilty is determined to be improvident will the accused be afforded an Article 32 investigation or is it permanently waived?

DC: (Responds.)

MJ: Trial Counsel, what is the government's position?

TC: (Responds.)

2–7–9. PRETRIAL AGREEMENT: WAIVER OF MEMBERS

MJ: Your pretrial agreement states that you agree to waive, that is give up, trial by members and to select trial by military judge alone.

ACC: (Responds.)

MJ: Do you understand the difference between trial before members and trial before military judge alone, as I explained to you earlier?

ACC: (Responds.)

MJ: Did you understand the difference between the various types of trials when you signed your pretrial agreement?

ACC: (Responds.)

MJ: Did you understand that you were giving up trial with members when you signed your pretrial agreement?

ACC: (Responds.)

MJ: Was that waiver a free and voluntary act on your part?

ACC: (Responds.)

2–7–10. PRETRIAL AGREEMENT: WAIVER OF MOTIONS

NOTE: Waiver of motions in a pretrial agreement. RCM 705 prohibits any term in a pretrial agreement that is not voluntary or deprives the accused of the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights. Thus, a term to 'waive all motions' is overbroad and cannot be enforced. However, if the pretrial agreement includes a term to waive a particular motion not precluded by R.C.M. 705 or a term to 'waive all waiveable motions' or words to that effect, proceed along the lines of the instruction below.

MJ: (To accused) Your pretrial agreement states that you waive, or give up, the right to make a motion regarding (*state the specific motion(s) waived by the pretrial agreement*). I advise you that certain motions are waived, or given up, if your defense counsel does not make the motion prior to entering your plea. Some motions, however, such as motions to dismiss for a lack of jurisdiction or failure to state an offense, for example, can never be given up. Do you understand that this term of your pretrial agreement means that you give up the right to make (this) (any) motion which by law is given up when you plead guilty?

ACC: (Responds.)

MJ: In particular, do you understand that this term of your pretrial agreement precludes this court or any appellate court from having the opportunity to determine if you are entitled to any relief based upon (this) (these) motion(s).

ACC: (Responds.)

MJ: When you elected to give up the right to litigate (this) (these) motion(s), did your defense counsel explain this term of your pretrial agreement and the consequences to you?

ACC: (Responds.)

MJ: Did anyone force you to enter into this term of your pretrial agreement?

ACC: (Responds.)

MJ: Defense Counsel, which side originated the waiver of motion(s) provision?

DC: (Responds.)

> ***NOTE: Unlawful Command Influence. The Government may not require waiver of an unlawful command influence motion to obtain a pretrial agreement. The accused, however, may offer to waive an unlawful command influence motion if the unlawful command influence involves issues occurring only during the accusatory phase of the court-martial (i.e., during preferral, forwarding, and referral of charges), as opposed to the adjudicative process (i.e., which includes interference with witnesses, judges, members, and counsel). See United States v. Weasler, 43 M.J. 15 (1995). If a waiver of an unlawful command influence motion originated with the prosecution, the judge should declare the term void as a matter of public policy. For other motions not falling within the prohibited terms of R.C.M. 705, regardless of their origination, and for unlawful command influence motions originated by the defense which involve issues only during the accusatory phase, continue as set forth below:***

MJ: (To accused) (Although the government originated this term of your pretrial agreement,) Did you freely and voluntarily agree to this term of your pretrial agreement in order to receive what you believed to be a beneficial pretrial agreement?

ACC: (Responds.)

MJ: Defense Counsel, what do you believe to be the factual basis of any motions covered by this term of the pretrial agreement?

DC: (Responds.)

MJ: (To accused) Do you understand that if (this) (these) motion(s) were made and granted by me, then a possible ruling could have been that (all charges against you would be dismissed) (the statement you gave to (your command) (law enforcement authorities) (_____) could not be used as evidence against you at this court-martial) (_____)?

ACC: (Responds.)

MJ: (To accused) Knowing what your defense counsel and I have told you, do you want to give up making (this) (these) motion(s) in order to get the benefit of your pretrial agreement?

ACC: (Responds.)

MJ: Do you have any questions about this provision of your pretrial agreement?

ACC: (Responds.)

2–7–11. PRETRIAL AGREEMENT: WAIVER OF MOTION FOR ILLEGAL PRETRIAL PUNISHMENT (ARTICLE 13) SENTENCING CREDIT

MJ: Your pretrial agreement indicates that you agree to waive, or give up, your right to make a motion about whether you have suffered from illegal pretrial punishment while being held for trial. Article 13 of the Uniform Code of Military Justice essentially prohibits anyone from imposing pretrial punishment upon you except for the minimum amount of restraint necessary to ensure your presence for trial. Do you understand what I have said?

ACC: (Responds.)

MJ: However, the time of your internment under Article 21, GC III, does not constitute illegal pretrial punishment. Do you understand?

ACC: (Responds.)

MJ: What was the nature of the pretrial restraint, if any, that you have undergone pending this trial?

ACC: (Responds.)

MJ: (If accused had been in pretrial restraint:) What is it about this pretrial restraint that you believe may have been illegal?

ACC: (Responds.)

MJ: Tell me about other illegal pretrial punishment, if any, you may have suffered.

ACC: (Responds.)

MJ: (If accused has been in pretrial confinement:) Do you understand that the law requires that I award you day-for-day credit against the sentence for any lawfully imposed pretrial confinement imposed in this case?

ACC: (Responds.)

MJ: Do you also understand that if you convinced me that more likely than not you suffered from illegal pretrial punishment, then you would be entitled to (additional) credit against any sentence which you may receive in this case?

ACC: (Responds.)

MJ: Do you understand that, by this term of your pretrial agreement, you are giving up the right for this court, or any court considering an appeal of your case, to determine if you actually suffered from illegal pretrial punishment to include a claim for (additional) credit against your sentence for illegal pretrial punishment?

ACC: (Responds.)

MJ: Defense Counsel, have you considered the amount of credit you would have asked for if this issue were to be litigated?

DC: (Responds.)

MJ: (To the accused) Do you understand that the amount of credit for illegal pretrial punishment, if any, would be subject to my discretion depending on the seriousness of the illegal pretrial punishment? If you succeeded on this issue, do you understand that you may have received the credit sought by your defense counsel, or possibly more or less than that amount?

ACC: (Responds.)

MJ: Do you understand that by not litigating this issue, you will never know what credit for illegal pretrial punishment, if any, that you would be entitled to, and that you will receive no credit against your sentence for illegal pretrial punishment?

ACC: (Responds.)

MJ: When you elected to give up the right to litigate the illegal pretrial punishment issue, did your defense counsel explain this issue and the consequences to you?

ACC: (Responds.)

MJ: Did anyone force you to enter into this term of your pretrial agreement?

ACC: (Responds.)

MJ: Defense Counsel, which side originated this term of the pretrial agreement?

DC: (Responds.)

MJ: (Although the government originated this term of your pretrial agreement,) (D)id you freely and voluntarily decide to agree to this term of your pretrial agreement in order to receive what you believed to be a beneficial pretrial agreement?

ACC: (Responds.)

MJ: Knowing what I have now told you, do you still desire to give up the right to litigate the issue of illegal pretrial punishment as long as your pretrial agreement continues to exist?

ACC: (Responds.)

MJ: Do you have any questions about this provision of your pretrial agreement?

ACC: (Responds.)

MJ: As I have stated, if I accept your waiver of the Article 13 issue, I will not order any credit to be applied against your sentence for illegal pretrial punishment. You may, however, bring to the court's attention (the conditions of your pretrial restraint) (and) (your perceived pretrial punishment) in the sentencing phase of the trial so that the court can consider such matters in deciding upon an appropriate sentence for you. Do you understand that?

ACC: (Responds.)

REFERENCES: United States v. McFadyen , 51 M.J. 289 (1999).

2–7–12. STATUTE OF LIMITATIONS

NOTE: Unless it affirmatively appears in the record that the accused is aware of his right to plead the statute of limitations when it is obviously applicable, the military judge has a duty to advise the accused of the right to assert the statute in bar of trial. This advice should be given before the accused is allowed to enter a plea except in the unusual case where the applicability of the statute first becomes known after evidence is presented or after findings. The advice may be substantially as follows:

MJ: _____, one of the offenses for which you are about to be tried is (*specify the offense*). This offense is alleged to have been committed more than (five) (___) years before the date upon which the sworn charges in this case were received by a summary court-martial convening authority. It therefore appears that the statute of limitations may properly be asserted by you in bar of trial for this offense. In other words, this specification (and charge) must be dismissed upon your request. Take time to consult with your counsel and then advise me whether you wish to assert the statute of limitations in bar of trial for the offense of (specify the offense).

NOTE: An election by the accused to assert the statute should be treated as a motion to dismiss. Where the motion to dismiss because of the statute of limitations raises a question of fact, the military judge should defer ruling until all evidence has been presented. When determination of such issue is essential to the question of guilt or innocence of an alleged offense, the issue of fact must be decided by the court pursuant to appropriate instructions. RCM 905 and 907.

2–7–13. MOTION FOR FINDING OF NOT GUILTY

NOTE: The defense counsel may make any motion for a finding of not guilty when the Government rests or after the defense has rested, or both. Such a motion should be made at a sidebar conference or out-of-court session. Before the motion is ruled upon, the defense counsel may properly be required to indicate specifically wherein the evidence is legally insufficient. Also, the ruling on the motion may be deferred to permit the trial counsel to reopen the case for the prosecution and produce any available evidence. The military judge rules finally on the motion for findings of not guilty. If there is any evidence which, together with all inferences which can properly be drawn therefrom and all applicable presumptions, could reasonably tend to establish every essential element of an offense charged, the motion will not be granted. If, using the same test, there is insufficient evidence to support the offense charged, but there is sufficient evidence to support a lesser included offense, the military judge may grant the motion as to the greater part and, if appropriate, the corresponding charge. See RCM 917. Normally, the motion should not be made before the court members. If the motion is mistakenly made before the members and is denied, the military judge should instruct the members as follows:

MJ: You are advised that my ruling(s) on the defense motion for a finding of not guilty must not influence you in any way when you consider whether the accused is guilty or not guilty. The ruling(s) (was) (were) governed by a different standard than that which will guide you in determining whether the accused is guilty or not guilty. A finding of guilty may not be reached unless the government has met its burden of establishing the guilt of the accused beyond a reasonable doubt, and whether this standard of proof has been met is a question which must be

determined by you without any references to my prior ruling(s) on the motion(s) for a finding of not guilty.

NOTE: If the motion is granted in part, so that the specification is reduced to a lesser offense, the military judge should instruct the members as follows:

MJ: You are advised that I have found the accused not guilty of the part of (the) Specification (___) of (the) Charge _____ which alleges the offense of _____. However, the accused remains charged in this specification with the lesser offense of _____. My ruling must not influence you in any way when you consider whether the accused is guilty or not guilty of the lesser offense. The ruling was governed by a different standard than that which will guide you in determining whether the accused is guilty or not guilty of the lesser offense. A finding of guilty may not be reached unless the government has met its burden of establishing the guilt of the accused beyond a reasonable doubt, and whether this standard of proof has been met is a question which must be determined by you without reference to my prior ruling on the motion for a finding of not guilty.

NOTE: Depending upon the complexity of the changes resulting from a partial finding of not guilty, the military judge should direct the members to amend their copies of the flyer or direct preparation of a new flyer.

2–7–14. RECONSIDERATION INSTRUCTION (FINDINGS)

NOTE: An instruction substantially as follows must be given when any court member proposes reconsideration:

MJ: Reconsideration is a process wherein you are allowed to re-vote on your finding(s) after you have reached a finding of either guilty or not guilty. The process for reconsideration is different depending on whether the proposal to reconsider relates to a finding of guilty or a finding of not guilty. After reaching your finding(s) by the required concurrence, any member may propose that (some or all of) the finding(s) be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the finding(s). In order for you to reconsider and re-vote on a finding, the following rules apply:

Table 2–4
Votes Needed for Reconsideration of Findings

No. of Members	Not Guilty	Guilty
3	2	2
4	3	2
5	3	2
6	4	3
7	4	3
8	5	3
9	5	4
10	6	4
11	6	4
12	7	5

MJ: If the proposal is to reconsider a not guilty finding, then a majority of the members must vote by secret written ballot in favor of reconsideration. Because we have _____ members, that means _____ members must vote in favor of reconsidering any finding of not guilty. If the proposal is to reconsider a guilty finding, then more than one-third of the members must vote by secret written

ballot in favor of reconsideration. Because we have _____ members, that means _____ members must vote in favor of reconsidering any finding of guilty. (If the proposal is to reconsider a guilty finding where the death penalty is mandatory for that finding, which means in this case, a guilty finding for the offense(s) of _____, then a proposal by any member for reconsideration regarding (that) (those) offense(s) requires you to reconsider that finding.) If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the findings as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for determining whether the accused is guilty or not guilty, to include the procedural rules pertaining to your voting on the findings and (the required two-thirds concurrence for a finding of guilty) (the unanimous vote requirement for a finding of guilty for a capital offense). (COL) (___) _____, when the findings are announced, do not indicate whether they are the original findings or the result of reconsideration.

2–7–16. CLEMENCY (RECOMMENDATION FOR SUSPENSION)

MJ: Although you have no authority to suspend either a part of or the entire sentence that you adjudge, you may recommend such suspension. However, you must keep in mind during deliberation that such a recommendation is not binding on the Convening or higher Authority. Therefore, in arriving at a sentence, you must be satisfied that it is appropriate for the offense(s) of which the accused has been convicted, even if the Convening or higher Authority refuses to adopt your recommendation for suspension.

If fewer than all members of the court wish to recommend suspension of a portion of or the entire sentence, then the names of those making such a recommendation, or not joining in such a recommendation, whichever is less, should be listed at the bottom of the Sentence Worksheet.

Where such a recommendation is made, then the President, after announcing the sentence, may announce the recommendation and the number of members joining in that recommendation. Whether to make any recommendation for suspension of a portion of or the entire sentence is solely within the discretion of the court.

However, you should keep in mind that your responsibility is to adjudge a sentence which you regard as fair and just at the time it is imposed, and not a sentence which will become fair and just only if your recommendation is adopted by the Convening or higher Authority.

2–7–17. CLEMENCY (ADDITIONAL INSTRUCTIONS)

MJ: It is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. However, if any or all of you wish to recommend clemency, it is within your authority to do so after the sentence is announced. Your responsibility is to adjudge a sentence which you regard as fair and just at the time it is imposed and not a sentence which will become fair and just only if the mitigating action recommended in your clemency recommendation is adopted by the convening or higher authority who is in no way obligated to accept your recommendation. You may make the court's recommendation expressly dependent upon such mitigating factors as (the) (attitude) (conduct) (of) (or restitution by) the accused after the trial and before the convening authority's action.

2–7–18. "HUNG JURY" INSTRUCTION

NOTE: Whenever any question arises concerning whether the required concurrence of members on a sentence or other matter relating to sentence is mandatory, or the MJ, after discussion with counsel for both sides and the accused, determines the jury has been deliberating for an inordinate length of time, the court may be advised substantially as follows:

MJ: As the sentence in this case is discretionary with you members, you each have the right to conscientiously disagree. It is not mandatory that the required fraction of members agree on a sentence and therefore you must not sacrifice conscientious opinions for the sake of agreeing upon a sentence. Accordingly, opinions may properly be changed by a full and free discussion during your deliberations. You should pay proper respect to each other's opinions, and with an open mind you should conscientiously compare your views with the views of others. Discussion may follow as well as precede the voting. All members must have a full and fair opportunity to exchange their points of view and to persuade others to join them in their beliefs. It is generally desirable to have the theories for both the prosecution and the defense weighed and debated thoroughly before final judgment. You must not go into the deliberation room with a fixed determination that the sentence shall represent your opinion of the case at the moment, nor should you close your ears to the arguments of the other members who have heard the same evidence, with the same attention, with an equal desire for truth and justice, and under the sanction of the same oath. But you are not to yield your judgment simply because you may be outnumbered or outweighed.

If, after comparing views and repeated voting for a reasonable period in accordance with these instructions, your differences are found to be irreconcilable, you should open the court and the president may then announce, in lieu of a formal sentence, that the required fraction of members are unable to agree upon a sentence.

NOTE: In capital cases, only one vote on the death penalty may be taken.

NOTE: If the president subsequently announces that the court is unable to agree upon a sentence, a mistrial as to sentence should be declared. The court should then be adjourned.

2–7–19. RECONSIDERATION INSTRUCTION (SENTENCE)

MJ: Reconsideration is a process wherein you are allowed to re-vote on a sentence after you have reached a sentence. The process for reconsideration is different depending on whether the proposal to reconsider relates to increasing or decreasing the sentence. After reaching a sentence by the required concurrence, any member may propose that the sentence be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the sentence. In order for you to reconsider and re-vote on the sentence, the following rules apply:

Table 2–5
Votes Needed for Reconsideration of Sentence

No. of Members	Increase Sentence	Decrease Sentence (10 years or less)	Decrease Sentence (Conf > 10 years)
3	2	2	
4	3	2	
5	3	2	2
6	4	3	2
7	4	3	2
8	5	3	3
9	5	4	3
10	6	4	3
11	6	4	3
12	7	5	4

If the proposal to reconsider is with a view to increasing the sentence, then a majority of the members must vote by secret written ballot in favor of reconsideration. Because we have _____members, that means at least _____ members must vote in favor of reconsideration with a view to increase the sentence. If the proposal to reconsider is with a view to decrease the sentence, then more than one-third of the members must vote by secret written ballot in favor of reconsideration. Since we have _____ members, then _____ members must vote in favor of reconsideration with a view to decrease the sentence. (However, if the sentence you have reached includes confinement in excess of ten years (or confinement for life) (or confinement for life

without eligibility for parole), then only more than one-fourth of the members, or at least _____ members must vote in favor of reconsideration with a view to decrease the sentence.) (If the sentence you have reached is death, then a proposal by any member for reconsideration requires you to reconsider.) If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the sentence as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for proposing and determining an appropriate sentence to include the two-thirds (or three-fourths) (or unanimous) concurrence required for a sentence. (COL) (_____) _____, when the sentence is announced, do not indicate whether it is the original sentence or the result of reconsideration.

2–7–20. COMMENT ON RIGHTS TO SILENCE OR COUNSEL

NOTE: Comment on or question about an accused's exercise of a right to remain silent, to counsel, or both. Except in extraordinary cases, a question concerning, evidence of, or argument about, an accused's right to remain silent or to counsel is improper and inadmissible. If such information is presented before the fact finder, even absent objection, the military judge should: determine whether or not this evidence is admissible and, if inadmissible, evaluate any potential prejudice, make any appropriate findings, and fashion an appropriate remedy. In trials with members, this should be done in an Article 39(a) session. Cautions to counsel and witnesses are usually appropriate. If the matter was improperly raised before members, the military judge must ordinarily give a curative instruction like the following, unless the defense affirmatively requests one not be given to avoid highlighting the matter. Other remedies, including mistrial, might be necessary. See United States v. Garrett, 24 M.J. 413 (CMA 1987) and United States v. Sidwell, 51 M.J. 262 (1999).

MJ: (You heard) (A question by counsel may have implied) that the accused may have exercised (his)(her) (right to remain silent) (and) (or) (right to request counsel). It is improper for this particular (question) (testimony) (statement) to have been brought before you. Under our military justice system, servicemembers have certain constitutional and legal rights that must be honored. When suspected or accused of a criminal offense, a servicemember has (an absolute right to remain silent) (and) (or) (certain rights to counsel). That the accused may have exercised (his)(her) right(s) in this case must not be held against (him)(her) in any way. You must not draw any inference adverse to the accused because (he)(she) may have exercised such right(s), and the exercise of such right(s) must not enter into your deliberations in any way. You must disregard the

(question) (testimony) (statement) that the accused may have invoked (his)(her) right(s). Will each of you follow this instruction?

MBRS: (Respond.)

2–7–22. VIEWS AND INSPECTIONS

NOTE: Guidance on views and inspections. The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object. A view or inspection should be permitted only in extraordinary circumstances (See NOTE below). A view or inspection shall take place only in the presence of all parties, the members (if any), the military judge and the reporter. A person familiar with the scene may be designated by the military judge to escort the court-martial. Such person shall perform the duties of escort under oath. The escort shall not testify, but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort, a party, the military judge, or any member shall be made a part of the record. The fact that a view or inspection has been made does not necessarily preclude the introduction in evidence of photographs, diagrams, maps, or sketches of the place or item viewed, if these are otherwise admissible. Before conducting the session described below in the presence of the members, the military judge should hold an Article 39(a) session to determine exactly what place or items will be viewed or inspected and that the below procedures and instructions are properly tailored to the circumstances.

NOTE: Considerations whether to permit a view.

a. The party requesting a view or inspection has the burden of proof both as to relevance and extraordinary circumstances. The military judge must be satisfied that a view or inspection is relevant to guilt or innocence as opposed to a collateral issue. The

relevance must be more than minimal and, even when relevance is established, the proponent must still establish extraordinary circumstances.

b. Extraordinary circumstances exist only when the military judge determines that other alternative evidence (testimony, sketches, diagrams, maps, photographs, videos, etc.) is inadequate to sufficiently describe the premises, place, article, or object. The military judge should also consider the orderliness of the trial, how time consuming a view or inspection would be, the logistics involved, safety concerns, and whether a view or inspection would mislead or confuse members.

c. A view is not intended as evidence, but simply to aid the trier of fact in understanding the evidence.

d. Counsel and the military judge should be attentive to alterations to, or differences in, the item or location to be viewed or inspected as compared to the time that the place or item is relevant to the proceedings. Differences in time of day, time of the year, lighting, and other factors should also be discussed. The military judge should be prepared, with assistance of counsel, to note these differences to the members.

MJ: The court will be permitted to view (the place in which the offense charged in this case is alleged to have been committed) (_____) as requested by (trial) (defense) counsel. Does the (trial) (defense) counsel desire that an escort accompany the court?

(TC) (DC): Yes, I suggest that _____ serve as the escort. (He/She has testified as to the (place) (_____) and I believe that it is desirable to have him/her as escort.)

MJ: Does (trial) (defense) counsel have any objection to _____as escort?

(TC) (DC): (No objection) (_____).

MJ: Have _____come into the courtroom. (The proposed escort enters the courtroom.)

TC: (To escort) State your full name, (grade, organization, station, and armed force) (occupation and (city and state) (country) of residence).

Escort: _____.

MJ: The court has been authorized to inspect (the place in which the offense charged in this case is alleged to have been committed) (_____) and desires you to act in the capacity of escort. Do you have any objections to serving as escort?

Escort: No, your Honor.

MJ: Trial counsel will administer the oath to the escort.

TC: Please raise your right hand. Do you (swear) (affirm) that you will escort the court and will well and truly point out to them (the place in which the offense charged in this case is alleged to have been committed) (_____); and that you will not speak to the court concerning (the alleged offense) (_____), except to describe (the place aforesaid) (_____). (So help you God.)

Escort: I do.

MJ: This view is being undertaken to assist the court in understanding and applying the evidence admitted in the trial. The view itself is not evidence; it merely enables the court to consider and apply the evidence before it in the light of the knowledge obtained by the inspection. Likewise, nothing said at the inspection is to be considered as evidence. The court will not hear witnesses or take evidence at the view. Counsel and members of the court properly may ask the escort to point

out certain features, but they must otherwise refrain from conversation. Counsel, the members, and I will be provided with paper and a writing instrument to write out any questions of the escort and the questions will be marked as an appellate exhibit. The reporter is instructed to record all statements made at the view by counsel, the accused, the escort, the members, or me. Reenactments of the events involved or alleged to have been committed are not authorized. The escort, counsel, the accused, the reporter, and I will be present with the court at all times during the view. The court will now recess and remain in the vicinity of the courtroom to await necessary transportation. When the view has been completed, the court will reassemble and the regular proceedings will be resumed.

Are there any questions from the members about the procedure we are to follow?

MBRS: (Respond)

MJ: (Other than at the previous Article 39(a) session held earlier on this matter,) (D)o counsel have any objections to these instructions or any requests about how the viewing is to be conducted?

TC/DC: (Respond)

> ***NOTE: The court should then proceed to the place to be inspected. After the court has assembled at the place to be viewed, the military judge should state in substance as follows:***

MJ: Let the record show that it is now ___ hours on day ____ of _____ 20 ____; all parties to the trial who were present when the court recessed are present; and that ___ is also present.

NOTE: The military judge should then ask questions of the escort to identify the physical location of the court.

MJ: The members of the court are at liberty to look around. If you have questions to ask of the escort, please write them out so that I can ask them in the presence of all the parties to the trial. Remain together. Please bear in mind that everything said during the course of the view must be recorded by the court reporter. The members may not talk or otherwise communicate among themselves.

NOTE: The court should then be allowed sufficient time to inspect the place or item in question.

MJ: Does any member or counsel have any questions to ask the escort? (If so, please write them out on the forms provided.) If not, I suggest we recess until _____.

NOTE: Once the view is conducted, the military judge should conduct an Article 39(a) session substantially as follows:

MJ: Does any party have any objections to how the view was conducted or to anything that occurred during the view?

TC/DC: (Respond.)

NOTE: After the court is called to order and all parties to the trial are accounted for, the military judge should make the following announcement:

MJ: Let the record show that, during the recess, the members of the court, counsel, the accused, the escort, the military judge, and the reporter viewed (the place in which the offense charged in this case is alleged to have been committed) (which was identified by the escort as _____) (_____). The transcript of the reporter's notes taken at the view will be inserted at the proper chronological point in the record of trial. The members are instructed to avoid, and not go to, the location we just visited until the trial has ended.

REFERENCES:

(1) Views and inspections generally. RCM 913(c)(3).

(2) Oath for escort. RCM 807(b).

(3) Test for whether a view is warranted. United States v. Marvin, 24 M.J. 365 (CMA 1987); United States v. Ayala, 22 M.J. 777 (ACMR 1986) *aff'd* 26 M.J. 190 (1988); and United States v. Huberty, 50 M.J. 704 (AFCCA 1999).

(4) View not evidence. United States v. Ayala, 22 M.J. 777 (ACMR 1986) *aff'd* 26 M.J. 190 (1988)

(5) Unauthorized view. United States v. Wolfe, 24 CMR 57 (1955).

(6) Completeness of record of a view. United States v. Martin, 19 CMR 646 (1955), *pet. denied*, 19 CMR 413 (1955).

2–7–23. ABSENT ACCUSED INSTRUCTION: PRELIMINARY FINDINGS

MJ: Under the law applicable to trials by court-martial, various circumstances may exist whereby a court-martial can proceed to findings and sentence, if appropriate, without the accused being present in the courtroom. I have determined that one or more of these circumstances exist in this case. You are not permitted to speculate as to why the accused is not present in court today and that you must not draw any inference adverse to the accused because (he)(she) is not appearing personally before you. You may neither impute to the accused any wrongdoing generally, nor impute to (him)(her) any inference of guilt as respects (his)(her) nonappearance here today. Further, should the accused be found guilty of any offense presently before this court, you must not consider the accused's nonappearance before this court in any manner when you close to deliberate upon the sentence to be adjudged. Will each member follow this instruction?

REFERENCES: *See* United States v. Minter, 8 M.J. 867 (N.M.C.M.R. 1980); *See also* United States v. Denney, 28 M.J. 521 (A.C.M.R. 1989) (indicating that accused's absence may be considered for rehabilitative potential); United States v. Chapman, 20 MJ 717 (N.M.C.M.R. 1985), *aff'd*, 23 M.J. 226 (C.M.A. 1986) (summary affirmance).

2–7–24. STIPULATIONS OF FACT AND EXPECTED TESTIMONY (NOT IAW A PRETRIAL AGREEMENT)

NOTE: Whenever the prosecution or defense offers a stipulation into evidence, the military judge should conduct an inquiry with the accused outside the presence of the court members along the following lines:

MJ: _____, before signing the stipulation, did you read it thoroughly?

ACC: (Responds.)

MJ: Do you understand the contents of the stipulation?

ACC: (Responds.)

MJ: Do you agree with the contents of the stipulation?

ACC: (Responds.)

MJ: Before signing the stipulation, did your defense counsel explain the stipulation to you?

ACC: (Responds.)

MJ: Do you understand that you have an absolute right to refuse to stipulate to the contents of this document?

ACC: (Responds.)

MJ: You should enter into this stipulation only if you believe it is in your best interest to do so. Do you understand that?

ACC: (Responds.)

MJ: _____, I want to ensure that you understand how this stipulation is to be used:

(IF STIPULATION OF FACT:) MJ: When counsel for both sides and you agree (to a fact) (the contents of a writing), the parties are bound by the stipulation and the stipulated matters are facts in evidence to be considered along with all the other evidence in the case. Do you understand that?

ACC: (Responds.)

(IF STIPULATION OF EXPECTED TESTIMONY:) MJ: When counsel for both sides and you agree to a stipulation of expected testimony, you are agreeing that if _____ were present in court and testifying under oath, he/she would testify substantially as set forth in this stipulation. The stipulation does not admit the truth of the person's testimony. The stipulation can be contradicted, attacked, or explained in the same way as if the person was testifying in person. Do you understand that?

ACC: (Responds.)

MJ: _____, knowing now what I have told you and what your defense counsel earlier told you about this stipulation, do you still desire to enter into the stipulation?

ACC: (Responds.)

MJ: Do counsel concur in the contents of the stipulation?

TC/DC: (Respond.)

MJ: The stipulation is admitted into evidence as _____.

NOTE: Stipulations of expected testimony are admitted into evidence, but only read to the court members. They are not to be given to them for use in deliberations.

2–7–25. CONFESSIONAL STIPULATION OF FACT INQUIRY

NOTE: The following inquiry is required by United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977), whenever a stipulation "practically amounts to a confession" as set forth in the discussion following RCM 811(c).

MJ: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure the accused has a copy.

TC/DC: (Respond.)

MJ: _____, I have before me Prosecution Exhibit ___ for Identification, a stipulation of fact. Did you sign this stipulation?

ACC: (Responds.)

MJ: Did you read this document thoroughly before you signed it?

ACC: (Responds.)

MJ: Do both counsel agree to the stipulation and that your signatures appear on the document?

TC/DC: (Respond.)

MJ: _____, a stipulation of fact is an agreement among the trial counsel, the defense counsel, and you that the contents of the stipulation are true, and if entered into evidence are the uncontradicted facts in this case. No one can be forced to enter into a stipulation, and no stipulation can be accepted without your consent, so you should enter into it only if you truly want to do so. Do you understand this?

ACC: (Responds.)

MJ: Are you voluntarily entering into this stipulation because you believe it is in your own best interest to do so?

ACC: (Responds.)

MJ: _____, the government has the burden of proving beyond a reasonable doubt every element of the offense(s) with which you are charged. By stipulating to the material elements of the offense(s), as you are doing here, you alleviate that burden. That means that based upon the stipulation alone, and without receiving any other evidence, the count can find you guilty of the offense(s) to which the stipulation relates. Do you understand that?

ACC: (Responds.)

(IF JUDGE ALONE TRIAL:) MJ: If I admit this stipulation into evidence it will be used in two ways.

First, I will use it to determine if you are, in fact, guilty of the offense(s) to which the stipulation relates.

And second, I will use it in determining an appropriate sentence for you.

(IF MEMBERS TRIAL:) MJ: If I admit this stipulation into evidence it will be used in two ways. First, members will use it to determine if you are, in fact, guilty of the offense(s) to which the stipulation relates.

And second, the trial counsel may read it to the court members and they will have it with them when they decide upon your sentence.

Do you understand and agree to these uses of the stipulation?

ACC: (Responds.)

MJ: Do both counsel also agree to these uses?

TC/DC: (Respond.)

MJ: _____, a stipulation of fact ordinarily cannot be contradicted. You should, therefore, let me know now if there is anything whatsoever in the stipulation that you disagree with or feel is untrue. Do you understand that?

ACC: (Responds.)

MJ: At this time, I want you to read your copy of the stipulation silently to yourself as I read it to myself.

> ***NOTE: The military judge should read the stipulation and be alert to resolve inconsistencies between what is stated in the stipulation and what the accused will say during the inquiry establishing the factual basis for the stipulation.***

MJ: Have you finished reading it?

ACC: (Responds.)

MJ: _____, is everything in the stipulation the truth?

ACC: (Responds.)

MJ: Is there anything in the stipulation that you do not which to admit that is true?

ACC: (Responds.)

MJ: _____, have you consulted fully with your counsel about the stipulation?

ACC: (Responds.)

MJ: After having consulted with your counsel, do you consent to my accepting the stipulation?

ACC: (Responds.)

MJ: _____, at this time I want you to tell me what the factual basis is for this stipulation. Tell me what happened.

> ***NOTE: At this point the military judge must personally question the accused to develop information showing what the accused did or did not do and what he intended, where intent is pertinent. The aim is to make clear the factual basis for the recitations in the stipulation. The military judge must be alert to the existence of any inconsistencies between the stipulation and the explanations of the accused. If any arise they must be discussed thoroughly with the accused, and the military judge must resolve them or reject the stipulation.***

MJ: Does either counsel believe that any further inquiry is required into the factual basis for the stipulation?

TC/DC: (Respond.)

MJ: _____, has anybody made any promises or agreements with you in connection with this stipulation?

ACC: (Responds.)

MJ: Counsel, are there any written or unwritten agreements between the parties in connection with the stipulation?

> ***NOTE: Should this inquiry reveal the existence of an agreement not to raise defenses or motions, the stipulation will be rejected as inconsistent with Article 45(a).***

TC/DC: (Respond.)

MJ: Defense Counsel, do you have any objections to Prosecution Exhibit ___ for Identification?

DC: (Responds.)

MJ: Prosecution Exhibit ___ for Identification is admitted into evidence.

2–7–26. ADVICE ON CONSEQUENCES OF VOLUNTARY ABSENCE

NOTE: The following inquiry is suggested when the accused is arraigned but trial on the merits is postponed to a later date. See RCM 804(b)(1).

MJ: _____, what has just happened is called an arraignment. An arraignment has certain legal consequences, one of which I'd like to explain to you now. Under ordinary circumstances, you have the right to be present at every stage of your trial. However, if you are voluntarily absent on the date this trial is scheduled to proceed, you may forfeit the right to be present. The trial could go forward on the date scheduled even if you were not present, up to and including sentencing, if necessary. Do you understand this?

ACC: (Responds.)

Chapter 3

INSTRUCTIONS ON ELEMENTS OF OFFENSES

GENERAL INFORMATION ABOUT THIS CHAPTER.

a. Each pattern instruction in Chapter 3 bears the same number as the corresponding paragraph in Part IV, MCM. Generally, EPWs may be prosecuted for post-capture criminal offenses under the UCMJ as well as under the LOW.

b. The pattern instructions for offenses in subchapters 3-A, 3-B, and 3-C are derived from the offenses listed in Military Commission Instruction No. 2 (MCI 2). See Military Order of 13 November 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (16 Nov. 2001) (President's Military Order); Military Commission Order No. 1 (21 Mar. 2002) (MCO 1). The purpose of including these offenses in this format is to allow a convenient cross reference of these offenses to military commission proceedings conducted under the President's Military Order. Each pattern instruction bears the same number as the corresponding enumerated offense in Paragraphs A, B, and C of Section 6 of MCI 2. For example, Hijacking or Hazarding a Vessel or Aircraft, is the first offense under paragraph B, Section 6, and the pattern instruction is 3-B-1.

It is important to note that most, though not all, of the offenses contained in MCI 2 are rooted in the law of war. Where appropriate, the instructions for such offenses contain clarifying definitions that are consistent with that body of law. For example, Instruction 3-A-1, which concerns the offense of Willful Killing of Protected Persons, contains a comprehensive definition of "protected persons" that is derived from the

Geneva Convention Relative to the Treatment of Prisoners of War (GC III), the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field (GWS), and the Protocol Additional to the Geneva Conventions of 1949 (GP I).

Although some of the offenses in subchapters 3-A through 3-C have never been viewed as law of war violations (e.g., spying, perjury, obstruction of justice, and various other inchoate offenses), MCO 1 §3(B) anticipates express authority in the UCMJ or other statute allowing these offenses to be tried by military commission. For example, Article 106, UCMJ, expressly states that spying may be tried by "general court-martial or by a military commission."

c. The pattern instructions for offenses in subchapter 3-D are derived from the law of war. These offenses deal specifically with criminal conduct directed against EPWs that are not covered elsewhere in this Benchbook.

d. If there are two or more methods by which the offense can be violated, the instructions are usually set forth separately, and are further numbered with a –2, –3, –4, and so forth. Each instruction includes a model charge, definitions of terms associated with that offense; and any required or desirable supplementary instructions. If an instruction includes a term having a special legal connotation (term of art), the term should be defined for the benefit of the court members, and ordinarily appears in the "DEFINITIONS AND OTHER INSTRUCTIONS" section of each instruction. Each pattern instruction set out in Chapter 3 should be prefaced by the language found in

Chapter 2 (2-3-8), PREFATORY INSTRUCTIONS ON FINDINGS. In the elements and definitions sections, language found in parentheses is dependent on the facts of the case, and may not be required, depending on the pleadings, the facts, and the contentions of the parties. Language set forth in brackets denotes elements that are alternative means of committing an offense, or aggravating factors that are not required to be instructed upon, unless pled.

e. ***REFERENCES:***

For comparative elements of LOW offenses, see Howard S. Levie, "Penal Sanctions for Maltreatment of Prisoners of War", 56 Am J Intl L 433, 444-454 (1962).

3-A-1. WILLFUL KILLING OF PROTECTED PERSONS

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, willfully, and without justification or excuse, kill (state name or description of victim(s) alleged), who then was and was then known by the accused to be (a) (state protected category of victim(s) alleged), (a) person(s) protected under the law of war, by (state manner alleged).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused killed (state the name or description of the victim(s) alleged);

(2) That the accused intended to kill (state the name or description of the victim(s) alleged);

(3) That (state the name or description of the victim(s) alleged) was (a) (state protected category of victim(s) alleged), (a) person(s) protected under the law of war;

(4) That the accused knew or should have known of the factual circumstances that established that protected status; and

(5) That the killing took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

The act of killing a human being is unlawful when done without legal justification or excuse.

"Willful killing of protected persons" means the formation of a specific intent to kill and consideration of the act intended to bring about death. The specific intent to kill does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the killing.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is

not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: <u>Protected persons</u>. All of the categories of protected persons are provided below. However, the Military Judge should tailor the instruction for the applicable categories of protected persons at issue. To qualify as a protected person, however, all of the elements for each category must be fulfilled.

"A person protected under the law of war" refers to a person who is expressly protected under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as such by the applicable law of armed conflict. The law of armed conflict expressly recognizes (<u>state category or categories of protected persons alleged to be in issue – see categories outlined below</u>) to be protected persons. (<u>State category or categories of protected persons alleged to be in issue</u>) are defined as (<u>provide the appropriate further definition(s) from the categories below</u>):

(Civilians: Persons who are not members of an enemy's armed forces; and who do not otherwise engage in hostile acts, meaning those acts, which, by their nature and purpose, are intended to cause actual harm to the personnel and equipment of an enemy's armed forces.)

(Prisoners of War: Persons belonging to one of the following categories, who have fallen into the power of their enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such

organized resistance movements, fulfill all the following conditions:

(a) are commanded by a person responsible for his/her subordinates;

(b) wear a fixed distinctive sign recognizable at a distance;

(c) carry arms openly; and

(d) conduct their operations in accordance with the laws and customs of war.

Distinctive signs are means of identification which such members may use so others may recognize their (militia group) (volunteer corps).

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card reflecting their status under the Geneva Conventions.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.

(6) Members of a *levee en masse*, that is inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms

to resist the invading force, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.)

(Wounded and Sick in the Field and at Sea: Those soldiers, sailors, or airmen who are out of combat and, hence, cease to fight, by reason of sickness or wounds.)

(Parachutists: Crewmen of a disabled aircraft who are presumed to be out of combat and may not be targeted unless it is apparent that they are engaged in a hostile mission.)

(Medical personnel:

(1) Medical personnel of the armed forces. For example:

(a) Doctors, surgeons, nurses, chemists, stretcher bearers, medics, corpsman, and

orderlies, etc., who are “exclusively engaged” in the direct care of the wounded and sick; and

(b) Administrative staffs of medical units, such as, drivers, generator operators, and cooks.

(2) Auxiliary Medical Personnel of the Armed Forces who have received “special training” and must be carrying out their medical duties when they come in contact with the enemy.

(3) Personnel of National Red Cross Societies and other recognized relief Societies, including personnel who belong to relief societies of neutral countries.

(4) Civilian Medical Personnel.)

(Religious personnel: Members of the military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and assigned or attached to the armed forces of a party to the conflict.

(Personnel engaged in the Protection of Cultural Property: [No further definition is needed here].)

NOTE 2*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to kill a protected person, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 3: Circumstantial Evidence -- Knowledge.* When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused knew or should have known that *the victim(s)* was/were protected under the law of war), and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(A)(1).

Protected persons:

(1) Generally: MCI 2 §5(F).

(2) Civilians:

(a) Geneva Protocol I (GP I), Official Commentary at 618 (describing when civilians lose their protected status, though this would hold true with other categories of protected individuals engaged in hostile acts).

(b) Articles 50 and 51, GP I (providing protected status to civilians).

(3) Prisoners of War: Article 4, Geneva Convention Relative to the Treatment of Prisoners of War (GC III).

(4) Wounded and Sick in the Field and at Sea: Article 12, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS).

(5) Parachutists: Article 42, GP I.

(6) Medical Personnel: Articles 24-27, GWS; GP I, Article 15 (civilian medical personnel).

(7) Religious Personnel:

(a) Article 24, GWS.

(b) Articles 8, 15, GP I.

3-A-2. ATTACKING CIVILIANS

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, intentionally attack (state name or description of alleged population or individual victim(s)), (a civilian population) (a civilian who was not taking part in hostilities), by (state manner alleged).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused engaged in an attack by (state the manner in which alleged);

(2) That the object of the attack was (state name or description of alleged population or individual victim(s)), (a civilian population) (an individual civilian not taking a direct or active part in hostilities);

(3) That the accused intended the (civilian population) (individual civilian not taking a direct or active part in hostilities) to be an object of the attack; and

(4) That the attack took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"Civilians" are persons who are not members of an enemy's armed forces, and who do not otherwise engage in hostile acts, meaning those acts, which, by their nature and purpose, are intended to cause actual harm to the personnel and equipment of an enemy's armed forces.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example,

murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: The definition in the MCI 2 §5(E) states "person, place, or thing." "Person or population" added here to tailor definition more closely to this offense. See MCI 2 §5(E).

"Object of the attack" refers to the person or population intentionally targeted. In this regard, the term does not include destruction of civilian objects nor injury or death to civilians, i.e., collateral damage, sustained as part of a lawful attack directed against military objectives.

NOTE 2*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused intended the civilian population or individual civilian not taking part in hostilities to be an object, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

(1) Civilians:

(a) Geneva Protocol I (GP I), Official Commentary at 618 (describing when civilians lose their protected status, though this would hold true with other categories of protected individuals engaged in hostile acts).

(b) Articles 50 and 51, GP I (providing protected status to civilians).

(2) Collateral damage: GP I, Articles 48, 51(5)(a), 57(2)(a)(iii), and 59(2).

3-A-3. ATTACKING CIVILIAN OBJECTS

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, intentionally engage in an attack on civilian property, to wit: _____, which the accused knew was not a military objective, by (state the manner in which alleged).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused engaged in an attack;

(2) That the object of the attack was civilian property, that is, namely (describe property attacked);

(3) That the accused intended such civilian property to be an object of the attack;

(4) That the accused knew or should have known that such property was not a military objective; and

(5) That the attack took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the

nexus so long as its magnitude or severity rises to the level of an “armed attack” or an “act of war”, or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: The following instruction is derived from MCI 2 §5(D), which mirrors the definition contained in GP I, art. 52(1), except for the deletion of “definite” preceding “military advantage.”

“Military objective” means a potential target during an armed conflict, which, by its nature, location, purpose, or use, effectively contributes to the enemy's war-fighting or war-sustaining capability *and* whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

NOTE 2: The definition in the MC instruction says "person, place, or thing." The Military Judge should tailor the definition more closely to the object of the offense. See MCI 2 §5(E).

"Object of the attack" refers to the (person) (place) (_____) intentionally targeted. In this regard, the term does not include destruction of civilian objects nor injury or death to civilians, i.e., collateral damage, sustained as part of a lawful attack directed against military objectives.

As I instructed, this offense requires proof beyond a reasonable doubt that the accused "knew or should have known" that the property, which was the object of the attack, was not a military objective. In this respect, the term "should have known" means that the facts and circumstances were such that a reasonable person in the accused's position would have had the relevant knowledge or awareness that the property was not a military objective.

***NOTE 3*: *Circumstantial Evidence -- Intent*. When circumstantial evidence has been introduced which reasonably tends to establish that the accused**

intended civilian property to be an object of the attack, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 4*: *Circumstantial Evidence -- Knowledge*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused knew or should have known that the property attacked was not a military objective, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(A)(3).

3-A-4. ATTACKING PROTECTED PROPERTY

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, intentionally engage in an attack on protected property, to wit: _____, which the accused knew was protected property, by (state the manner in which alleged).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused engaged in an attack;

(2) That the object of the attack was protected property, namely (describe property attacked);

(3) That the accused intended such protected property to be an object of the attack;

(4) That the accused knew or should have known of the factual circumstances that established the property's protected status; and

(5) That the attack took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"Object of the attack" refers to the (place) (_____) intentionally targeted. In this regard, the term does not include destruction of civilian objects nor injury or death to civilians, i.e., collateral damage, sustained as part of a lawful attack directed against military objectives.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example,

murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: The following instruction expands upon the definition of protected property under MCI 2 §5(F).

"Property protected under the law of war" means property specifically protected under the law of armed conflict, provided

it is not being used for military purposes and is not otherwise a military objective. Protected property includes: [Objects traditionally associated with civilian use, such as dwellings or schools] [places where the sick and wounded are collected such as medical units and hospitals] [medical transports of the wounded and sick or of medical equipment] [cultural property, such as buildings dedicated to religion, art, science, charitable purposes, historic monuments]. In some cases, protected property is identified by one of the distinctive emblems of the Geneva Conventions, such as the Red Cross.

As I instructed, this offense requires proof beyond a reasonable doubt that the accused "knew or should have known" that the property was protected property under the law of war. In this respect, the term "should have known" means that the facts and circumstances were such that a reasonable person in the accused's position would have had the relevant knowledge or awareness of the property's protected status.

NOTE 2*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused

intended protected property to be an object of the attack, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 3*: *Circumstantial Evidence -- Knowledge*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused knew or should have known that the property attacked was protected property, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

Objects associated with civilian use: Article 52(3), GP I.

Medical units and hospitals: 19, GWS. See also FM 27-10, paras. 257-58.

Medical transports: Article 35, GWS.

Cultural property: Article 27, Hague Convention No. IV Respecting the Laws and Customs of War on Land ("Hague Regulation").

3-A-5. PILLAGING

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at--location), on or about (_____), in the context of and in association with armed conflict, engage in pillaging by unlawfully (appropriating) (seizing) (state property pillaged), (the property of _____).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused (appropriated) (seized) certain property, that is, _____;

(2) That the accused intended to (appropriate) (seize) such property for private or personal use;

(3) That the (appropriation) (seizure) was without the consent of the owner of the property or other person with authority to permit such (appropriation) (seizure); and

(4) That the (appropriation) (seizure) took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"Pillaging" means to unlawfully appropriate or seize property which is located in enemy or occupied territory.

"Unlawfully (appropriating) (seizing) property" means to take possession of property in an unauthorized manner or to exercise control over property without proper authorization or justification.

The term "property" includes both public or private property.

As indicated by the term "private or personal use," legitimate captures, appropriations, or seizures justified by military necessity cannot constitute the offense of pillaging.

“Military necessity” means those measures not otherwise forbidden by the law of armed conflict that are used to secure the complete submission of the enemy as soon as possible.

“In the context of and was associated with armed conflict” means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not “in the context of” the armed conflict. An “armed conflict” may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an “armed attack” or an “act of war,” or the number, power, stated intent or organization of the force with which the actor is

associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

***NOTE 1*: *Circumstantial Evidence -- Intent*. When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to appropriate or seize the alleged property, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.**

d. REFERENCES:

MCI 2 §6(A)(5)

3-A-6. DENYING QUARTER

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, [(declare) (order) (indicate)] ((to) (state entity or person alleged)) ((in) (by) (state manner alleged)) that there shall be no survivors or surrender accepted.

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused [(declared) (ordered) (indicated)] ((to) (state entity or person alleged)) ((in) (by) (state manner alleged)) that there shall be no survivors or surrender accepted;

(2) That the accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;

(3) That it was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;

(4) That the accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and

(5) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if

associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: <u>Remote Attack</u>. The following instruction derives from MCI 2 §6(A)(b)(1). This provision, however, does not define "a remotely delivered attack." If an issue arises as to what constitutes a remote attack, e.g., shelling or mortar fire, the Military Judge should summarize the respective contentions of the parties for the court members.

As I instructed, this offense requires a finding that there were foreseeable circumstances such that a practicable and reasonable ability to accept surrender would exist. Thus, this offense does not limit the application of lawful means or methods of warfare against the enemy combatants. For example, a remotely delivered attack cannot give rise to this offense, absent an express declaration or threat to deny quarter prior to initiation of such an attack.

NOTE 2*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to deny quarter, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(A)(6)

Foreseeable circumstances requirement: MCI 2 §6(A)(6)(b)(1).

3-A-7. TAKING HOSTAGES

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, (seize) (detain) (hold) and threaten to (kill) (injure) (continue to detain) (state name or description of victim(s) alleged), with intent to compel ((a State) (an international organization) (a natural or legal person) (a group of persons)) ((to act) (refrain from acting)) as an (explicit) (implicit) condition for the (safety) (release) of such person(s).

b. ELEMENTS:

(1) That (state the time and placed alleged,) the accused (seized) (detained) (held) hostage (state name or description of victim(s) alleged);

(2) That the accused threatened to (kill) (injure) (continue to detain) such person(s);

(3) That the accused intended to compel (a State) (an international organization) (a natural or legal person) (a group of persons), namely (state name or description of State, organization, person, or group), to (act) (refrain from acting) as an (explicit) (implicit) condition for the (safety) (release) of such person(s); and

(4) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the

context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: <u>Lawful detention</u>. If evidence is introduced that the accused detained enemy combatants or other individuals as authorized by the law of armed conflict, the following instruction is appropriate (see MCI 2 §6(A)(7)(b)(1)):

The accused may not be convicted of taking hostage(s) by (seizing) (detaining) (holding) (a) certain individual(s) if (seized)

(detained) (held) as (an) enemy combatant(s) as authorized by the law of armed conflict.

NOTE 2*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused intended to compel a State, an international organization, a natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of persons detained, seized or held, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(A)(7).

Detention of enemy combatants or others as authorized under law of armed conflict: MCI 2 §6(A)(7)(b)(1).

3-A-8. EMPLOYING POISONOUS OR ANALOGOUS WEAPONS

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, knowingly employ (state substance or weapon employed), a (substance) (weapon) that releases (state substance released), which is a substance capable of causing death or serious damage to health in the ordinary course of events through its (asphyxiating) (poisonous) (bacteriological) properties, and that (_____) did so with the intent to utilize such (asphyxiating) (poisonous) (bacteriological) properties as a method of warfare.

b. ELEMENTS

(1) That (state the time and place alleged,) the accused employed (state name or description of substance or weapon allegedly employed), which is a (substance) (weapon that releases a substance as a result of its employment), namely (state name or description of substance allegedly released);

(2) That (state name or description of substance allegedly released) is a substance that causes (death) (serious damage to health) in the ordinary course of events through its (asphyxiating) (poisonous) (bacteriological) properties;

(3) That the accused employed the substance or weapon with the intent of utilizing such (asphyxiating) (poisonous) (bacteriological) properties as a method of warfare;

(4) That the accused knew or should have known of the nature of the substance or weapon employed; and

(5) That the conduct took place in the context of and was associated with armed conflict.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The "substance or weapon" as used in the context of this offense must be proscribed under the law of armed conflict. It may include chemical or biological agents.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or

contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: <u>Chemical or Biological Agents</u>. The preceding instruction derives from MCI 2 §6(A)(8)(b)(3). Although the language of this provision does not specifically include radiological agents, e.g., dirty bombs, the "substance or weapon" at issue arguably may include radiological agents because of their poisonous properties.

As I instructed, the substance allegedly released must be such that exposure thereto causes "death or serious damage to health." Such "death or serious damage to health" must be a direct result of the substance's effect on the human body. For example, asphyxiation caused by the depletion of atmospheric oxygen secondary to a chemical or other reaction would not give rise to this offense.

The clause "serious damage to health" does not include temporary incapacitation or sensory irritation.

As I stated, this offense requires proof beyond a reasonable doubt that the accused employed the (substance) (weapon) with the intent of using its (asphyxiating) (poisonous) (bacteriological) properties as a method of warfare. The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences. For example, mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense.

As I instructed, this offense requires proof beyond a reasonable doubt that the accused "knew or should have known" the nature of the substance or weapon. In this regard, the term "should have known" means that the facts and circumstances were such that a reasonable person in the accused's position would have had the knowledge or awareness that (state the substance or weapon employed) released (state the name of the substance released), which causes death or serious damage to health through its (asphyxiating) (poisonous) (bacteriological) properties.

NOTE 2: ***<u>Circumstantial Evidence -- Intent</u>.*** ***When circumstantial evidence has been introduced which reasonably tends to establish that the accused employed the substance or weapon with the intent to utilize its asphyxiating, poisonous, or bacteriological properties, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.***

NOTE 3**:** ***<u>Circumstantial Evidence -- Knowledge</u>.*** ***When circumstantial evidence has been introduced which reasonably tends to establish that the accused knew or should have known of the nature of the substance released, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.***

d. REFERENCES:

MCI 2 §6(A)(8)

Serious damage to health: MCI 2 §6(A)(8)(b)(2).

3-A-9. USING PROTECTED PERSONS AS SHIELDS

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, (position) (take advantage of the location of) (state name or description of victim(s) alleged), (a civilian) ((a) person(s) protected under the law of war), with the intent to [shield a military objective from attack] [(shield) (favor) (impede) military operations].

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused (positioned) (took advantage of the location of) (state the name or description of the victim(s) alleged), (a civilian) ((a) person(s) protected under the law of war);

(2) That the accused did so with the intent [to shield a military objective from attack, to wit: (state military objective alleged)] [to (shield) (favor) (impede) military operations]; and

(3) That this act took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or

confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: The following instruction is derived from MCI 2 §5(D), which mirrors the definition contained in GP I, art. 52(1), except for the deletion of "definite" preceding "military advantage."

"Military objective" means a potential target during an armed conflict which, by its nature, location, purpose, or use, effectively contributes to the opposing force's war-fighting or war-sustaining capability *and* whose total or partial destruction, capture, or neutralization would constitute a military advantage

to the attacker under the circumstances at the time of the attack.

NOTE 2: <u>Protected persons</u>. All the categories of protected persons are provided below. However, the Military Judge should tailor the instruction for the applicable categories of protected persons at issue. To qualify as a protected person, however, all of the elements for each category must be fulfilled.

"A person protected under the law of war" refers to a person who is expressly protected under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as such by the applicable law of armed conflict. The law of armed conflict expressly recognizes (<u>state category or categories of protected persons alleged to be in issue – see categories outlined below</u>) to be protected persons. (<u>State category or categories of protected persons alleged to be in issue</u>) are

defined as (provide the appropriate further definition(s) from the categories below):

(Civilians: Persons who are not members of an enemy's armed forces; and who do not otherwise engage in hostile acts, meaning those acts, which, by their nature and purpose, are intended to cause actual harm to the personnel and equipment of an enemy's armed forces.)

(Prisoners of War: Persons belonging to one of the following categories, who have fallen into the power of their enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the

conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill all the following conditions:

(a) are commanded by a person responsible for his/her subordinates;

(b) wear a fixed distinctive sign recognizable at a distance;

(c) carry arms openly; and

(d) conduct their operations in accordance with the laws and customs of war.

Distinctive signs are means of identification which such members may use so others may recognize their (militia group) (volunteer corps).

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card reflecting their status under the Geneva Conventions.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do

not benefit by more favorable treatment under any other provisions of international law.

(6) Members of a *levee en masse*, that is inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading force, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.)

(Wounded and Sick in the Field and at Sea: Those soldiers, sailors, or airmen who are out of combat and, hence, cease to fight, by reason of sickness or wounds.)

(Parachutists: Crewmen of a disabled aircraft who are presumed to be out of combat and may not be targeted unless it is apparent that they are engaged in a hostile mission.)

(Medical personnel:

(1) Medical personnel of the armed forces. For example:

(a) Doctors, surgeons, nurses, chemists, stretcher bearers, medics, corpsman, and orderlies, etc., who are “exclusively engaged” in the direct care of the wounded and sick; and

(b) Administrative staffs of medical units, such as, drivers, generator operators, and cooks.

(2) Auxiliary Medical Personnel of the Armed Forces who have received “special training” and must be carrying out their medical duties when they come in contact with the enemy.

(3) Personnel of National Red Cross Societies and other recognized relief Societies, including personnel who belong to relief societies of neutral countries.

(4) Civilian Medical Personnel.)

(Religious personnel: Members of the military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and assigned or attached to the armed forces of a party to the conflict.

(Personnel engaged in the Protection of Cultural Property: [No further definition is needed here].)

NOTE 3*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to shield a military objective from attack or to shield, favor, or impede military operations, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(A)(9).

Protected persons:

(1) Generally: MCI 2 §5(F).

(2) Civilians:

(a) Geneva Protocol I (GP I), Official Commentary at 618 (describing when civilians lose their protected status, though this would hold true with other categories of protected individuals engaged in hostile acts).

(b) Articles 50 and 51, GP I (providing protected status to civilians).

(3) Prisoners of War: Article 4, Geneva Convention Relative to the Treatment of Prisoners of War (GC III).

(4) Wounded and Sick in the Field and at Sea: Article 12, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS).

(5) Parachutists: Article 42, GP I.

(6) Medical Personnel: Article 24-27 GWS, Article 15, GP I (civilian medical personnel).

(7) Religious Personnel:

(a) Article 24, GWS.

(b) Articles 8, 15, GP I.

(8) Military objective: MCI 2 §5(D).

3-A-10. USING PROTECTED PROPERTY AS SHIELDS

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, (position) (take advantage of the location of) (state or describe property alleged), to wit: (_____), (civilian) property protected under the law of war, with the intent [to shield a military objective from attack] [to (shield) (favor) (impede) military operations].

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused (positioned) (took advantage of the location of) (state or describe property alleged), which was (civilian) property protected under the law of war;

(2) That the accused did so with the intent to [shield a military objective from attack, to wit: (state military objective alleged)] [(shield) (favor) (impede) military operations]; and

(3) That this act took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power,

stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: The following instruction expands upon the definition of protected property under MCI 2 §5(F).

"Property protected under the law of war" means property specifically protected under the law of armed conflict, provided it is not being used for military purposes and is not otherwise a military objective. Protected property includes: [Objects traditionally associated with civilian use, such as dwellings or schools] [places where the sick and wounded are collected such as medical units and hospitals] [medical transports of the wounded and sick or of medical equipment] [cultural property, such as buildings dedicated to religion, art, science, charitable purposes, historic monuments]. In some cases, protected

property is identified by one of the distinctive emblems of the Geneva Conventions, such as the Red Cross.

NOTE 2: MCI 2 §5(D). The following instruction mirrors the definition contained in GP I, art. 52(1), except for the deletion of "definite" preceding "military advantage."

As I instructed, property that is a military objective is not protected. "Military objective" means a potential target during an armed conflict, which, by its nature, location, purpose, or use, effectively contributes to the enemy's war-fighting or war-sustaining capability *and* whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

***NOTE 3*: *Circumstantial Evidence -- Intent*. When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to shield a military objective from attack, or to shield, favor or impede military operations, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.**

d. REFERENCES:

Objects associated with civilian use: Article 52(3), GP I.

Medical units and hospitals: 19, GWS. See also FM 27-10, paras. 257-58.

Medical transports: Article 35, GWS.

Cultural property: Article 27, Hague Convention No. IV Respecting the Laws and Customs of War on Land ("Hague Regulation").

3-A-11. TORTURE

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at--location), on or about (_____), in the context of and in association with armed conflict, inflict severe (physical) (and) (mental) pain and suffering upon (state name or description of victim(s) alleged), by (state manner alleged).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused inflicted severe (physical) (and) (mental) pain and suffering upon (state the name or description of the victim(s) alleged) by (state manner alleged) (in order to elicit information);

(2) That the accused intended to inflict such severe (physical) (and) (mental) pain and suffering;

(3) That (state the name or description of the victim(s) alleged) was in the custody or under the control of the accused at the time of the alleged conduct; and

(4) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

This offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed punishments. This offense does not include the incidental infliction of pain or suffering associated with the legitimate conduct of hostilities.

"Severe mental pain or suffering" refers to prolonged mental harm caused by or resulting from one or more of the following:

(a) the intentional infliction or threatened infliction of severe physical pain or suffering.

(b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(c) the threat of imminent death; or

(d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

“Prolonged mental harm” is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.

In determining the severity of physical pain and suffering, the members should consider all of the surrounding facts and circumstances, including the means and methods used to inflict pain or suffering.

The requirement that (state the name or description of the victim(s) alleged) was in the custody or under the control of the accused does not require a particular formal relationship between the accused and the victim(s). Rather, it precludes prosecution for pain or suffering consequent to a lawful military attack.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single

hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to torture, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(A)(11).

Pain/suffering: MCI 2 §6(A)(11)(b)(1), (2).

3-A-12. CAUSING SERIOUS INJURY

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, cause serious injury upon (state name or description of victim(s) alleged), who then was in the custody and control of the accused, by (_____), and that (_____) did so with the intent to inflict serious injury upon him/her, to wit: (_____).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused caused serious injury to the (body) (health) of (state the name or description of the victim(s) alleged) by (state the manner alleged);

(2) That the accused intended to inflict such serious injury upon (state the name or description of the victim(s) alleged);

(3) That (state the name or description of the victim(s) alleged) was in the custody and under the control of the accused at the time of the alleged offense; and

(4) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"Serious injury" is an injury to a person's body or health, including, but not limited to, fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force

for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to cause serious injury, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(A)(12).

3-A-13. MUTILATION OR MAIMING

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, (mutilate) (maim) (state name or description of victim(s) alleged), by permanently [(disfiguring) (disabling) him/her] [(disabling) (removing) his/her (organ) (appendage), to wit: (_____)], which conduct [caused his/her death] [seriously (damaged) (endangered) the (physical health) (mental health) (appearance)] of (state name or description of victim(s) alleged).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused subjected (state the name or description of the victim(s) alleged) to mutilation, in particular by (state the manner of mutilation alleged);

(2) That the accused intended to subject (state the name or description of the victim(s) alleged) to such mutilation;

(3) That the conduct [caused the death] [seriously (damaged) (endangered) the (physical health) (mental health) (appearance)] of (state the name or description of the victim(s) alleged));

(4) That the conduct was neither justified by the medical treatment of (state the name or description of the victim(s) alleged) nor carried out in his/her interest;

(5) That the act occurred while (state the name or description of the victim(s) alleged) was in the custody or control of the accused at the time of the offense; and

(6) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

A disfigurement does not have to mutilate an entire body part, but it must cause visible bodily damage and significantly detract from the victim(s)'s physical appearance.

The (disfigurement) (disablement) of the body part must be a serious injury of a substantially permanent nature. Once the injury is inflicted, it does not matter that the victim(s) may eventually recover the use of the body part, or that the disfigurement may be corrected medically.

(Mutilation) (Maiming) requires a specific intent to injure generally, but not a specific intent to (mutilate) (maim). Thus, one commits the offense who intends only a slight injury, if in fact there is infliction of an injury of the type specified in this offense.

“In the context of and was associated with armed conflict” means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if

associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to mutilate or maim, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 2*: *Lack of Causation, Intervening Cause, or Contributory Negligence*. *This offense requires a causal nexus between the accused's

conduct and the harm inflicted on the victim(s). If causation is in issue, the Military Judge must instruct, sua sponte, on proximate cause, joint causes, intervening cause, and contributory negligence. The following instructions may be used with appropriate tailoring.

a. <u>Proximate cause in issue; intervening cause or acts or omissions of someone other than the accused NOT in issue</u>. If there is no evidence that there was an intervening, independent cause and no evidence that anyone other than the accused had a role in the alleged harm, give the following instruction:

To find the accused guilty of this offense, it must be proved beyond a reasonable doubt that the accused's (conduct) ((willful) (intentional) (inherently dangerous) act) (omission) ((culpable) negligence) (_____) was a proximate cause of the ((death of) (injury to) (grievous bodily harm to)) (<u>state the name or description of the victim(s) alleged</u>). This means that the (death) (injury) (grievous bodily harm) must have been the natural and probable result of the accused's (conduct) (act) (omission) (negligence) (_____). A proximate cause does not have to be the only cause, nor must it be the immediate cause. However, it must be a direct or contributing

cause that plays a material role, meaning an important role, in bringing about the ((death of) (injury to) (grievous bodily harm to)) (state the name or description of the victim(s) alleged).

In determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause, you must consider all relevant facts and circumstances, (including, but not limited to (here the Military Judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to prove proximate cause. Unless you are satisfied beyond a reasonable doubt that the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the alleged harm, you may not find the accused guilty of this offense

b. Proximate cause in issue; independent, intervening cause and/or acts or omissions of others in issue. If there is evidence that an independent, intervening event might have been a proximate cause of the alleged harm, or that anyone other than the alleged victim(s) and accused had a role in

the alleged harm, give the following instruction, which must be tailored depending on whether there is evidence of an independent intervening cause (NOTE 2b1) or another had a role in the alleged harm (NOTE 2b2), or both.

To find the accused guilty of this offense, it must be proved beyond a reasonable doubt that the accused's (conduct) ((willful) (intentional) (inherently dangerous) act) (omission) ((culpable) negligence) (_____) was a proximate cause of the ((death of) (injury to) (grievous bodily harm to)) (state the name or description of the victim(s) alleged). This means that the (death) (injury) (grievous bodily harm) must have been the natural and probable result of the accused's (conduct) (act) (omission) (negligence) (_____). A proximate cause does not have to be the only cause, nor must it be the immediate cause. However, it must be a direct or contributing cause that plays a material role, meaning an important role, in bringing about the ((death of) (injury to) (grievous bodily harm to)) (state the name or description of the victim(s) alleged).

1. ***Intervening cause.***

If some other unforeseeable, independent, intervening event that did not involve the accused was the only cause that played any important part in bringing about the ((death of) (injury to) (grievous bodily harm to)) (state the name or description of the victim(s) alleged), then the accused's (conduct) (act) (omission) (negligence) (_____) was not the proximate cause of the alleged harm.)

2. ***More than one contributor to proximate cause.***

(In addition) It is possible for the (conduct) (act) (omission) (negligence) (_____) of two or more persons to contribute as a proximate cause of the ((death of) (injury to) (grievous bodily harm to)) (state the name or description of the victim(s) alleged). If the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the alleged harm, the accused will not be relieved of criminal responsibility because some other person's (conduct) (act) (omission) (negligence) (_____) was also a proximate cause of the alleged harm. An (act) (omission) is a proximate

cause of the ((death of) (injury to) (grievous bodily harm to)) (state the name or description of the victim(s) alleged) even if it is not the only cause, as long as it is a direct or contributing cause that plays a material role, meaning an important role, in bringing about the ((death of) (injury to) (grievous bodily harm to)) (state the name or description of the victim(s) alleged).

In determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause and the role, if any, of (other events) (or) (the acts or omissions of another), you must consider all relevant facts and circumstances, (including, but not limited to, (here the Military Judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to prove proximate cause. Unless you are satisfied beyond a reasonable doubt that the accused's (conduct) (act) (omission) (negligence)

(_____) was a proximate cause of the alleged harm, you may not find the accused guilty of this offense.

c. <u>Contributory negligence</u>. If there is evidence that the victim(s) of an injury or death may have been contributorily negligent, the Military Judge should give the instructions following NOTES 2a or 2b, as appropriate and also the following instruction. The Military Judge should consider whether there are situations other than homicide, assault, or injury in which contributory negligence can be a defense.

There is evidence raising the issue of whether the (<u>state the name or description of the victim(s) alleged</u>) failed to use reasonable care and caution for his/her own safety. If the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the ((death of) (injury to)) (<u>state the name or description of the victim(s) alleged</u>), the accused is not relieved of criminal responsibility because the negligence of (<u>state the name or description of the victim(s) alleged</u>) may have contributed to his/her own (death) (injury). You should consider the conduct of the (deceased) (injured) person in determining whether the accused's (conduct) (act)

(omission) (negligence) (_____) was a proximate cause of the (death) (injury). (Conduct) (An act) (An omission) (Negligence) is a proximate cause of (death) (injury) even if it is not the only cause, as long as it is a direct or contributing cause that plays a material or important role in bringing about the (death) (injury). (An act) (An omission) (Negligence) is not a proximate cause if some other unforeseeable, independent, intervening event, which did not involve the accused's conduct, was the only cause that played any important part in bringing about the (death) (injury). If the negligence of (state the name or description of the victim(s) alleged) looms so large in comparison with the (conduct) (act) (omission) (negligence) (_____) by the accused that the accused's conduct should not be regarded as a substantial factor in the final result, then conduct of (state the name or description of the victim(s) alleged) is an independent, intervening cause and the accused is not guilty.

Finding the accused's (conduct) (act) (omission) (negligence) (_____) to be the proximate cause also requires you to

find beyond a reasonable doubt that the (act) (conduct) of the alleged victim(s) was not the only cause that played any material or important role in bringing about the (death) (injury).

NOTE 3: Relationship to accident defense. The evidence that raises lack of causation, intervening cause, or contributory negligence may also raise the defense of accident. See Instruction 5-4, Accident.

NOTE 4: Different degrees of culpability raised by lesser included offenses. The Military Judge must be especially attentive in applying this instruction when lesser included offenses involve different degrees of culpability. The instructions may have to be tailored differently for certain lesser included offenses. The respective degrees of culpability would then include an intentional act or omission, an inherently dangerous act, an intentional act or omission, culpable negligence, and simple negligence.

d. REFERENCES:

MCI 2 §6(A)(3).

3-A-14. USE OF TREACHERY OR PERFIDY

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____) in the context of and in association with armed conflict, (kill) (injure) (capture) (state name or description of the alleged victim(s)) by inviting, with an intent to betray, his/her/their (confidence) (belief) that [the accused was entitled to] [(he/she was) (they were)) were obliged to accord the accused] protection under the law of war.

b. ELEMENTS:

NOTE 1: The various methods by which this offense can be violated, which are contained in brackets, are derived from GP I, art. 37.

(1) That (state time and place alleged,) the accused invited the (confidence) (belief) of (state name or description of the victim(s) alleged) that [the accused was entitled to] [(he/she was) (they were) obliged to accord the accused] protection under the law of war by [feigning (an intent to negotiate under a flag of truce) (a surrender)] [(feigning an incapacitation by

wounds or sickness) (feigning a civilian, non-combatant status)] [(feigning a protected status by the use of (signs) (emblems) (uniforms) of (the United Nations) (a neutral State) (a State not a party to the conflict) (_____)];

(2) That the accused intended to betray that (confidence) (belief);

(3) That the accused (killed) (injured) (captured) (state name of the victim(s) alleged);

(4) That the accused made use of that (confidence) (belief) in (killing) (injuring) (capturing) (state name of the victim(s) alleged); and

(5) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war," or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or

contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 2: <u>Protected persons</u>. All of the categories of protected persons are provided below. However, the Military Judge should tailor the instruction for the applicable categories of protected persons at issue. To qualify as a protected person, however, all of the elements for each category must be fulfilled.

"A person protected under the law of war" refers to a person who is expressly protected under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as such by the applicable law of armed conflict. The law of armed conflict expressly recognizes (<u>state category or categories of protected persons alleged to be in issue – see categories outlined below</u>) to be protected persons. (<u>State category or categories of protected persons alleged to be in issue</u>) are

defined as (provide the appropriate further definition(s) from the categories below):

(Civilians: Persons who are not members of an enemy's armed forces; and who do not otherwise engage in hostile acts, meaning those acts, which, by their nature and purpose, are intended to cause actual harm to the personnel and equipment of an enemy's armed forces.)

(Prisoners of War: Persons belonging to one of the following categories, who have fallen into the power of their enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own

territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill all the following conditions:

(a) are commanded by a person responsible for his/her subordinates;

(b) wear a fixed distinctive sign recognizable at a distance;

(c) carry arms openly; and

(d) conduct their operations in accordance with the laws and customs of war.

Distinctive signs are means of identification which such members may use so others may recognize their (militia group) (volunteer corps).

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card reflecting their status under the Geneva Conventions.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.

(6) Members of a *levee en masse*, that is inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading force, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.)

(Wounded and Sick in the Field and at Sea: Those soldiers, sailors, or airmen who are out of combat and, hence, cease to fight, by reason of sickness or wounds.)

(Parachutists: Crewmen of a disabled aircraft who are presumed to be out of combat and may not be targeted unless it is apparent that they are engaged in a hostile mission.)

(Medical personnel:

(1) Medical personnel of the armed forces. For example:

(a) Doctors, surgeons, nurses, chemists, stretcher bearers, medics, corpsman, and orderlies, etc., who are “exclusively engaged” in the direct care of the wounded and sick; and

(b) Administrative staffs of medical units, such as, drivers, generator operators, and cooks.

(2) Auxiliary Medical Personnel of the Armed Forces who have received “special training” and must be carrying out their medical duties when they come in contact with the enemy.

(3) Personnel of National Red Cross Societies and other recognized relief Societies, including

personnel who belong to relief societies of neutral countries.

(4) Civilian Medical Personnel.)

(Religious personnel: Members of the military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and assigned or attached to the armed forces of a party to the conflict.

(Personnel engaged in the Protection of Cultural Property: [No further definition is needed here].)

NOTE 3: If evidence is introduced that the accused's action amounted to a legitimate ruse, the following instruction, which is derived from GP I, art. 37, may be appropriate:

Ruses of war, as opposed to acts of perfidy, are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him/her to act recklessly, but which infringe no rule of international law applicable in armed conflict,

and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of legitimate ruses: the use of camouflage, decoys, mock operations, and misinformation.

NOTE 4*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to betray the confidence or belief of one or more persons, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(A)(14).

Protected persons:

(1) Generally: MCI 2 §5(F).

(2) Civilians:

(a) Geneva Protocol I (GP I), Official Commentary at 618 (describing when civilians lose their protected status, though this would hold true with other categories of protected individuals engaged in hostile acts).

(b) Articles 50 and 51, GP I (providing protected status to civilians).

(3) Prisoners of War: Article 4, Geneva Convention Relative to the Treatment of Prisoners of War (GC III).

(4) Wounded and Sick in the Field and at Sea: Article 12, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS).

(5) Parachutists: Article 42, GP I.

(6) Medical Personnel: Articles 24-27, GWS; Article 15, GP I (civilian medical personnel).

(7) Religious Personnel:

(a) Article 24, GWS.

(b) Articles 8, 15, GP I.

3-A-15. IMPROPER USE OF FLAG OF TRUCE

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, use a flag of truce to feign an intention (to negotiate the suspension of hostilities) (to surrender in order to suspend hostilities) (to otherwise suspend hostilities) when there was no such intention on the part of the accused.

c. ELEMENTS:

(1) That (state the time and place alleged,) the accused used a flag of truce (by (state manner alleged));

(2) That the accused made such use in order to feign an intention (to negotiate the suspension of hostilities) (to surrender in order to suspend hostilities) (to otherwise suspend hostilities) when there was no such intention on the part of the accused; and

(3) That the conduct took place in the context of and was associated with armed conflict.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An engagement with the enemy does not have to be in progress when the offer to surrender is made, but it is essential that there is sufficient contact with the enemy to give the opportunity for making the offer.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or

confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: The following instruction is derived from the definition following Article 100, UCMJ.

It is not essential that the accused's offer be received, accepted, or rejected. However, the offer must be transmitted in some manner designed to result in receipt by the opposing party.

***NOTE 2*: *Circumstantial Evidence -- Intent*. When circumstantial evidence has been introduced which reasonably tends to establish that the accused**

had the specific intent to use a flag of truce to feign an intention to suspend hostilities, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(A)(15).

3-A-16. IMPROPER USE OF PROTECTIVE EMBLEMS

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, knowingly use a protective emblem recognized by the law of war, to wit: (_____), for combatant purposes in a manner prohibited by the law of armed conflict, by (state manner alleged).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused used a protective emblem recognized by the law of war, namely (state protective emblem allegedly used);

NOTE 1: The following element is from MCI 2 §6(A)(16)(2), which seems to contemplate that the prosecution must offer proof that the alleged use is prohibited under the LOW. However, any use of a protective emblem for "combatant purposes" would violate LOW.

(2) That the accused undertook such use for combatant purposes in a manner prohibited by the law of armed conflict by (state manner alleged);

(3) That the accused knew or should have known of the prohibited nature of such use; and

(4) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"Combatant purposes" means purposes that are directly related to hostilities and does not include medical, religious, or similar activities.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors,

however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

As I instructed, this offense requires proof beyond a reasonable doubt that the accused "knew or should have known" of the prohibited nature of (his)(her) use of (state protective emblem).

In this regard, the term "should have known" means that the facts and circumstances were such that a reasonable person in the accused's position would have had the knowledge or awareness that using (state protective emblem) by (describe manner of prohibitive use alleged) was prohibited by the law of war.

NOTE 2: Proof of Existence of Protective Emblem Recognized By Law of Armed Conflict. The government must offer evidence of the particular emblem used and establish, through judicial notice or otherwise, that the emblem used is one recognized under the law of armed conflict as a protected emblem. This may be either a legal or a factual issue, depending on the circumstances of the case. Factual disputes should be resolved by the members. If the facts are not in dispute, the Military Judge should resolve the issue of whether the emblem used is a protected emblem under the law of armed conflict. The following instruction may be used.

As a matter of law, the (state emblem alleged) in this case, as described in the specification, if in fact there was such (an) (state emblem alleged), was a protective emblem recognized by the law of armed conflict.

NOTE 3: Circumstantial Evidence -- Knowledge. When the accused's knowledge of a certain fact is an essential element or is otherwise

necessary to establish the commission of an offense (e.g., that the accused knew or should have known that his use of a protective emblem was prohibited under the law of armed conflict) and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(A)(16)

Combatant purposes: MCI 2 §6(A)(16)(b)(1).

3-A-17. DEGRADING TREATMENT OF A DEAD BODY

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____) in the context of and in association with armed conflict, intentionally (degrade) (violate the dignity of) the body of a dead person by (state manner alleged).

b. ELEMENTS:

(1) That (state time the time and place alleged,) the accused (degraded) (violated the dignity of) the body of a dead person by (state the manner alleged);

(2) That the accused intended to (degrade) (violate the dignity of) such body;

(3) That the severity of the (degradation) (violation) was of such degree as to be generally recognized as an outrage upon personal dignity; and

(4) That this act took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"Degrading" and "violating dignity" in this context means displaying or treating a dead body in a humiliating manner that detracts from the respect accorded by civilized people to the body of a dead person. For example, (kicking the dead body of a non-combatant) (_____) would be a violation of this offense.

The accused may not be found guilty of this offense if such (degradation) (violation of the dignity) of the body was required by military necessity.

"Military necessity" means those measures not otherwise forbidden by the law of armed conflict that are used to secure the complete submission of the enemy as soon as possible.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or

contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE*: *<u>Circumstantial Evidence -- Intent</u>*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to degrade or otherwise violate the dignity of the body of a dead person, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(A)(17).

3-A-18. RAPE

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at--location), on or about (_____), in the context of and in association with armed conflict, rape (state name or description of victim(s) alleged) [(who was (state age of victim(s) alleged) years of age) (who was (state victim(s)'s physical incapacitation) at the time of the offense)].

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused invaded the body of (state name or description of the victim(s) alleged) [who was ((state age of victim(s) alleged) years of age at the time of the offense) (state victim(s)'s physical incapacitation alleged),] by conduct resulting in penetration, however slight, [of any part of the body of the (victim(s)) (accused), with a (state sexual organ alleged)] [of the anal or genital opening of (state name or description of the victim(s) alleged) with (state object or part of the body alleged)];

NOTE 1: Unlike with Article 120, UCMJ, lack of consent is not an element to the offense of rape under MCI 2. However, MCI 2, Comment 1, explains that the second element "recognizes" that consensual conduct does not give rise to the offense. See Note 6, infra. (consent raised).

(2) That the invasion was committed [by (force) (threat of force) (coercion)] [against a person incapable of giving consent]; and

(3) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

The concept of "invasion" is linked to an inherently wrongful act. For example, a legitimate body cavity search could not give rise to the offense of rape. In addition, the concept of "invasion" is gender neutral.

As I instructed, the invasion of the body of (state name or description of the victim(s) alleged) must have been committed [by (force) (threat of force) (coercion)] [against a person

incapable of giving consent]. Therefore, consensual conduct does not give rise to the offense of rape.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount

to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 2: <u>Lack of penetration in issue</u>. If lack of penetration is in issue in a case concerning a female, the Military Judge should further define what is meant by the female genital opening. The instruction below, which is adapted from the Military Judges' Benchbook instruction for Article 120, may be helpful:

The "female genital opening" includes not only the vagina, which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora.

NOTE 3: <u>Actual, physical force</u>. Where the evidence suggests that the accused committed the act by actual (physical) force, the following instruction, which is adapted from the Military Judges' Benchbook instruction for Article 120, may be helpful:

The prosecution has presented evidence that the accused committed the sexual act by force. Force is physical violence or power applied by the accused to the victim(s). A sexual act occurs "by force" when the accused uses physical violence or power to compel the victim(s) to submit against his/her will.

NOTE 4: <u>Threats of Force; Coercion</u>: Where the evidence suggests that the accused committed the act by threats of force or coercion, the following instruction, which is adapted from the Military Judges' Benchbook instruction for Article 120, may be helpful:

The prosecution has presented evidence that the accused committed the sexual act by threat of force or coercion (rather than by actual force). In this respect, the accused's (actions and words) (conduct), coupled with the surrounding circumstances, are relevant in determining whether there was a reasonable belief in (<u>state name or description of victim(s) alleged</u>) mind that death or physical injury would be inflicted on him/her if he/she did not engage in the act.

NOTE 5: <u>Victim(s) incapable of giving consent—age related incapacity.</u> If the alleged victim(s) is of tender years and may not have, as a matter of fact, the requisite mental maturity to consent, the following instruction may be helpful. It is worth noting that the offense of rape does not require force or the threat of force if the victim is incapable of giving consent. <u>See</u> MCI 2 §6(A)(18)(a)(2).

If (<u>state name or description of victim(s) alleged</u>) was, due to his/her (tender age) (and) (lack of) mental development, unable to understand the act, its motive, and its possible consequences, then no force, threat of force, or coercion is necessary to establish rape.

In deciding whether (<u>state the name or description of the victim(s) alleged</u>) had, at the time of the sexual intercourse, the requisite knowledge and mental (development) (capacity) (ability) to be capable of consent, you should consider all the evidence in the case, including but not limited to: (<u>state any lay or expert testimony relevant to the child's development</u>) (<u>state any other information about the victim(s) alleged).</u>

NOTE 6: Victim(s) incapable of giving consent—natural or induced incapacity. If evidence was presented that the alleged victim(s) was incapable of giving consent due to natural or induced incapacity, the following instruction may be helpful. It is worth noting that the offense of rape does not require force or the threat of force if the victim is incapable of giving consent. See MCI 2 §6(A)(18)(a)(2).

If (state the name or description of the victim(s) alleged) was incapable, due to natural or induced incapacity, of giving consent, then the act was done without consent. In deciding whether (state the name or description of the victim(s) alleged) was incapable of giving consent, you should consider all the evidence in the case, including but not limited to: (state any relevant lay or expert testimony) (state any other information about the alleged victim(s)).

NOTE 7: Consent raised. Unlike with Article 120, UCMJ, lack of consent is not an element to the offense of rape under MCI 2. However, MCI 2, Comment 1, explains that the second element "recognizes" that consensual conduct does not give rise to the offense. Accordingly, while consent may be raised as a defense, the prosecution is not required to affirmatively prove lack of consent to establish the offense. If evidence is

presented that the alleged victim(s) consented to the sexual act, the following instruction may be helpful. If it is alleged that the accused used force or threat of force, the Military Judge also should give the instructions following Notes 2 and 3, supra.

The defense has presented evidence that (state name of description of victim(s) alleged) consented to the sexual act in this case. You are instructed that if (state name of description of victim(s) alleged) consented to the sexual act, it is not rape. In determining whether there was consent in this case, you must consider all the surrounding circumstances, (including but not limited to _____). (The Military Judge may wish to summarize the evidence bearing on the issue of consent and the respective contentions of counsel).

NOTE 8: Mistake of fact to consent--completed rapes. An honest and reasonable mistake of fact as to the victim(s)'s consent is a defense to rape. See MCI 2 §4(B) (explaining that an accused may assert any defense available under the law of war, including mistake of fact). If mistake of fact is in issue, the following instruction would be appropriate.

The evidence has raised the issue of mistake on the part of the accused concerning whether (state the name or description of the victim(s) alleged) consented to the sexual act in relation to the offense of rape.

If the accused had an honest and mistaken belief that (state the name or description of the victim(s) alleged) consented to the act of sexual intercourse, (he)(she) is not guilty of rape, if the accused's belief was reasonable.

To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name or description of the victim(s) alleged) was consenting to the act.

In deciding whether the accused was under the mistaken belief that (state the name or description of the victim(s) alleged) consented, you should consider the probability or improbability of the evidence presented on the matter. (Here the Military Judge may summarize other evidence that may bear on the accused's mistake of fact)).

The burden is on the prosecution to establish the accused's guilt. If it is established beyond a reasonable doubt that, at the time of the charged rape, the accused was not under the mistaken belief that (state the name or description of the victim(s) alleged) consented to the sexual act, the defense of mistake does not exist. Even if you conclude that the accused was under the honest and mistaken belief that (state the name or description of the victim(s) alleged) consented to the sexual act, if it is established beyond a reasonable doubt that, at the time of the charged offense, the accused's mistake was unreasonable, the defense of mistake does not exist.

d. REFERENCES:

MCI 2 §6(A)(18).

Consent: MCI 2 §6(A)(18)(b)(2), (3).

Invasion: MCI 2 §6(A)(18)(b)(3), (4).

3-B-1. HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, intentionally ((seize) (exercise control over) (endanger the safe navigation of) (a vessel) (an aircraft), to wit: (_____), by (state manner alleged).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused ((seized) (exercised control over) (endangered the safe navigation of)) (a vessel) (an aircraft), namely (describe aircraft of vessel), by (state manner in which alleged);

(2) That the accused intended to (seize) (exercise control over) (endanger the safe navigation of) such (vessel) (aircraft);

(3) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power,

stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

The accused may not be found guilty of this offense if the (seizure) (exercise of control over) (endangerment to the safe navigation) of the (vessel) (aircraft) was required by military necessity or if it was against a lawful military objective *and* was undertaken by forces of a State in the exercise of their official duties.

"Military necessity" means those measures not otherwise forbidden by the law of armed conflict that are used to secure the complete submission of the enemy as soon as possible.

NOTE 1: The following instruction is derived from MCI 2 §5(D), which mirrors the definition contained in GP I, art. 52(1), except for the deletion of "definite" preceding "military advantage."

"Military objective" means a potential target during an armed conflict, which, by its nature, location, purpose, or use, effectively contributes to the enemy's war-fighting or war-sustaining capability *and* whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

NOTE 2*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to seize, exercise control over, or endanger the safe navigation of a vessel or aircraft, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(B)(2).

3-B-2-1. TERRORISM (WITH INTENT TO KILL OR HARM)

NOTE 1: This offense has been split into two separate instructions depending on the nature of the accused's intent. See MCI 2 §6(B)(2)(a)(2) (providing that terrorism may be committed with intent to kill/harm or by intentionally engaging in an inherently dangerous act.)

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, intentionally [(kill) (inflict bodily harm on) (state name or description of victim(s) alleged)] [destroy certain property, to wit: (_____)] by means of (state manner alleged), and (_____) did so with the intent to [(intimidate) (coerce) a civilian population] [influence the policy of a government, to wit: (_____), by (intimidation) (coercion)].

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused [(killed) (inflicted bodily harm on) (state name of victim(s) alleged)] [destroyed (state property alleged)];

NOTE 2: Although this offense includes the destruction of property, MCI 2 does not state that the accused must have intended this destruction. See MCI 2 §6(B)(2)(a)(2). Nevertheless, such intent seems reasonably implied and has been included in this instruction.

(2) That the accused intended [(to kill) (to inflict bodily harm on) (state name of victim(s) alleged)] [destroy (state property alleged)];

(3) That the (killing) (harm) (destruction) was intended to [(intimidate) (coerce) a civilian population] [influence the policy of a government, namely (state name of government), by (intimidation) (coercion)]; and

(4) That the (killing) (harm) (destruction) took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

The offense of terrorism is not established by an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

As I instructed, (death) (infliction of bodily harm) is a required element for this offense. It is sufficient if this is an *indirect* result of the accused's action.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or

confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an “armed attack” or an “act of war”, or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 3: The following instruction is derived from MCI 2 §5(D), which mirrors the definition contained in GP I, art. 52(1), except for the deletion of “definite” preceding “military advantage.”

“Military objective” means a potential target during an armed conflict, which, by its nature, location, purpose, or use, effectively contributes to the enemy's war-fighting or war-sustaining capability *and* whose total or partial destruction, capture, or neutralization would constitute a definite military

advantage to the attacker under the circumstances at the time of the attack.

NOTE 4: <u>Circumstantial Evidence -- Intent</u>. When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to kill or inflict bodily harm and to intimidate or coerce a civilian population, or influence the policy of a government, by intimidation or coercion, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(B)(2).

3-B-2-2. TERRORISM (BY ENGAGINING IN AN INHERENTLY DANGEROUS ACT)

NOTE 1: This offense has been split into two separate instructions depending on the nature of the accused intent. See MCI 2 §6(B)(2)(a)(2) (providing that terrorism may be committed with intent to kill/harm or by intentionally engaging in an inherently dangerous act.)

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), in the context of and in association with armed conflict, intentionally engage in (state act alleged), an act inherently dangerous to another, and (_____) did so with the intent to[(kill) (inflict bodily harm on) (state name or description of victim(s) alleged)] [destroy certain property, to wit: (_____)] for the purpose of [(intimidating) (coercing) a civilian population] [influencing the policy of a government, to wit: (_____), by (intimidation) (coercion)].

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused [(killed) (inflicted bodily harm on) (state name of victim(s) alleged] [destroyed (state property alleged];

(2) That the accused intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) That the (killing) (harm) (destruction) was intended to [(intimidate) (coerce) a civilian population] [influence the policy of a government, namely (state name of government, by (intimidation) (coercion)]; and

(4) That the (killing) (harm) (destruction) took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

The offense of terrorism is not established by an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

As I instructed, (death) (infliction of bodily harm) is a required element for this offense. It is sufficient if this is an *indirect* result of the accused's action.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power,

stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 2: The above instruction is derived from MCI 2 §5(D), which mirrors the definition contained in GP I, art. 52(1), except for the deletion of "definite" preceding "military advantage."

"Military objective" means a potential target during an armed conflict, which, by its nature, location, purpose, or use, effectively contributes to the enemy's war-fighting or war-sustaining capability *and* whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

NOTE 3: <u>Circumstantial Evidence -- Intent</u>. When circumstantial evidence has been introduced which reasonably tends to establish that the accused

had the specific intent to kill or inflict bodily harm and to intimidate or coerce a civilian population, or influence the policy of a government, by intimidation or coercion, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(B)(2).

3-B-3. MURDER BY AN UNPRIVILEGED BELLIGERENT

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), an unprivileged belligerent, did, (at—location), on or about (_____), in the context of and in association with armed conflict, (intentionally) kill (state name or description of victim(s) alleged), by (state manner alleged) [and (_____) did so (with the intent to inflict great bodily harm) (while intentionally engaged in an inherently dangerous act, to wit: (_____))].

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused killed (state the name or description of victim(s) alleged);

(2) That the accused:

(a) intended to (kill) (inflict great bodily harm on) (state the name or description of victim(s) alleged); or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) That the accused did not enjoy combatant immunity; and

(4) That the killing took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

The term "kill" includes intentionally causing death, whether directly or indirectly without legal justification or excuse.

"Combatant immunity" which is also known as "belligerent privilege," is a concept that forbids prosecution of lawful combatants for the lawful conduct of hostilities during armed conflict. In other words, an individual has combatant immunity for acts, such as the taking of life and the destruction of property, that (he)(she) commits if 1) (he)(she) is a lawful

combatant and 2) (his)(her) actions do not violate the law of armed conflict.

An individual is a "lawful combatant" if (he)(she) is a:

(1) Member of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Member of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill all the following conditions:

(a) are commanded by a person responsible for his/her subordinates;

(b) wear a fixed distinctive sign recognizable at a distance;

(c) carry arms openly; and

(d) conduct their operations in accordance with the laws and customs of war.

Distinctive signs are means of identification which such members may use so others may recognize their (militia group) (volunteer corps).

(3) Members of a *levee en masse*, that is inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading force, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.)

For the offense of murder by an unprivileged belligerent, the victim(s)'s status is immaterial. Even an attack on a soldier would be a crime if the attacker did not enjoy "belligerent privilege" or "combatant immunity."

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power,

stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to kill, inflict great bodily harm, or intentionally engage in an inherently dangerous act and wanton disregard of human life, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(B)(3).

MCI 2 §6(b)(3)(B)(1) (defining scope of the term "kill").

Lawful combatant: Article 4, GC III; Article 13, GWS.

3-B-4. DESTRUCTION OF PROPERTY BY AN UNPRIVILEGED BELLIGERENT

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), an unprivileged belligerent, did, (at—location), on or about (_____), in the context of and in association with armed conflict, without consent, intentionally destroy (state property alleged), the property of (_____).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused destroyed certain property, namely (state the property alleged);

(2) That the property belonged to (state the name of the owner alleged);

(3) That the destruction was without the consent of the owner (or other person authorized to give consent);

(4) That the accused intended to destroy such property;

(5) That the accused did not enjoy combatant immunity; and

(6) That the destruction took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"Combatant immunity" which is also known as "belligerent privilege," is a concept that forbids prosecution of lawful combatants for the lawful conduct of hostilities during armed conflict. In other words, an individual has combatant immunity for acts, such as the taking of life and the destruction of property, that (he)(she) commits if 1) (he)(she) is a lawful combatant and 2) (his)(her) actions do not violate the law of armed conflict.

An individual is a "lawful combatant" if (he)(she) is a:

(1) Member of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Member of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill all the following conditions:

(a) are commanded by a person responsible for his/her subordinates;

(b) wear a fixed distinctive sign recognizable at a distance;

(c) carry arms openly; and

(d) conduct their operations in accordance with the laws and customs of war.

Distinctive signs are means of identification which such members may use so others may recognize their (militia group) (volunteer corps).

(3) Members of a *levee en masse*, that is inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading force, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.)

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example,

murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to destroy certain property, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(B)(5).

Lawful combatant: Article 4, GC III; Article 13, GWS.

3-B-5. AIDING THE ENEMY

a. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at—location), on or about _____, in the context of and in association with armed conflict, intentionally aid the enemy by providing (arms) (ammunition) (supplies) (money) (protection) (intelligence) (_____).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused aided (state the name or description of the person or entity alleged), the enemy, by (state the manner alleged);

(2) That the accused intended to aid the enemy; and

(3) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

The term “enemy” includes any entity with which the United States or allied forces may be engaged in armed conflict, or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof. “Enemy” specifically includes any organization of terrorists with international reach.

Conduct is wrongful if the accused acted without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.

An accused may not be convicted of this offense absent allegiance to or some duty to the United States of America, or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States, or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or

contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE*: *Circumstantial Evidence -- Intent*. When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to aid the enemy, *see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(B)(5).

Aiding the enemy: MCI 2 §6(B)(5)(B)(1) (providing non-exhaustive list means by which enemy may be aided).

Enemy: MCI 2 §5(B).

Acting without proper authority: MCI 2 §6(B)(5)(B)(2).

Allegiance/duty: MCI 2 §6(B)(5)(B)(3).

3-B-6. SPYING

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), was, (at—location), on or about (_____), in the context of and in association with armed conflict, found (lurking) (acting clandestinely) (acting under false pretenses) (acting) as a spy (in) (about) (in and about) (_____) for the purpose of (collecting) (attempting to collect) information, to wit: (_____), with intent to impart the same to the enemy.

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused (collected) (attempted to collect) certain information to wit: (_____);

(2) That the accused intended to convey such information to (state the name or description of the person or entity alleged), the enemy;

(3) That the accused, in (collecting) (attempting to collect) the information, was (lurking) (acting clandestinely) (acting under false pretenses); and

(4) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

For this offense, a spy does not include members of a military organization or others who carry out their missions openly; even though they may have resorted to concealment, they have not acted under false pretenses. However, a member of a military organization who hides (his)(her) status or affiliation by wearing a disguise or civilian clothing may be acting under false pretenses.

“Enemy” includes any entity with which the United States or allied forces may be engaged in armed conflict, or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof.

“Enemy” specifically includes any organization of terrorists with international reach.

The term “clandestinely” means in disguise, secretly, covertly, or under concealment.

“In the context of and was associated with armed conflict” means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not “in the context of” the armed conflict. An “armed conflict” may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of

an “armed attack” or an “act of war”, or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: The following instruction is derived from the Military Judges' Benchbook instruction for Article 106.

It is not essential that the accused obtain the information sought or that (he)(she) actually communicate it. However, this offense requires some form of clandestine action, lurking about, false pretenses or deception with the intent to provide the information to the enemy.

NOTE 2: The above is derived from the definition contained in the Military Judges' Benchbook (Article 134, Instruction 3-78-1).

A “false pretense” is any misrepresentation of a (past) (or) (existing) fact by a person who knows it to be untrue.

NOTE 3: If there is evidence that the accused rejoined the armed force to which he belonged, the following instruction is appropriate.

Under the law of war, a lawful combatant who, after rejoining the armed force to which (he)(she) belongs, is subsequently captured, can not be punished for previous acts of espionage. In other words, the combatant’s successful rejoining of (his)(her) armed force constitutes a defense.

If you find that the accused successfully rejoined (his)(her) military unit after the alleged act(s) of espionage, the accused must be acquitted of (this) (these) offense(s).

NOTE 4*: *<u>Circumstantial Evidence -- Intent</u>. When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to spy, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(B)(6).

Acting under false pretenses: [0]MCI 2 §6(B)(6)(b)(1).

Enemy: MCI 2 §5(B).

Rejoining armed force: MCI 2 §6(B)(6)(b)(1).

3-B-7. PERJURY OR FALSE TESTIMONY

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), having [testified (at a military commission) (in proceedings ancillary to a military commission)] [provided information in a writing executed under (an oath to tell the truth) (a declaration acknowledging the applicability of penalties of perjury) in connection with (a military commission) (proceedings ancillary to a military commission)], did, (at—location), on or about _____, willfully, corruptly, and contrary to such (oath) (declaration) (testify) (depose) falsely in substance that _____, which (he)(she) did not then believe to be true.

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused [testified (at a military commission) (in proceedings ancillary to a military commission)] [provided information in a writing executed under (an oath to tell the truth) (a declaration acknowledging the applicability of penalties of perjury) in connection with (a military commission) (proceedings ancillary to a military commission))];

(2) That such (testimony) (information) was material;

(3) That such (testimony) (information) was false; and

(4) That the accused knew such (testimony) (information) to be false.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

An oath, which includes an affirmation, is a formal outward pledge, which appeals to the conscience of the person to whom it is administered and binds the person to speak the truth.

NOTE 1: The definition of "material" is derived from Article 131, UCMJ.

"Material" means important to the issue or matter of inquiry.

NOTE 2: In contrast to Article 131, UCMJ, MCI 2 does not discuss a corroboration requirement in connection with this offense.

NOTE 3: <u>Circumstantial Evidence -- Knowledge</u>. When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused knew that the testimony or information was false), and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(B)(7).

Oath: MCO 1 §6(C).

3-B-8. OBSTRUCTION OF JUSTICE (RELATED TO MILITARY COMMISSIONS)

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), wrongfully (endeavor to) [impede (a trial by military commission) (an investigation) (_____)] [influence the actions of _____, (a prosecutor of the military commission) (a defense counsel of the military commission) (an officer responsible for making a recommendation concerning disposition of charges) (_____)] [(influence) (alter) the testimony of _____ as a witness before (a military commission) (an investigating officer) (_____)] in the case of _____, by [(promising) (offering) (giving) to the said _____, (the sum of $_____) _____, of a value of about $_____)] [communicating to the said _____ a threat to _____] [_____], (if) (unless) he/she, the said _____, would [recommend dismissal of the charges against said _____] [(wrongfully refuse to testify) (testify falsely concerning _____) (_____)] [(at the military commission) (before such investigating officer)] [_____].

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused did an act, that is, (state the act alleged);

(2) That the accused intended to (influence) (impede) (obstruct) the due administration of justice by (state manner alleged); and

(3) That the accused did such act in the case of (state the person alleged) whom the accused had reason to believe:

(a) there were or would be proceedings before a military commission; or

(b) there was an ongoing investigation of offenses triable by military commission.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

One can obstruct justice in relation to a criminal proceeding involving (himself)(herself).

(While the prosecution is required to prove beyond a reasonable doubt that the accused had the specific intent to (influence) (impede) (obstruct) the due administration of justice, there need not be an actual obstruction of justice.)

NOTE 1: <u>When proceedings not pending or investigation not begun</u>. For the offense of obstruction, the commission proceeding/investigation need not have begun. However, the accused must have had reason to believe that there were or would be commission proceedings or an investigation. The following instruction may be helpful when the offense was allegedly committed prior to the proceedings/investigation. It should be noted be noted that this instruction is derived from the Military Judges' Benchbook (Article 134, Instruction 3-96-1).

It is not necessary that commission proceedings be pending or even that an investigation be underway. (The accused (also) does not have to know that charges have been brought or proceedings begun.) The prosecution must, however, prove beyond a reasonable doubt, that the accused had reason to believe there were or would be commission proceedings or that there was an ongoing investigation of offenses triable by military commission.

NOTE 2*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to obstruct justice related to military commissions, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 3: *Knowledge of the Pendency of the Proceedings - Circumstantial Evidence -- Knowledge*. The accused must not only have the specific intent to obstruct a potential commission proceeding, but he must also have reason to believe that proceedings had begun or would begin or that an investigation was ongoing. When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused had reason to believe that proceedings had begun or would begin) and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(B)(8).

3-C-1. AIDING AND/OR ABETTING

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____) aid and/or abet (state name or description of the person or entity alleged) in the commission of (state the substantive offense), an offense triable by military commission.

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused committed an act that aided and/or abetted (state the name or description of the person or entity alleged) in the commission of (state the substantive offense), which is triable by military commission, by (state manner allegedly aided or abetted);

(2) That (state the name or description of the person or entity alleged) (committed) (attempted to commit) the substantive offense of (state the substantive offense); and

(3) That the accused (intended to) (knew) that the act would aid and/or abet (state the name or description of the person or entity alleged) in the commission of (state the substantive offense), or an associated criminal purpose or enterprise.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

Any person who actually commits an offense triable by military commission is a principal. Anyone who knowingly and willfully aids and/or abets another in committing an offense triable by military commission is also a principal and equally guilty of the offense even if another individual more directly perpetrated the offense. An aider or abettor must knowingly and willfully participate in the commission of the crime as something (he)(she) wishes to bring about and must aid, encourage, or incite the person to commit the criminal act.

For this offense, the term “aided or abetted” includes: assisting, encouraging, advising, instigating, counseling, ordering, or procuring another to commit a substantive offense; assisting, encouraging, advising, counseling, or ordering another in the

commission of a substantive offense; and in any other way facilitating the commission of a substantive offense.

Although the accused must consciously share in the actual perpetrator's criminal intent to be an aider and/or abettor, there is no requirement that the accused agree with, or even have knowledge of, the means by which the perpetrator is to carry out that criminal intent.

This offense does not require proof that the act of aiding and abetting actually occurred or was completed.

NOTE 2*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to aid and/or abet the commission of an offense,

NOTE 3: *Circumstantial Evidence -- Knowledge*. *When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that accused knew that the act would aid or abet another person) in the commission of a substantive offense, and circumstantial evidence has been introduced

which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

***NOTE 4*: *When alleging inaction as basis for aiding and/or abetting*. *When the evidence raises the issue that the accused's inaction aided or abetted the commission of the substantive offense, give the following instruction*:**

> In some circumstances, inaction may render one liable as an aider and/or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so that person may be considered to have aided and/or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

d. REFERENCES:

MCI 2 §6(C)(1).

Principal: MCI 2 §C; cf. Military Judges' Benchbook, Instruction 7-1-1.

Forms of aiding or abetting: MCI 2 §C(1)(b)(1).

Inaction: MCI 2 §C(1)(b)(2).

3-C-2. SOLICITATION

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at--location), on or about (_____) by (state the manner and form of solicitation or advice), (solicit) (order) (induce) (advise) (_____) (and _____) to commit (state substantive offense solicited), an offense triable by military commission.

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused (solicited) (ordered) (induced) (advised) (state the name or description of the person allegedly solicited or advised), by (specify the statement, acts, or conduct allegedly constituting solicitation or advice) to commit (state the substantive offense), a substantive offense triable by military commission;

(2) That the accused intended that the offense actually be committed.

b. DEFINITIONS AND OTHER INSTRUCTIONS:

("Solicitation") ("Advice") means any statement, oral or written, or any other act or conduct which can reasonably be understood as a serious request or advice to commit the offense named in the specification.

The offense of solicitation is complete when a solicitation is made or advice is given with the specific wrongful intent to induce a person or persons to commit any offense triable by military commission. It is not necessary that the person or persons solicited, ordered, induced, advised, or assisted agree to or act upon the solicitation or advice. If the offense solicited is actually committed, however, the accused is liable under the law of armed conflict for the substantive offense. An accused should not be convicted of both solicitation and the substantive offense solicited if criminal liability for the substantive offense is based upon the solicitation.

NOTE 1: <u>If solicitation is by means other than speech or writing</u>. The following instruction should be given if the alleged solicitation is by means other than speech or writing.

Any act or conduct that reasonably may be construed as a serious request, order, inducement, advice, or offer of assistance to commit any offense triable by military commission may constitute solicitation.

NOTE 2: <u>If accused acted through another</u>. The following instruction should be given if there is evidence that the accused acted through another in committing the solicitation.

It is not necessary that the accused act alone in the solicitation, order, inducement, advising, or assistance. The accused may act through other persons in committing this offense.

NOTE 3: Solicitation is a separate offense rather than a means of charging an accused as a principal. Thus, an accused charged with solicitation of an uncompleted offense may be charged with the offense of solicitation. Solicitation is not a lesser-included offense of the related substantive offense.

NOTE 4*: *<u>Circumstantial Evidence -- Intent</u>*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to solicit the commission of an offense triable by military commission, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(C)(2).

Solicitation/advice: MCI 2 § 6(C)(2)(b)(2).

Completion of this offense; means of committing; acting through another: MCI 2 § 6(C)(2)(b)(1).

3-C-3. COMMAND/SUPERIOR RESPONSIBILITY – PERPETRATING

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), who knew or should have known that (_____), a subordinate under (his)(her) ((command and control) (effective authority and control)) (had committed) (attempted to commit) (solicited others to commit) (conspired to commit) (aided and abetted the commission of) an offense triable by military commission, to wit: _____, did, (at—location), from about (_____) to about (_____), fail to take all necessary and reasonable measures within (his)(her) power to (prevent) (repress) the commission of the offense.

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused had (command and control) (effective authority and control) over a certain subordinate, to wit: (state name of accused's subordinate);

(2) That the accused's subordinate, (state name of accused's subordinate), (committed) (attempted to commit) (conspired to commit) (solicited others to commit) (aided or abetted the commission of) (state nature of the offense), which is an offense triable by military commission;

(3) That the accused (knew) (should have known) that (state name accused's subordinate) (was committing) (attempting to commit) (conspiring to commit) (soliciting others to commit) (aiding and abetting the commission of) (state nature of the offense); and

(4) That the accused failed to take all necessary and reasonable measures within (his)(her) power to (prevent) (repress) the commission of the offense.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

The phrase "effective authority and control" includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be

relevant to a civilian superior who should not be responsible for the behavior of subordinates involved in activities that have no relationship to such superior's sphere of authority. Subject matter authority need not be demonstrated for command responsibility as it applies to a military commander.

"Aided and/or abetted" means assisting, encouraging, advising, instigating, counseling, ordering, or procuring another to commit a substantive offense; assisting, encouraging, advising, counseling, or ordering another in the commission of a substantive offense; and in any other way facilitating the commission of a substantive offense. In some circumstances, inaction may render one liable as an aider and/or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so, that person may be considered to have aided and/or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

"Conspiring" means an agreement between one or more persons to commit an offense or the joining of one or more persons in an enterprise with a common criminal purpose that involves the commission of an offense.

NOTE 1: In contrast to the UCMJ offense of misprision (Article 134), the MC offense may be violated where the accused "should have known" of the actions of his subordinate. It should be noted, however, that the UCMJ offense is not limited to the command/superior – subordinate context. The above instruction incorporates the definition of "should have known" from the circumstantial evidence (knowledge) instruction.

As I instructed, this offense requires proof beyond a reasonable doubt that the accused "knew or should have known" that (his)(her) subordinate was (committing) (attempting to commit) (soliciting others to commit) (aiding and/or abetting the commission of) (state nature of offense), an offense triable by military commission. In this regard, the term "should have known" means that the facts and circumstances were such that a reasonable person in the accused's position would have had the relevant knowledge or awareness.

NOTE 2: <u>Circumstantial Evidence -- Knowledge</u>. When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused knew or should have known that his subordinate was committing, attempting to commit, soliciting others to commit, conspiring to commit, or aiding or abetting the commission of an offense triable by military commission) and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 3: A commander or other military or civilian superior, not in command, charged with failing adequately to prevent or repress a substantive offense triable by military commission may be charged with the related substantive offense as a principal. <u>See</u> Instruction 7-1 (Vicarious Liability).

d. REFERENCES:

MCI 2 § 6(C)(3).

Forms of aiding or abetting: MCI 2 §6(C)(1)(b)(1).

Definition of conspiring derived from MCI 2 §6(C)(6).

3-C-4. COMMAND/SUPERIOR RESPONSIBILITY – MISPRISION

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), having knowledge that (_____), a subordinate under (his)(her) ((command and control) (effective authority and control)) (had committed) (attempted to commit) (solicited others to commit) (conspired to commit) (aided and abetted the commission of) an offense triable by military commission, to wit: (_____), did, (at—location), from about (_____) to about (_____), failed to submit the matter to competent authorities for investigation or prosecution as appropriate.

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused had (command and control) (effective authority and control) over a certain subordinate, to wit: (state name of accused's subordinate);

(2) That the accused's subordinate, (state name of accused's subordinate) had ((committed) (attempted to commit)

(conspired to commit) (solicited others to commit) (aided or abetted the commission of)) (state nature of the offense), which is an offense triable by military commission;

(3) That the accused (knew) (should have known) that (state name accused's subordinate) ((was committing) (attempting to commit) (conspiring to commit) (soliciting others to commit) (aiding and abetting the commission of)) (state nature of the offense); and

(4) That the accused failed to submit the matter to competent authorities for investigation or prosecution as appropriate.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: The following instruction comports with MCI 2 § 6(C)(6)(b)(5).

The phrase "effective authority and control" includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be

relevant to a civilian superior who should not be responsible for the behavior of subordinates involved in activities that have no relationship to such superior's sphere of authority. Subject matter authority need not be demonstrated for command responsibility as it applies to a military commander.

"Aided or abetted" means assisting, encouraging, advising, instigating, counseling, ordering, or procuring another to commit a substantive offense; assisting, encouraging, advising, counseling, or ordering another in the commission of a substantive offense; and in any other way facilitating the commission of a substantive offense. In some circumstances, inaction may render one liable as an aider or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so, that person may be considered to have aided or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

"Conspiring" means an agreement between one or more persons to commit an offense or the joining of one or more persons in an enterprise with a common criminal purpose that involves the commission of an offense.

NOTE 2: <u>Circumstantial Evidence -- Knowledge</u>. When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused knew or should have known that his subordinate was committing, attempting to commit, soliciting others to commit, conspiring to commit, or aiding or abetting the commission of an offense triable by military commission) and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 3: A commander or superior charged with failing to take appropriate punitive or investigative action subsequent to the perpetration of a substantive offense triable by military commission should not be charged for the substantive offense as a principal. Such commander or superior should be charged for the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.

d. REFERENCES:

MCI 2 § 6(C)(4).

Forms of aiding or abetting: MCI 2 § 6(C)(1)(b)(1).

3-C-5. ACCESSORY AFTER THE FACT

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), (knowing) (believing) that (state name of principal) had committed (state offense alleged), (a closely related offense), an offense triable by military commission, to wit: (_____), did, (at—location), on or about (_____), (receive) (comfort) (assist) the said (_____) by (state manner alleged) in order to (hinder) (prevent) the (apprehension) (trial) (punishment) of the said (_____).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused (received) (comforted) (assisted) (state name of the principal);

(2) That the said (state name of the principal) had committed (state the offense alleged), which is an offense triable by military commission;

(3) That the accused (knew that (state name of the principal) had committed such offense) (believed (state name of the

principal) had committed a similar or closely related offense); and

(4) That the accused intended to (hinder) (prevent) the (apprehension) (trial) (punishment) of (state name of the principal).

c. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: Offense alleged. The Military Judge should give an instruction defining the underlying offense allegedly committed by the principal.

The accused is alleged to be an accessory after the fact in the commission of (state the offense alleged). (State the offense alleged) is defined as (state the elements of the offense alleged).

NOTE 2: Conviction of the principal not required. Although not stated in MCI 2, it would seem that conviction of the principal of the offense to which the accused is allegedly an accessory after the fact is not a prerequisite to the trial of the accused. Cf. Military Judges' Benchbook Instruction 3-2-1.

This being the case, evidence of the acquittal or conviction of the principal in a separate trial is likely irrelevant and inadmissible.

NOTE 3: Accessory after the fact is a separate offense rather than a means of charging an accused for the related substantive offense. It is not a lesser-included offense of the related substantive offense.

NOTE 4: <u>Circumstantial evidence – Intent</u>. When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to hinder or prevent the apprehension, trial, or punishment of the principal in issue, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 5: <u>Circumstantial evidence -- Knowledge</u>. When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused knew or should have known that the principal in issue had committed an offense triable by military commission or believed that the principal in issue had committed a similar or closely related offense) and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

MCI 2 §6(C)(5).

3-C-6-1. CONSPIRACY (BY AGREEMENT)

NOTE 1: Comporting with element (1) of this offense, conspiracy is split into two separate instructions: by agreement – by joining in a criminal enterprise. See MCI 2 §6(C)(6)(a)(1).

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), willfully enter into an agreement with (_____) (and (_____)) to commit an offense triable by military commission, to wit: (_____), and in order to effect the object of the conspiracy, the said (_____) (and (_____)) did (_____).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused entered into an agreement with (state the name(s) of the alleged co-conspirator(s)) to commit (state the name of the offense(s) allegedly conspired), which (is) (are) (an offense) (offenses) triable by military commission;

NOTE 2: MCI 2 §6(C)(6)(a)(1) provides that the agreement must be to commit an offense triable by military commission. By contrast, for a conspiracy involving a criminal enterprise, it is sufficient if this is only part of the enterprise.

(2) That the accused knew the unlawful purpose of the agreement and entered into the agreement willfully, that is, with the intent to further the unlawful purpose; and

(3) That one of the conspirators, (state name of accused or co-conspirator(s) who allegedly performed the overt act), during the existence of the agreement, knowingly committed an overt act; that is, (state the alleged overt act(s)), in order to accomplish some objective or purpose of the agreement.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

Two or more persons are required in order to have a conspiracy. The accused's knowledge of the identity of co-

conspirators and their particular connection with the agreement, however, need not be established.

The accused may be found guilty of conspiracy, even if (he)(she) is incapable of committing the intended offense.

The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators.

The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy and this may be proved by the conduct of the parties. The agreement does not have to express the manner in which the conspiracy is to be carried out or what part each conspirator is to play.

NOTE 3: The above instruction is derived from the Military Judges' Benchbook instruction for Article 81 (Conspiracy; Instruction 3-5-1).

The agreement must involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not contain knowledge that any related offense is triable by military commission.

As I instructed, during the existence of the agreement, one or more of the conspirators must have committed an overt act tending to accomplish an objective or purpose.

The overt act required for this offense must be done by one or more of the conspirators, but not necessarily by the accused, and it must be done to effectuate the object of the conspiracy. Further, the accused need not have entered the agreement at the time of the overt act.

The overt need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

NOTE 4: The above instruction is derived from the Military Judges' Benchbook instruction for Article 81 (Conspiracy; Instruction 3-5-1).

The overt act must clearly be independent of the agreement itself, that is, it must be more than merely the act of entering into the agreement or an act necessary to reach the agreement.

NOTE 5: The above instruction is derived from the Military Judges' Benchbook instruction for Article 81 (Conspiracy; Instruction 3-5-1).

NOTE 6: <u>More than one overt act alleged</u>. The following instruction, may be appropriate when more than one overt act is alleged.

More than one overt act has been listed in the specification in this case. The accused may be found guilty of conspiracy only if it is proved beyond a reasonable doubt that at least one of the overt acts described in the specification has been committed. Accordingly, if it is proved beyond a reasonable doubt that the accused (or a co-conspirator) committed one (or more) of the

described overt acts, but not (all) (both) of them, the findings should reflect this by appropriate exceptions.

NOTE 7: <u>Circumstantial evidence – Intent</u>. When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to further the unlawful purpose of the agreement, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 8: <u>Circumstantial Evidence -- Knowledge</u>. When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused knew or should have known the unlawful purpose of the agreement and joined in it willfully with the intent to further the unlawful purpose) and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 9: Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and the person remains a party to it. <u>See</u> MCI 2 §6(C)(6)(b)(5).

NOTE 10: <u>Abandonment or withdrawal raised</u>. The following additional instruction, which comports with MCI 2 §6(C)(6)(b)(6), should be given when an issue arises as to whether the accused may have abandoned or withdrawn from the conspiracy.

There has been some evidence that the accused abandoned or withdrew from the charged conspiracy. (<u>Here the Military Judge may specify significant evidentiary factors bearing upon the issue and indicate the respective contentions of all counsel</u>.) A party to the conspiracy who withdraws from or abandons the agreement before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment.

NOTE 11: Impossibility is not usually a defense to the offense of conspiracy.

NOTE 12: Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy may be charged separately from the related substantive offense. It is not a lesser included offense of the substantive offense. See MCI 2 §6(C)(6)(b)(8).

d. REFERENCES:

MCI 2 §6(C)(6).

3-C-6-2. CONSPIRACY (BY JOINING A CRIMINAL ENTERPRISE)

NOTE 1: Conspiracy is split into two separate instructions: by agreement – by joining in a criminal enterprise. This comports with element (1). See MCI 2 §6(C)(a)(6)(1).

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), on or about (_____), willfully join an enterprise with (_____) (and (_____)), who shared a common criminal purpose that (involved) (involved in part) the (commission) (intended commission) of (an offense) (offenses) triable by military commission, to wit: (_____), and in order to effect the object of the enterprise, the said (_____) (and (_____)) did (_____).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused joined an enterprise of persons (state name(s) of alleged enterprise members) who shared a common criminal purpose that

(involved) (that involved in part) (the commission) (intended commission) of (state the name of the offense(s) allegedly conspired), which (is) (are) (an offense) (offenses) triable by military commission;

NOTE 2: It is sufficient if the purpose of the enterprise at least in part involves commission of an offense triable by military commission. See MCI 2 §6(C)(6)(a)(1).

(2) That the accused knew the common criminal purpose of the enterprise and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(3) That one of the enterprise members, (state name of accused or other enterprise member who allegedly performed the overt act), during the existence of the enterprise, knowingly committed an overt act; that is, (state the alleged overt act(s)), in order to accomplish some objective or purpose of the enterprise.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

Two or more persons are required in order to have a conspiracy. The accused's knowledge of the identity of co-conspirators and their particular connection with the agreement, however, need not be established.

The accused may be found guilty of conspiracy, even if (he)(she) is incapable of committing the intended offense.

The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators.

The common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish a common criminal purpose and this may be proved by the conduct of the parties. The parties do not have to express the manner in which the conspiracy is to be carried out or what part each conspirator is to play.

NOTE 3: The above instruction is derived from the Military Judges' Benchbook instruction for Article 81 (Conspiracy; Instruction 3-5-1).

The common criminal purpose must involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives.

As I instructed, during the existence of the enterprise, one or more of the conspirators must have committed an overt act tending to accomplish an objective or purpose.

The overt act required for this offense must be done by one or more of the conspirators, but not necessarily by the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. Further, the accused need not have entered the criminal enterprise at the time of the overt act.

The overt act required for this offense need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

NOTE 4: The above instruction is derived from the Military Judges' Benchbook instruction for Article 81 (Conspiracy; Instruction 3-5-1).

The overt act must clearly be independent of the agreement itself, that is, it must be more than merely the act of entering into the agreement or an act necessary to reach the agreement.

NOTE 5: The above instruction is derived from the Military Judges' Benchbook instruction for Article 81 (Conspiracy; Instruction 3-5-1).

NOTE 6: <u>More than one overt act alleged</u>. The following instruction, may be appropriate with more than one overt act is alleged.

More than one overt act has been listed in the specification in this case. The accused may be found guilty of conspiracy only if it is proved beyond a reasonable doubt that at least one of the

overt acts described in the specification has been committed. Accordingly, if it is proved beyond a reasonable doubt that the accused (or a co-conspirator) committed one (or more) of the described overt acts, but not (all) (both) of them, the findings should reflect this by appropriate exceptions.

NOTE 7: <u>Circumstantial evidence – Intent</u>. When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to further the unlawful purpose of the enterprise, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 8: <u>Circumstantial Evidence -- Knowledge</u>. When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused knew or should have known the common criminal purpose of the enterprise) and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 9: Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after

such conspirator has joined the conspiracy and while the conspiracy continues and the person remains a party to it. See MCI 2 §6(C)(6)(b)(5).

NOTE 10: Abandonment or withdrawal raised. The following additional instruction, which comports with MCI 2 §6(C)(6)(b)(6), should be given when an issue arises as to whether the accused may have abandoned or withdrawn from the conspiracy.

There has been some evidence that the accused abandoned or withdrew from the charged conspiracy. (Here the Military Judge may specify significant evidentiary factors bearing upon the issue and indicate the respective contentions of all counsel.) A party to the conspiracy who withdraws from or abandons the agreement before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the

conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment.

NOTE 11: Impossibility is not usually a defense to the offense of conspiracy.

***NOTE 12: Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy may be charged separately from the related substantive offense. It is not a lesser included offense of the substantive offense. See MCI 2* §6(C)(6)(b)(8).**

d. REFERENCES:

MCI 2 §6(C)(6).

3-C-7. ATTEMPT

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data) did, (at—location), on or about (_____), attempt to (describe offense triable by military commission with sufficient detail to include expressly or by necessary implication every element).

b. ELEMENTS:

(1) That (state the time and place alleged,) the accused committed, (_____), a certain act, to wit: (_____);

(2) That the accused intended to commit (state offense alleged), an offense triable by military commission;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the offense intended offense of (state the intended offense).

c. DEFINITIONS AND OTHER INSTRUCTIONS:

Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt.

To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose. The intent need not involve knowledge that the offense is in fact "triable by military commission."

NOTE 1: <u>Circumstantial Evidence – Intent</u>. When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to commit an act triable by a military commission, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 2: <u>Factual Impossibility</u>. If the evidence indicates that it was impossible for the accused to have committed the offense attempted for reasons unknown to him, the accused may still be found guilty of attempt. A person who purposefully engages in conduct which would constitute an offense if the circumstances were as that person believes them to be is guilty of attempt. When factual impossibility is raised, the following instruction is appropriate.

The evidence has raised the issue that it was impossible for the accused to have committed the offense of (_____) because (<u>here state the facts or contention of the counsel</u>). If the facts were as the accused believed them to be, and under those facts the accused's conduct would constitute the offense of (_____), the accused may be found guilty of attempted (_____) even though under the facts as they actually existed it was impossible for the accused to complete the offense of (_____). The burden of proof to establish the accused's guilt beyond a reasonable doubt is upon the prosecution. The accused may be found guilty of attempted (_____) only if it is proved beyond a reasonable doubt that all of the elements I have described are present, even

though under the facts as they actually existed it was impossible for the accused to commit the offense of (_____).

NOTE 3: <u>Voluntary Abandonment</u>. Where the evidence raises the issue that the accused may have abandoned his criminal purpose, the following instruction, which is adapted from the Military Judge's Benchbook, is appropriate:

The defense of voluntary abandonment has been raised by the evidence with respect to the offense(s) of attempted (<u>state the alleged offense(s)</u>). It is a defense to the offense of attempt if, prior to the completion of (<u>state the offense intended</u>), the accused abandoned (his)(her) effort to commit that offense solely because of (his)(her) own sense that it was wrong. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons. For example, the defense would not apply if the accused abandoned (his)(her) effort because (he)(she) feared detection, decided to await a better opportunity for success, was unable to

complete the crime, or because (he)(she) encountered unanticipated difficulties or unexpected resistance.

In determining whether the defense of voluntary abandonment applies, all of the relevant facts and circumstances must be considered (including but not limited to (here the Military Judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

NOTE 4: Attempt is a lesser-included offense of any substantive offense triable by military commission and need not be charged separately. An accused may be charged with attempt without being charged with the substantive offense.

d. REFERENCES.

MCI 2 §6(C)(7).

Factual impossibility: MCI 2 §6(C)(7)(b)(3).

Voluntary Abandonment: MCI 2 §6(C)(7)(b)(4).

SUBCHAPTER 3-D

The pattern instructions for offenses in subchapter 3-D are derived from the law of war. These offenses deal specifically with criminal conduct directed against EPWs that are not covered elsewhere in this Benchbook.

3-D-1. INADEQUATE CONDITIONS FOR INTERNED ENEMY PRISONERS OF WAR

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), in the context of and in association with armed conflict, provide inadequate conditions to (state name or description of alleged victim(s)), who then (was) (were) and (was) (were) then known by the accused to be (an) enemy prisoner(s) of war protected under the law of war and interned under (his)(her) care and control, by (state manner alleged).

b. ELEMENTS:

(1) That (state the time and place alleged), the accused provided inadequate conditions to (state the name or description of alleged victim(s));

(2) That the accused did so by (state the manner alleged);

(3) That (state the name or description of alleged victim(s)) (was) (were) (an) enemy prisoner(s) of war protected under the law of war;

(4) That the accused knew or should have known of the factual circumstances that established that protected status;

(5) That (state the name or description of alleged victim(s)) (was) (were) in the custody and under the control of the accused at the time of the alleged offense; and

(6) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

An "enemy prisoner of war" is a person expressly protected by the Geneva Convention Relative to the Treatment of Prisoners of War of 1949 (GC III). Article 4, GC III, defines an enemy prisoner of war as a person belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill all the following conditions:

(a) are commanded by a person responsible for his/her subordinates;

(b) wear a fixed distinctive sign recognizable at a distance;

(c) carry arms openly; and

(d) conduct their operations in accordance with the laws and customs of war.

Distinctive signs are means of identification which such members may use so others may recognize their (militia group) (volunteer corps).

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card reflecting their status under the Geneva Conventions.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more

favorable treatment under any other provisions of international law.

(6) Members of a *levee en masse*, that is inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading force, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

The following persons shall likewise be treated as enemy prisoners of war:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in

combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of these categories enumerated in Article 4, GC III, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favorable treatment which these Powers may choose to give and with the exception of certain articles as outlined in Article 4(B)(2), GC III, and, where diplomatic relations exist between the Parties to the conflict and the neutral or nonbelligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the GC III, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

"Inadequate conditions" includes, but is not limited to, the deliberate, willful failure or refusal to provide proper and adequate food, water, medical treatment or supplies, clothing, living quarters and facilities, sanitation, and other necessities with consequent starvation and malnutrition; the deliberate and unnecessary exposure to gunfire and other hazards; looting and stealing the contents of, and willfully failing to deliver or make available Red Cross packages and supplies intended for such enemy prisoners of war; and deliberately contaminate and poison a well of water, which was the sole source of potable drinking water. In determining the inadequate conditions of an accused's internment, the military judge should consider all of the facts and circumstances surrounding the accused's internment. The military judge may tailor the instruction below for the applicable conditions at issue.

It is a violation to deny enemy prisoners of war subsistence, quarters, and other comforts or aids to which they are lawfully entitled under the GC III.

("Maltreated" means the infliction of real abuse, although it does not have to be physical. It must be without justifiable cause. (To subject to improper punishment) (or) (to deprive of benefits) could constitute maltreatment.)

("Cruelty" and "maltreatment" refer to treatment, that, when viewed objectively under all the circumstances, is abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose and that results in physical or mental harm or suffering, or reasonably could have caused physical or mental harm or suffering.)

(If the accused occupies a position of authority over the enemy prisoner of war, the source of that authority is not important. The authority may by through designation by the captor authorities) (_____).)

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed

hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 2: Circumstantial Evidence -- Knowledge. When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused knew or should have known that the victim(s) was/were protected under the law of war), and circumstantial

evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) (GC III), Articles 4, 13, 121, and 130.

3-D-2. INADEQUATE FOOD RATIONS FOR ENEMY PRISONERS OF WAR

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), in the context of and in association with armed conflict, provide inadequate food rations to (state name or description of alleged victim(s)), who then was and was then known by the accused to be (an) enemy prisoner(s) of war protected under the law of war and interned under (his)(her) care and control, by (state manner alleged)

b. ELEMENTS:

(1) That (state the time and place alleged), the accused provided inadequate rations to (state the name or description of alleged victim(s));

(2) That the accused did so by (state the manner alleged);

(3) That (state the name or description of alleged victim(s)) (was) (were) (an) enemy prisoner(s) of war protected under the law of war;

(4) That the accused knew or should have known of the factual circumstances that established that protected status;

(5) That (state the name or description of alleged victim(s)) (was) (were) in the custody and under the control of the accused at the time of the alleged offense; and

(6) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

An "enemy prisoner of war" is a person expressly protected by the Geneva Convention Relative to the Treatment of Prisoners of War of 1949 (GC III). Article 4, GC III, defines an enemy prisoner of war as a person belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill all the following conditions:

(a) are commanded by a person responsible for his/her subordinates;

(b) wear a fixed distinctive sign recognizable at a distance;

(c) carry arms openly; and

(d) conduct their operations in accordance with the laws and customs of war.

Distinctive signs are means of identification which such members may use so others may recognize their (militia group) (volunteer corps).

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card reflecting their status under the Geneva Conventions.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more

favorable treatment under any other provisions of international law.

(6) Members of a *levee en masse*, that is inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading force, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

The following persons shall likewise be treated as enemy prisoners of war:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in

combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of these categories enumerated in Article 4, GC III, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favorable treatment which these Powers may choose to give and with the exception of certain articles as outlined in Article 4(B)(2), GC III, and, where diplomatic relations exist between the Parties to the conflict and the neutral or nonbelligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the GC III, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

It is a violation of this article to deny enemy prisoners of war subsistence, quarters, and other comforts or aids to which they are lawfully entitled under the GC III.

The basic daily food rations shall be sufficient in quantity, quality, and variety to keep an enemy prisoner of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Sufficient drinking water shall be supplied to prisoners of war.

(If the accused occupies a position of authority over the prisoner, the source of that authority is not important. The authority may by through designation by the captor authorities) (_____).)

“In the context of and was associated with armed conflict” means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time

and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 1: Circumstantial Evidence -- Knowledge. ***When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused knew or should have known that the victim(s) was/were protected under the law of war), and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.***

d. REFERENCES:

Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) (GC III), Articles 4, 13, 121, 130

3-D-3. SUBJECTING PRISONERS OF WAR TO INTIMIDATION, INSULTS, OR PUBLIC CURIOSITY

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at--location), in the context of and in association with armed conflict, subject (state name or description of alleged victim(s)), who then was and was then known by the accused to be (an) enemy prisoner(s) of war protected under the law of war and interned under (his)(her) care and control, to (public humiliation) (intimidation) (insults) (curiosity) [by (state manner alleged)] [by saying (the following contemptuous words) to him/her "(_____)," or words to that effect, (orally and publicly) (in a contemptuous manner)].

NOTE 1: In cases that involve allegations of public humiliation, it has been suggested that the accused's intent to humiliate and degrade may be relevant. Specifically, if the act was intended to be "humiliating and degrading," it would almost certainly seem to breach the GC III. By contrast, television footage that was "merely factual," may not necessarily violate the GC III. On the other hand, simply being taken as a prisoner may also be considered humiliating

or could subject the alleged victim to reprisals because some may view him/her as a traitor. See "The Geneva Conventions and Prisoners of War" by Anthony Dworkin (24 March 2003) at http://www.crimesofwar.org/special/Iraq/brief-pow.html (last visited 15 Aug 03).

b. ELEMENTS:

(1) That (state the time and place alleged), the accused:

(a) did (a) certain act(s), namely, (state the behavior alleged); or

(b) used (orally and publicly) certain language (state the words alleged);

(2) That such (behavior) (language) was contemptuous (in themselves) (or) (by virtue of the circumstances under which they were used) and subjected (state the name or description of the alleged victim(s)) to (intimidation) (insult) (curiosity);

(3) That such (behavior) (language) was intentionally directed toward (state the name or description of the alleged victim(s));

(4) That (state the name or description of alleged victim(s)) (was) (were) (an) enemy prisoner(s) of war protected under the law of war;

(5) That the accused knew or should have known of the factual circumstances that established that protected status;

(6) That (state the name or description of alleged victim(s)) (was) (were) in the custody and under the control of the accused at the time of the alleged offense; and

(7) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

"Contemptuous" means insulting, rude, disdainful, or otherwise disrespectfully attributing to another qualities of meanness, disreputableness, or worthlessness.

“Disrespect” is behavior which detracts from the respect which is due to an enemy prisoner of war. It may consist of acts or language provided the behavior is disrespectful.

(Disrespect by words may be conveyed by disgraceful names or other contemptuous or denunciatory language in the presence of an enemy prisoner of war.)

(Disrespect by acts may be demonstrated by obvious disdain, rudeness, indifference, gross impertinence, undue and excessive familiarity, silent insolence, or other disgraceful, contemptuous, or denunciatory conduct in the presence of an enemy prisoner of war.)

“In the context of and was associated with armed conflict” means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain

unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 2*: *Circumstantial Evidence -- Intent*. *When circumstantial evidence has been introduced which reasonably tends to establish that the accused had the specific intent to subject an enemy prisoner of war to intimidation, insults, or public curiosity, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

NOTE 3: Circumstantial Evidence -- Knowledge. When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused knew or should have known that

the victim(s) was/were protected under the law of war), and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES

Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (12 August 1949) (GC IV), Article 27.

3-D-4. INHUMANE TREATMENT OF ENEMY PRISONERS OF WAR

a. MODEL SPECIFICATION:

In that (_____) (personal jurisdiction data), did, (at—location), in the context of and in association with armed conflict, subject (state name or description of alleged victim(s)), who then was and was then known by the accused to be (an) enemy prisoner(s) of war protected under the law of war and interned under (his)(her) care and control, to inhumane treatment by (state manner alleged).

b. ELEMENTS:

(1) That (state the time and place alleged), the accused subjected (state the name or description of alleged victim(s)) to inhumane treatment;

(2) That the accused did so by (state the manner alleged) (being kept in cramped or overcrowded facilities) (being provided with inadequate or no medical treatment for his/her (infirmary) (wounds), to wit:

_____) (being subjected to physical or psychological abuse and intimidation);

(3) That (state the name or description of alleged victim(s)) (was) (were) (an) enemy prisoner(s) of war protected under the law of war;

(4) That the accused knew or should have known of the factual circumstances that established that protected status;

(5) That (state the name or description of alleged victim(s)) (was) (were) in the custody and under the control of the accused at the time of the alleged offense; and

(6) That the conduct took place in the context of and was associated with armed conflict.

c. DEFINITIONS AND OTHER INSTRUCTIONS:

An "enemy prisoner of war" is a person expressly protected by the Geneva Convention Relative to the Treatment of Prisoners of War of 1949 (GC III). Article 4, GC III, defines an enemy prisoner of war as a

person belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill all the following conditions:

(a) are commanded by a person responsible for his/her subordinates;

(b) wear a fixed distinctive sign recognizable at a distance;

(c) carry arms openly; and

(d) conduct their operations in accordance with the laws and customs of war.

Distinctive signs are means of identification which such members may use so others may recognize their (militia group) (volunteer corps).

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card reflecting their status under the Geneva Conventions.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.

(6) Members of a *levee en masse*, that is inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading force, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

The following persons shall likewise be treated as enemy prisoners of war:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where

such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of these categories enumerated in Article 4, GC III, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favorable treatment which these Powers may choose to give and with the exception of certain articles as outlined in Article 4(B)(2), GC III, and, where diplomatic relations exist between the Parties to the conflict and the neutral or nonbelligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the GC III, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

NOTE 1: <u>Inhumane treatment</u>. The military judge may tailor the instruction below for the applicable conditions at issue.

Inhumane treatment includes, but is not limited to, forced labor (to digging trenches), excessive and cruel interrogation, physical and psychological harm, and in hazardous circumstances, being used as human shields.

"In the context of and was associated with armed conflict" means that the prosecution must establish a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus. For example, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if associated with armed conflict in time and location, is not "in the context of" the armed conflict. An "armed conflict" may exist without a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for

the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

NOTE 2: <u>Circumstantial Evidence -- Knowledge.</u> When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., that the accused knew or should have known that <u>the victim(s)</u> was/were protected under the law of war), and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, see Instruction 7-3, CIRCUMSTANTIAL EVIDENCE.

d. REFERENCES:

Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) (GC III), Articles 4, 13, 121, and 130.

Chapter 4

CONFESSIONS INSTRUCTIONS

NOTE: The confessions instructions retained in the Military Judges' Benchbook used in courts-martial should be used as a guide to tailor confessions instructions in a trial by court-martial of EPWs. See Chapter 4, Military Judges' Benchbook, (DA Pam 27-9). The military judge, however, should be mindful of any specific guidance the DP may issue regarding confessions and proceed accordingly.

NOTE: M.R.E. 304 (Confessions and admissions) and 305 (Warnings about rights) are applicable in a trial by court-martial of EPWs. See Arts. 85 and 102, GC III. In contrast, note that the Rules of Evidence and Procedure of the International Criminal Tribunal for the Former Yugoslavia's (ICTY) presume that an accused's confession was made freely and voluntarily unless the contrary is proved. ICTY Rule 92, Confessions. See ICC Rules 42 (Rights of suspect during investigation) and 63 (Questioning of accused).

4–1. CONFESSIONS AND ADMISSIONS

NOTE 1: General. Upon timely motion to suppress or objection to the use of a pretrial statement of the accused or any derivative evidence therefrom, the military judge must determine admissibility by a preponderance of the evidence standard. Military Rules of Evidence 304 and 305 cover pertinent definitions and rules for admissibility. Absent a stipulation of fact, the judge shall make essential findings of fact.

NOTE 2: Timing of motion and ruling. Except for "good cause," motions to suppress statements of the accused must be made prior to plea or are waived. The military judge should ordinarily rule on such objections prior to entry of plea.

NOTE 3: Presenting evidence on voluntariness to the court members. If a statement is admitted into evidence, the defense must be permitted to present evidence as to the voluntariness of the statement. The military judge in such a case must instruct the members to give such weight to the statement as it deserves under all the circumstances. Defense evidence relevant to voluntariness might include, for example, evidence of an inadequate or improper rights advisement; evidence of coercion, unlawful influence or inducement; or evidence concerning the accused's failure to understand any required rights advisement. A tailored instruction substantially as follows is appropriate in such a case:

A pretrial statement by the accused has been admitted into evidence (as Prosecution Exhibit _____). The defense has introduced

evidence that the accused's statement(s) (was) (were) obtained (through the use of _____) (in violation of _____) (_____). You must decide the weight or significance, if any, such statement(s) deserve(s) under all the circumstances. In deciding what weight or significance, if any, to give to the accused's statement(s), you should consider the specific evidence offered on the matter (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides), your own common sense and knowledge of human nature, and the nature of any corroborating evidence as well as the other evidence in this trial (to include any evidence presented by the government in rebuttal).

NOTE 4: Corroboration. A pretrial admission or confession can only be considered as evidence against the accused if it is corroborated. Corroboration is not required for a statement made by the accused before the court, those made prior to or contemporaneously with the alleged criminal act, or for statements introduced under a rule of evidence other than that pertaining to the admissibility of admissions or confessions. The corroboration required for a pretrial statement is proof of independent facts which raise an inference of the truth of the essential facts admitted. The military judge alone determines the admissibility of the admission or confession. Corroborating evidence is usually introduced before the statement, but the statement may be admitted subject to later corroboration. If the military judge determines that there is sufficient

evidence to corroborate the accused's admission or confession and admits it, the members may consider any corroborating evidence in deciding what weight to give the admission or confession. United States v. Duvall, 47 M.J. 189 (1997). See also United States v. Faciane, 40 M.J. 399 (CMA 1994). If the corroborating evidence contains uncharged misconduct, the military judge should give an appropriately tailored uncharged misconduct instruction. See Instruction 7-13-1.

NOTE 5: Accused's testimony on the limited issue of voluntariness. If the accused has testified on the merits concerning only the voluntariness of a pretrial statement, the members must be instructed upon defense request that the testimony can only be used for this limited purpose and for no other purpose. The judge may instruct sua sponte if a failure to do so would constitute plain error. See also Instruction 7–12, Accused's Failure to Testify. The following instruction may be used:

> The accused testified for the limited purpose of contesting the voluntariness of (his)(her) pretrial statement. You are to consider this testimony in determining the weight and significance to be given to the pretrial statement and for no other purpose.

NOTE 6: Issue as to whether statement was made by the accused. If evidence has been received on the merits raising an issue as to whether a statement was in fact made by the accused, the military judge should instruct the court substantially as follows:

The evidence has raised an issue as to whether a pretrial statement was in fact made by the accused as to the offense(s) of (specify the relevant offense(s)). You must consider all relevant facts and circumstances (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)). You must decide in your deliberations on the findings of guilt or innocence whether and to what extent the evidence (on behalf of either side) should be believed. You may only consider the statement as evidence if you are convinced beyond a reasonable doubt that it was in fact made by the accused. Otherwise you must disregard it and give it no consideration whatsoever.

(The accused testified for the limited purpose of whether (he)(she) made the pretrial statement. You are to consider this testimony for determining this issue only and for no other purpose.)

REFERENCES: MRE 304 and 305.

Chapter 5

SPECIAL AND OTHER DEFENSES

5–1. GENERAL INFORMATION ABOUT INSTRUCTIONS IN THIS CHAPTER

a. The defenses in Chapter 5 are applicable in a trial by court-martial of members of the U.S. armed forces. The defenses in Chapter 5 are also applicable in a trial by court-martial of EPWs for post-capture criminal offenses under the UCMJ. See Arts. 85 and 102. The instructions for defenses retained in the Military Judges' Benchbook used in courts-martial should be used as a guide to tailor defenses instructions in a trial by court-martial of EPWs. See Chapter 5, Military Judges' Benchbook, (DA Pam 27-9). The military judge, however, should be mindful of any specific guidance the DP may issue regarding defenses and proceed accordingly.

b. Special defenses, sometimes called affirmative defenses, are those that, although not denying that the objective acts were committed by the accused, do deny, either wholly or partially, criminal responsibility for those acts. Special defenses must be instructed upon *sua sponte* when there is some evidence raising the defense. The credibility of witnesses, including the accused, whose testimony raises a possible affirmative defense, is not a factor in determining whether an instruction is necessary. Other defenses, such as alibi or character, deny the commission of the acts charged by the accused. When raised, a *sua sponte* instruction is not ordinarily required, but the military judge must instruct on such issues when requested to do so. Whenever a special defense is raised, the burden is on the prosecution to establish beyond a reasonable doubt the non-existence of the defense and the military judge must so instruct in each case.

c. The instructions in this chapter are not all inclusive. Special defenses concerning mental conditions are discussed in Chapter 6, *infra*. Chapter 7, Evidentiary Instructions, also contains instructions that bear on matters the defense may raise. *See*, for example, Instruction 7-8 on the accused's character.

d. As in Chapter 3, instructional language in Chapter 5 which follows a note is to be given only when the note applies to the facts and circumstances of the offense.

e. **REFERENCES:**

(1) Abandonment: Instruction 5-15.

(2) Accident: RCM 916(f); Instruction 5-4.

(3) Alibi: Instruction 5-13.

(4) Burden of proof: RCM 916(b).

(5) Causation (Lack of Causation, Intervening Cause, and Contributory Negligence): Instruction 5-19.

(6) Character: Instructions 5-14 and 7-8.

(7) Claim of right: Instruction 5-18.

(8) Coercion or duress: RCM 916(h); Instruction 5-5.

(9) Defenses generally: RCM 916(a).

(10) Defense of another: RCM 916(e)(5); Instruction 5-3.

(11) Defense of property: Instruction 5-7.

(12) Entrapment: RCM 916(g); Instruction 5-6.

(13) Ignorance or mistake of fact: RCM 916(j); Instruction 5-11.

(14) Ignorance or mistake of law: RCM 916(l)(1); Instruction 5-11.

(15) Inability and impossibility: RCM 916(i); Instructions 5-9 and 5-10.

(16) Justification: RCM 916(c).

(17) Mental responsibility: RCM 916(k); Chapter 6, DA Pam 27-9; Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988); compare Instruction 5-17.

(18) Obedience to orders: RCM 916(d); Instruction 5-8.

(19) Parental Discipline: Instruction 5-16.

(20) Self-Defense: RCM 916(e); Instruction 5-2.

(21) Voluntary intoxication: RCM 916(l)(2), Instructions 5-12 and 5-2-6, NOTE 4.

5–2. SELF-DEFENSE GENERALLY AND USING THESE INSTRUCTIONS

The military judge must instruct on self-defense, *sua sponte*, when the issue has been raised by some evidence. The first five instructions (Instructions 5-2-1 through 5-2-5) contain basic self-defense instructions that apply in five distinct situations:

a. Homicide is charged or the assault in issue involves the use of deadly force, or a force likely to produce grievous bodily harm (Instruction 5-2-1).

b. Ordinary assault or battery not involving deadly force or a force likely to produce grievous bodily harm is in issue (Instruction 5-2-2).

c. Assault or assault consummated by a battery is in issue as a lesser included offense to an offense involving the use of deadly force or a force likely to produce grievous bodily harm (Instruction 5-2-3).

d. Homicide is charged and there is evidence that the death was an unintended result of the application of less than deadly force (Instruction 5-2-4).

e. The use of force to deter (Instruction 5-2-5).

Instruction 5-2-6 contains instructions on issues that occasionally arise in connection with self-defense (*e.g.*, opportunity to withdraw; mutual combat).

5–2–1. HOMICIDE OR ASSAULT AND/OR BATTERY INVOLVING DEADLY FORCE

The evidence has raised the issue of self-defense in relation to the offense(s) of (state the alleged offense(s)). (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

Self-defense is a complete defense to the offense(s) of (state the alleged offense(s)).

For self-defense to exist, the accused must have had a reasonable apprehension that death or grievous bodily harm was about to be inflicted on (himself)(herself) and (he)(she) must have actually believed that the force (he)(she) used was necessary to prevent death or grievous bodily harm.

In other words, self-defense has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on (himself)(herself). The test here is whether, under the same facts and circumstances present in this case, an

ordinary prudent adult person faced with the same situation would have believed that there were grounds to fear immediate death or serious bodily harm. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant. Second, the accused must have actually believed that the amount of force (he)(she) used was required to protect against death or serious bodily harm. To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors to consider in determining the accused's actual belief about the amount of force required to protect (himself)(herself). As long as the accused actually believed that the amount of force (he)(she) used was necessary to protect against death or grievous bodily harm, the fact that the accused may have used excessive force (or a different type of force than that used by the attacker) does not matter.

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the alleged offense(s)) (and) (the lesser included offense(s) of (state the lesser included offense(s) raised)), but also to the issue of self-defense. In

order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.

NOTE 1: <u>Grievous bodily harm</u>. The following definition may be given if the term has not yet been defined:

"Grievous bodily harm" means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

NOTE 2: <u>Reasonableness of apprehension of harm</u>. The ordinary objective standard used to determine whether apprehension of serious bodily harm or death was reasonable must be qualified if there is evidence of a special factor affecting the reasonableness of the apprehension (e.g., sex of the accused, age of the accused, or if the accused is a person who lacks sufficient intelligence to act as a normal prudent adult person). The requirement of reasonableness should be determined in light of these special factors.

NOTE 3: <u>Other instructions</u>. Instructions on additional issues in connection with self-defense should be given at this point when appropriate. Sample instructions on opportunity to retreat/presence of others, accused's state of mind, voluntary intoxication, and provocateur/mutual combatant are included in Instruction 5-2-6.

5–2–2. ASSAULT OR ASSAULT AND BATTERY INVOLVING OTHER THAN DEADLY FORCE

NOTE 1: Using this instruction. This instruction is distinguished from deadly force situations. When ordinary assault or battery is charged and deadly force is not employed, the standard of self-defense is different from a situation in which deadly force is employed. The accused must only apprehend some bodily harm, not death or grievous bodily harm. However, when the accused only apprehends some bodily harm, the accused is then limited in the force which the accused can legitimately use to defend himself, i.e., the accused may not use such force as would likely cause death or grievous bodily harm.

The evidence has raised the issue of self-defense in relation to the offense(s) of (state the alleged offense(s)). (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

Self-defense is a complete defense to the offense(s) of (state the alleged offense(s)).

For self-defense (to exist) (to be a defense to the lesser included offense(s) of (state the lesser included offense(s) raised)), the

accused must have had a reasonable belief that bodily harm was about to be inflicted on (himself)(herself) and (he)(she) must have actually believed that the force (he)(she) used was necessary to prevent bodily harm.

In other words, the defense of self-defense has two parts. First, the accused must have had a reasonable belief that physical harm was about to be inflicted on (him)(her). The test here is whether, under the same facts and circumstances in this case, any reasonably prudent person faced with the same situation, would have believed that (he)(she) would immediately be physically harmed. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant. Secondly, the accused must have actually believed that the amount of force (he)(she) used was required to protect (himself)(herself). To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors in determining the accused's actual belief about the amount of force required to protect (himself)(herself). In protecting (himself)(herself), the accused is not required to use the same

amount or kind of force as the attacker. However, the accused cannot use force which is likely to produce death or grievous bodily harm.

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the alleged offense(s)) (and) (to the lesser included offense(s) of (state the lesser included offense(s)) but also to the issue of self-defense. Therefore, in order to find the accused guilty of the offense of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.

NOTE 2: Grievous bodily harm. The following definition may be given if the term has not yet been defined:

"Grievous bodily harm" means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

NOTE 3: Reasonableness of apprehension of harm. The ordinary objective standard used to determine whether apprehension of serious bodily harm or death was reasonable must be qualified if there is evidence of a special factor affecting the reasonableness of the apprehension (e.g., sex of the accused, age of the accused, or if

the accused is a person who lacks sufficient intelligence to act as a normal prudent adult person). The requirement of reasonableness should be determined in light of these special factors.

NOTE 4: <u>Other instructions</u>. Instructions on additional issues in connection with self-defense should be given at this point when appropriate. Sample instructions on opportunity to retreat/presence of others, accused's state of mind, voluntary intoxication, and provocateur/mutual combatant are included in Instruction 5-2-6.

5–2–3. HOMICIDE OR AGGRAVATED ASSAULT WITH ASSAULT CONSUMMATED BY A BATTERY OR ASSAULT AS A LESSER INCLUDED OFFENSE

NOTE 1: Using this instruction. In some cases both standards of self-defense (deadly and non-deadly force) may be in issue. In such cases the military judge must carefully explain and distinguish both standards and the offenses to which they apply. The following may be used as a guide in such cases:

The evidence has raised the issue of self-defense in relation to the offense(s) of (state the alleged offense(s)). (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

Self-defense is a complete defense to the offense(s) of (state the alleged offense(s)).

For self-defense to exist, the accused must have had a reasonable apprehension that death or grievous bodily harm or some lesser degree of harm was about to be inflicted on (himself)(herself) and (he)(she) must have actually believed that the force (he)(she) used was necessary to prevent death or harm to (himself)(herself).

In other words, the defense of self-defense has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm or a lesser degree of harm was about to be inflicted on (himself)(herself). The test here is whether, under the same facts and circumstances present in this case, an ordinary prudent adult person faced with the same situation would have believed that there were grounds to fear immediate death or grievous bodily harm or some lesser degree of harm. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant. Second, the accused must have actually believed that the amount of force (he)(she) used was required to protect against death or the harm that (he)(she) reasonably apprehended.

If the accused reasonably apprehended that death or grievous bodily harm was about to be inflicted upon (himself)(herself), then (he)(she) was permitted to use any degree of force actually believed necessary to protect against death or grievous bodily harm. The fact that the accused used excessive force, if in fact you believe that, or that (he)(she) used a different type of force than that used by the attacker does not matter.

If the accused reasonably apprehended that some harm less than death or grievous bodily harm was about to be inflicted upon (his)(her) person, (he)(she) was permitted to use the degree of force actually believed necessary to prevent that harm. However, the accused could not use force which was likely to produce death or grievous bodily harm. The accused was not required to use the same amount or kind of force as the attacker.

To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors to consider in determining the accused's actual belief about the amount of force required to protect (himself)(herself).

If the accused reasonably apprehended that death or grievous bodily harm was about to be inflicted upon (himself)(herself), and if the accused believed that the force (he)(she) used was necessary to protect against death or grievous bodily harm, (he)(she) must be acquitted of the alleged offense(s) and all lesser included offenses.

(If the accused reasonably apprehended that some harm less than grievous bodily harm was about to be inflicted upon (himself)(herself), and if (he)(she) believed that the force used was necessary to prevent this harm, and such force was not likely to produce death or grievous bodily harm, the accused may not be convicted of any of these offenses including the lesser included offense(s) of (assault) (or) (assault consummated by a battery).)

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the alleged offense(s)) (and to the lesser included offense(s) of (state the lesser included offense(s) raised)), but also to the issue of self-defense. In order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.

NOTE 2: Grievous bodily harm. The below definition may be given if the term has not yet been defined:

"Grievous bodily harm" means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

NOTE 3: <u>Reasonableness of apprehension of harm</u>. The ordinary objective standard used to determine whether apprehension of serious bodily harm or death was reasonable must be qualified if there is evidence of a special factor affecting the reasonableness of the apprehension (e.g., sex of the accused, age of the accused, or if the accused is a person who lacks sufficient intelligence to act as a normal prudent adult person). The requirement of reasonableness should be determined in light of these special factors.

NOTE 4: <u>Other instructions</u>. Instructions on additional issues in connection with self-defense should be given at this point when appropriate. Sample instructions on opportunity to retreat/presence of others, accused's state of mind, voluntary intoxication, and provocateur/mutual combatant are included in Instruction 5-2-6.

5–2–4. DEATH OF VICTIM UNINTENDED—DEADLY FORCE NOT AUTHORIZED (SELF-DEFENSE)

NOTE 1: Using this instruction. Even if the accused was not entitled to use deadly force, self-defense will still require acquittal despite the death of the victim if: (1) the accused reasonably anticipated immediate bodily harm; (2) the accused believed the force actually used was necessary for self-protection; (3) deadly force was not used; (4) the death was unintended; and (5) the death was not a reasonably foreseeable consequence. The following instruction may be used as a guide in such cases:

In this case, there is evidence which indicates that the death of (state the name of the alleged victim) may have occurred as an unintended result of the accused's lawful use of force in defense of (himself)(herself). (Here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides.)

Self-defense is a complete defense to the death of (state the name of the alleged victim) if:

First, the accused had a reasonable belief that bodily harm was about to be inflicted on (himself)(herself);

Second, the accused actually believed that the force (he)(she) used was necessary to protect (himself)(herself);

Third, deadly force was not used by the accused;

Fourth, the death of (state the name of the alleged victim) was not intended by the accused; and

Fifth, the death of (state the name of the alleged victim) was not a reasonably foreseeable result of the accused's act.

The accused must have had a reasonable belief that bodily harm was about to be inflicted on (himself)(herself). The test here is whether, under the same facts and circumstances, any reasonably prudent person faced with the same situation, would have believed that there were grounds to anticipate immediate physical harm. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant.

If you are convinced beyond a reasonable doubt that the accused either did not fear immediate bodily harm or that the accused's fear

was not a reasonable one under the circumstances, the defense of self-defense does not exist.

In deciding the remaining elements of the defense of self-defense, you must determine whether the force used by the accused was proper. You are advised that a person who anticipates an assault may stand (his)(her) ground and resist force with force. In protecting (himself)(herself), a person is not required to use exactly the same type or amount of force used by the attacker. With the following principles in mind, you must decide whether the force used by the accused was legal.

The accused cannot use more force than (he)(she) actually believed was necessary to protect (himself)(herself). To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors in determining the accused's actual belief about the amount of force required to protect (himself)(herself).

Next, the accused must not have used force likely to produce death or grievous bodily harm.

Additionally, the accused must not have intended to cause the death of (state the name of the alleged victim).

Finally, the death of (state the name of the alleged victim) must not have been a reasonably foreseeable result of the force used by the accused.

If you are satisfied beyond a reasonable doubt that the accused exceeded one or more of these limitations I have described for you, the defense of self-defense does not exist.

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of (and the lesser included offenses of (state the lesser included offense(s) raised), but also to the issue of self-defense. In order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.

NOTE 2: <u>Grievous bodily harm</u>. The below definition may be given if the term has not yet been defined:

> "Grievous bodily harm" means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

NOTE 3: <u>Reasonableness of apprehension of harm</u>. The ordinary objective standard used to determine whether apprehension of serious bodily harm or death was reasonable must be qualified if there is evidence of a special factor affecting the reasonableness of the apprehension (e.g., sex of the accused, age of the accused, or if the accused is a person who lacks sufficient intelligence to act as a normal prudent adult person). The requirement of reasonableness should be determined in light of these special factors.

NOTE 4: <u>Other instructions</u>. Instructions on additional issues in connection with self-defense should be given at this point when appropriate. Sample instructions on opportunity to retreat/presence of others, accused's state of mind, voluntary intoxication, and provocateur/mutual combatant are included in Instruction 5-2-6.

5–2–5. EXCESSIVE FORCE TO DETER (SELF-DEFENSE)

NOTE 1: Using this instruction. An accused may threaten more force than can actually be used in self-defense (e.g., brandish a weapon to deter a simple assault), as long as the accused does not actually use the weapon or other means in a manner likely to produce death or grievous bodily harm.

There is evidence in this case that the accused (displayed) (brandished) (_____) the (state the object used) solely to defend (himself)(herself) by deterring (state the name of the alleged victim) rather than for the purpose of actually injuring (state the name of the alleged victim). (Evidence has been offered tending to show (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

A person may, acting in self-defense, in order to (frighten) (or) (discourage) an assailant, threaten more force than (he)(she) is legally allowed to actually use under the circumstances.

An accused who reasonably fears an immediate attack is allowed to ((display) (threaten the use of)) ((an ordinarily dangerous weapon) (an object likely to produce grievous bodily harm) (_____))

even though the accused does not have a reasonable fear of serious harm, as long as (he)(she) does not actually use the (weapon) (means) (_____) (or attempt to use it) in a manner likely to produce grievous bodily harm.

Whether the accused was using the (state the weapon or object concerned) as a deterrent, or was using it in a manner likely to cause death or grievous bodily harm, is for you to decide. Your determination rests on two factors. First, the accused must have reasonably and honestly believed that (state the name of the alleged victim) was about to inflict some bodily harm on the accused. The test here is whether, under the same facts and circumstances, a reasonably prudent adult (male) (female) faced with the same situation, would have believed that there were grounds to anticipate immediate physical harm. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant. Second, the accused must have intended to use, and must in fact have used, the weapon or means only as a deterrent and not in a manner likely to produce death or grievous bodily harm.

If you are satisfied beyond a reasonable doubt that the accused (displayed) (brandished) (used) (_____) the (state the weapon

or object in question) in a manner likely to produce death or grievous bodily harm, rather than merely threatening its use to deter (state the name of the alleged victim), the defense of self-defense does not exist.

The prosecution's burden of proof to establish the guilt of the accused applies to the issue of self-defense. In order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.

NOTE 2: Grievous bodily harm. The following definition may be given if the term has not yet been defined.

"Grievous bodily harm" means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

NOTE 3: Reasonableness of apprehension of harm. The ordinary objective standard used to determine whether apprehension of serious bodily harm or death was reasonable must be qualified if there is evidence of a special factor affecting the reasonableness of the apprehension (e.g., sex of the accused, age of the accused, or if the accused is a person who lacks sufficient intelligence to act as a normal prudent

adult person). The requirement of reasonableness should be determined in light of these special factors.

NOTE 4: Other instructions. Instructions on additional issues in connection with self-defense should be given at this point when appropriate. Sample instructions on opportunity to retreat/presence of others, accused's state of mind, voluntary intoxication, and provocateur/mutual combatant are included in Instruction 5-2-6.

NOTE 5: When accident may be in issue. If the victim was killed or seriously injured as an apparent result of the accused's display of the weapon, this may raise an issue of accident. Such an instruction (see Instruction 5-4, Accident) should be combined with the above.

5–2–6. OTHER INSTRUCTIONS (SELF-DEFENSE)

NOTE 1: Using this instruction. This instruction contains several instructions pertaining to self-defense. The headers to the NOTES provide information on when the instruction is appropriate.

NOTE 2: Self-defense—opportunity to withdraw—presence of others. The accused is not required to retreat when at a place the accused has a right to be. The presence or absence of an opportunity to withdraw may be a factor in deciding whether the accused acted in self-defense. The following instruction should be given when opportunity to withdraw or the presence of others is raised by the evidence.

There has been some evidence in this case concerning the accused's (ability) (or) (lack of ability) to leave (or move away) from (his)(her) assailant.

A person may stand (his)(her) ground when (he)(she) is at a place at which (he)(she) has a right to be. Evidence tending to show that the accused (had) (did not have) an opportunity to withdraw safely is a factor which should be considered along with all the other circumstances in deciding the issue of self-defense.

(You should also consider any evidence as to whether the accused knew that other persons who might have helped (him)(her) were (present) (in the immediate area) at the time of the incident.)

NOTE 3: <u>State of mind</u>. The state of mind instruction below should normally be given in conjunction with the above instruction.

The accused, under the pressure of a fast moving situation or immediate attack, is not required to pause at (his)(her) peril to evaluate the degree of danger or the amount of force necessary to protect (himself)(herself). In deciding the issue of self-defense, you must give careful consideration to the violence and rapidity, if any, involved in the incident.

NOTE 4: <u>Voluntary intoxication</u>. When there is evidence of prior use of intoxicants by the accused, the military judge may wish to give the following clarifying instruction. This instruction may be especially appropriate when voluntary intoxication is the subject of other instructions in the case.

There exists evidence that indicates that at the time of the offense alleged the accused may have been under the influence of (alcohol) (drugs).

(I (have previously instructed) (will later instruct) you on the relevance that intoxication has on the accused's (intent) (knowledge) (ability to premeditate) (_____) with regard to the offense(s) of (state the alleged offense(s)).

On the issue of self-defense alone, the accused's voluntary intoxication should not be considered in deciding whether the accused was in reasonable apprehension of (immediate death or grievous bodily harm) (an attack upon (himself)(herself)). Voluntary intoxication does not permit the accused to use any greater force than (he)(she) would believe necessary to use when sober.

NOTE 5: Provocateur—mutual combatant. One who intentionally provokes an assault, or voluntarily engages in mutual combat is not entitled to claim self-defense, although the right to self-defense may be regained by good faith withdrawal. The following instructions may be used, as appropriate, in conjunction with earlier instructions, when such issues are raised by the evidence. If any of the following instructions are given, either the instruction following NOTE 6, or that following NOTE 7, or both, is ordinarily required.

There exists evidence in this case that the accused may have been (a person who intentionally provoked the incident) (a person who voluntarily engaged in mutual fighting). A person who (intentionally

provoked an attack upon (himself)(herself)) (voluntarily engaged in mutual fighting) is not entitled to self-defense (unless (he)(she) previously withdrew in good faith).

A person has provoked an attack and, therefore, given up the right to self-defense if (he)(she) willingly and knowingly does some act toward the other person reasonably calculated and intended to lead to a fight (or a deadly conflict). Unless such act is clearly calculated and intended by the accused to lead to a fight (or a deadly conflict), the right to self-defense is not lost.

(A person may seek an interview with another in a non-violent way for the purpose of (demanding an explanation of offensive words or conduct) (demanding redress of a grievance or settlement of a claim) without giving up the right to self-defense. One need not seek the interview in a friendly mood. (The right to self-defense is not lost merely because the person arms (himself)(herself) before seeking the interview.))

NOTE 6: <u>Burden of proof—provocateur or mutual combatant issue</u>. Either the instruction following this NOTE or that following NOTE 7, or both, is ordinarily required if any Instruction in NOTE 5 is given.

The burden of proof on this issue is on the prosecution. If you are convinced beyond a reasonable doubt that the accused (intentionally provoked an attack upon (himself)(herself) so that (he)(she) could respond by (injuring) (killing) (state name of victim)) (voluntarily engaged in mutual fighting), then you have found that the accused gave up the right to self-defense. However, if you have a reasonable doubt that the accused (intentionally provoked an attack upon (himself)(herself)) (voluntarily engaged in mutual combat) then you must conclude that the accused retained the right to self-defense, and, then you must determine if the accused actually did act in self-defense.

NOTE 7: Withdrawal as reviving right to self-defense. The following instruction covers the burden of proof when there is an issue of withdrawal.

Even if you find that the accused (intentionally provoked an attack upon (himself)(herself)) (voluntarily engaged in mutual fighting), if the accused later withdrew in good faith and indicated to (his)(her) adversary a desire for peace, by words or actions or both, and if (state the name of the victim) (followed the accused and) revived the (conflict) (fight), then the accused was no longer (voluntarily engaged

in mutual fighting) (provoking an attack) and was entitled to act in self-defense.

If you have a reasonable doubt that the accused remained (a person provoking an attack) (a voluntary mutual combatant) at the time of the offense, you must find that the accused did not lose the right to act in self-defense, and, then, you must decide if the accused acted in self-defense.

REFERENCES:

(1) RCM 916(e), MCM.

(2) *See* the list of references at Instruction 5-1.

5–3–1. DEFENSE OF ANOTHER (HOMICIDE OR AGGRAVATED ASSAULT CHARGED; NO LESSER ASSAULTS IN ISSUE)

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on defense of another when it has been raised by some evidence. The following instruction, properly tailored, can be used when the accused is charged with homicide, or aggravated assault, and no lesser assaults are raised by the evidence. When ordinary assault or battery is charged or raised as a lesser included offense, use either Instruction 5-3-2 or 5-3-3, as appropriate.

The evidence has raised the issue of defense of another in relation to the offense(s) of (state the alleged offense(s)). (There has been some (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides). A person may use force in defense of another only if that other person could have lawfully used such force in defense of (himself)(herself) under the same circumstances. (Therefore, if (state name of person defended) was also (an aggressor) (intentionally provoked an attack) (a mutual combatant) then the accused could not lawfully use force in (his)(her) behalf (regardless of the accused's understanding of the situation).)

For defense of another to exist, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on the person defended, and, the accused must have actually believed that the force (he)(she) used was necessary to protect that person. In other words, defense of another has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on (state name of person defended). The test here is whether, under the same facts and circumstances, a reasonably prudent person, faced with the same situation, would have believed that death or grievous bodily harm was about to be inflicted. Second, the accused must have actually believed that the amount of force (he)(she) used was necessary to protect against death or grievous bodily harm. To determine the accused's actual belief as to the amount of force necessary, you must view the situation through the eyes of the accused. In addition to what was known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors to consider in determining (his)(her) actual belief as to the amount of force necessary to protect (state the name of person defended). (As long as the accused actually believed that the amount of force (he)(she) used was necessary to protect against

death or grievous bodily harm, the fact that the accused may have used such force (or a different type of force than that used by the attacker) does not matter.) The burden is on the prosecution to establish the guilt of the accused. Unless you are satisfied beyond a reasonable doubt that the accused did not act in defense of another, you must acquit the accused of the offense(s) of (_____).

NOTE 2: Other instructions. See Instructions 5-2-1 through 5-2-6, Self-Defense instructions, for additional instructions which, when properly tailored, maybe appropriate in an instruction on defense of another.

NOTE 3: Use of force in defense of property or to prevent a crime. See Instruction 5-7 for an instruction on use of force in protection of property, premises, or to prevent the commission of a crime.

REFERENCES: RCM 916(e)(5).

5–3–2. DEFENSE OF ANOTHER (ASSAULT OR ASSAULT AND BATTERY CHARGED)

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on defense of another when it has been raised by some evidence. When homicide or aggravated assault is the charged offense, do not use this instruction. Use Instruction 5-3-1, instead. If an assault other than aggravated assault is raised as a lesser included offense to a charged homicide or aggravated assault, Instruction 5-3-3, appropriately tailored, should be given.

The evidence has raised the issue of defense of another in relation to the offense(s) of (state the alleged offense(s)). (There has been some (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides). A person may use force in defense of another only if that other person could have lawfully used such force in defense of (himself)(herself) under the same circumstances. (Therefore, if (state name of person defended) was also (an aggressor) (intentionally provoked an attack) (a mutual combatant) then the accused could not lawfully use force in (his)(her) behalf (regardless of the accused's understanding of the situation).)

For defense of another to exist, the accused must have had a reasonable belief that bodily harm was about to be inflicted on the person defended, and, the accused must have actually believed that the force (he)(she) used was necessary to protect that person, and the force used by the accused must have been less than force likely to result in death or grievous bodily harm. In other words, defense of another has two parts. First, the accused must have had a reasonable belief that bodily harm was about to be inflicted on (state name of person defended). The test here is whether, under the same facts and circumstances, a reasonably prudent person, faced with the same situation, would have believed that bodily harm was about to be inflicted. Second, the accused must have actually believed that the amount of force (he)(she) used was necessary to protect against bodily harm, and the force used by the accused was not likely to cause death or grievous bodily harm. To determine the accused's actual belief as to the amount of force necessary, you must view the situation through the eyes of the accused. In addition to what was known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors to consider in determining (his)(her) actual belief as to the amount of force necessary to protect (state the name of person defended). (As

long as the accused actually believed that the amount of force (he)(she) used was necessary to protect against bodily harm, the fact that the accused may have used such force (or a different type of force than that used by the attacker) does not matter.)

In defending another person the accused is not required to use the same type or amount of force used by the attacker, but the accused cannot use force which is likely to produce death or grievous bodily harm.

The burden is on the prosecution to establish the guilt of the accused. Unless you are satisfied beyond a reasonable doubt that the accused did not act in defense of another, you must acquit the accused of the offense(s) of (_____).

NOTE 2: Other instructions. See Instructions 5-2-1 through 5-2-6, Self-Defense instructions, for additional instructions which, when properly tailored, may be appropriate in an instruction on defense of another.

NOTE 3: Use of force in defense of property or to prevent a crime. See Instruction 5-7 for an instruction on use of force in protection of property, premises, or to prevent the commission of a crime.

REFERENCES: RCM 916(e)(5).

5–3–3. DEFENSE OF ANOTHER (HOMICIDE OR AGGRAVATED ASSAULT CHARGED AND A LESSER ASSAULT RAISED AS A LESSER INCLUDED OFFENSE)

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on defense of another when it has been raised by some evidence. The following instruction, properly tailored, can be used when the accused is charged with homicide, or aggravated assault, and a lesser form of assault is also raised. When ordinary assault or battery is charged, use Instruction 5-3-2, not this instruction.

The evidence has raised the issue of defense of another in relation to the offense(s) of (state the alleged offense(s)). (There has been some (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides). A person may use force in defense of another only if that other person could have lawfully used such force in defense of (himself)(herself) under the same circumstances. (Therefore, if (state name of person defended) was also (an aggressor) (intentionally provoked an attack) (a mutual combatant) then the accused could not lawfully use force in (his)(her) behalf (regardless of the accused's understanding of the situation).)

For defense of another to exist, the accused must have had a reasonable belief that death or grievous bodily harm or some lesser degree of harm, was about to be inflicted on the person defended, and, the accused must have actually believed that the force (he)(she) used was necessary to protect that person.

In other words, defense of another has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm or a lesser degree of harm was about to be inflicted on (state name of person defended). The test here is whether, under the same facts and circumstances present in this case, a reasonably prudent person, faced with the same situation, would have believed that death or grievous bodily harm or some lesser degree of harm was about to be inflicted. Second, the accused must have actually believed that the amount of force (he)(she) used was necessary to protect against death or other harm.

If the accused reasonably apprehended that death or grievous bodily harm was about to be inflicted upon (state the name of the person defended), then (he)(she) was permitted to use any degree of force (he)(she) actually believed was necessary to protect against death or grievous bodily harm. The fact that the accused used excessive

force, if, in fact, you believe that, or that (he)(she) used a different type of force than that used by the attacker does not matter.

If the accused reasonably apprehended that some harm less than death or grievous bodily harm was about to be inflicted, (he)(she) was permitted to use the degree of force (he)(she) actually believed necessary to prevent that harm. However, (he)(she) could not use force which was likely to produce death or grievous bodily harm. The accused was not required to use the same amount or kind of force as the attacker.

To determine the accused's actual belief as to the amount of force necessary, you must view the situation through the eyes of the accused. In addition to what was known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors to consider in determining (his)(her) actual belief as to the amount of force necessary to protect (state the name of person defended).

If the accused reasonably believed that death or grievous bodily harm was about to be inflicted upon (state the name of the person defended), and if (he)(she) believed that the force (he)(she) used was

necessary to protect against death or grievous bodily harm, (he)(she) must be acquitted of the alleged offense(s) and all lesser included offenses.

If the accused reasonably apprehended that some harm less than grievous bodily harm was about to be inflicted upon (state the name of the person defended), and if (he)(she) believed that the force (he)(she) used was necessary to prevent this harm, and such force was not likely to produce death or grievous bodily harm, (he)(she) may not be convicted of any of these offenses, including the lesser included offense(s) of (assault) (or) (assault consummated by a battery).

The prosecution's burden to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the charged offense(s)) (and to the lesser included offense(s) of (state the lesser offense(s) raised)), but also to the issue of defense of another. Unless you are satisfied beyond a reasonable doubt that the accused did not act in defense of another, you must acquit the accused of the offense(s) of (_____).

NOTE 2: Other instructions. See Instructions 5-2-1 through 5-2-6, Self-Defense instructions, for additional instructions which, when properly tailored, may be appropriate in an instruction on defense of another.

NOTE 3: Use of force in defense of property or to prevent a crime. See Instruction 5-7 for an instruction on use of force in protection of property, premises, or to prevent the commission of a crime.

REFERENCES: RCM 916(e)(5).

5–4. ACCIDENT

NOTE 1: Using this instruction. Generally, the military judge must instruct, sua sponte, on the defense of accident when the issue has been raised by some evidence. The instruction following NOTE 2 is always given when accident is in issue. When accident has been raised concerning an offense requiring the accused's conduct to be intentional, willful, inherently dangerous, or culpably negligent, great care must be taken to explain how accident relates to the offense's required degree of culpability. In such cases, the instructions following NOTE 3 should be given. When proximate cause is in issue, an instruction may be necessary to explain why the accused's negligence could negate an accident defense but not be a proximate cause of the charged harm. The instructions following NOTE 4 accomplish this purpose. The military judge should consult NOTE 5 if the charged and lesser included offenses involve different degrees of culpability.

NOTE 2: Mandatory instruction. The following instruction is given in ALL cases where accident is in issue:

> The evidence has raised the issue of accident in relationship to the offense(s) of (state the alleged offense(s)). In determining this issue, you must consider all the relevant facts and circumstances (including, but not limited to: (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

Accident is a complete defense to the offense(s) of (state the alleged offense(s)).

If the accused was doing a lawful act in a lawful manner free of any negligence on (his)(her) part, and (an) unexpected (death) (bodily harm) (_____) occurs, the accused is not criminally liable. The defense of accident has three parts. First, the accused's (act(s)) (and) (or) (failure to act) resulting in the (death) (bodily harm) (_____) (state the name alleged victim) must have been lawful. Second, the accused must not have been negligent. In other words, the accused must have been acting with the amount of care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances. Third, the (death) (bodily harm) (_____) (state the name of the victim) must have been unforeseeable and unintentional.

The burden is on the prosecution to establish the guilt of the accused. Consequently, unless you are convinced beyond a reasonable doubt that the (death) (bodily harm) (_____) (state name of the victim) was not the result of an accident, the accused may not be convicted of (state the alleged offense(s)).

NOTE 3: <u>Intentional, willful, inherently dangerous, or culpably negligent act/failure to act</u>. When an intentional, willful, or inherently dangerous act or failure to act, or culpable negligence is an element, the military judge must instruct that while the members may have found the accused was negligent, simple negligence does not establish the degree of culpability required to find the accused guilty of the offense in issue. In such cases, the following should be tailored and given:

If you are satisfied beyond a reasonable doubt that the accused did not act with the amount of care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances, the defense of accident does not exist. However, this does not necessarily mean that the accused is guilty of (<u>state the alleged offense(s)</u>). To find the accused guilty of (this) (these) offense(s) the accused's conduct must have amounted to more than simple negligence. You will recall that to convict the accused of (<u>state the alleged offense(s)</u>), one of the elements the government must prove beyond a reasonable doubt is that the accused ((intentionally) (willfully)) (or) ((with) (by) (an inherently dangerous act evincing a wanton disregard for human life) (culpable negligence)) ((caused) (inflicted) (did)) ((kill) (killed) (grievous bodily harm) (bodily harm) (_____)) (<u>state name of the victim</u>).

(Simple negligence is the failure to act with the care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances. (Culpable negligence is a negligent (act) (or) (failure to act) accompanied by a gross, reckless, indifferent, wanton, or deliberate disregard for the foreseeable results to others.) (An act inherently dangerous to another is one that is characterized by heedlessness of the probable consequences of the act, indifference to the likelihood of death or great bodily harm, and clearly demonstrates a total disregard for the known probable results of death or great bodily harm.))

To summarize on this point, a finding of simple negligence will deprive the accused of the accident defense; however, simple negligence is not enough to find the accused guilty of the offense(s) of (state the alleged offense(s)).

NOTE 4: Relationship between proximate cause and defense of accident. An accused's negligence, or a greater degree of culpability, defeats the defense of accident. Nevertheless, the accused cannot be convicted unless the accused's conduct is a proximate cause of the death or bodily harm. When the issue of proximate cause is raised, the following should be tailored and given:

If you find the accused (committed an inherently dangerous act evincing a wanton disregard for human life) (was (culpably) negligent) and, thus, not protected from criminal liability by the defense of accident, you may not convict unless you find beyond a reasonable doubt that the (inherently dangerous act) (culpable) (negligence) was a proximate cause of the (death) (bodily harm inflicted) (_____) (state name of the victim).

Proximate cause means that the (death) (bodily harm) (_____) (state name of the victim) must have been the result of the accused's (inherently dangerous) (culpably) (negligent) (act) (failure to act). A proximate cause does not have to be the only cause, but it must be a direct or contributing cause which plays a material role, meaning an important role, in bringing about the (death) (bodily harm) (_____) (state name of the victim). If some other unforeseeable, independent, intervening event, which did not involve the accused, was the only cause which played any important part in bringing about the (death) (bodily harm upon) (_____) (state name of the victim), then the accused may not be convicted of the offense(s) of (state the alleged offense(s)).

The burden is on the prosecution to establish the guilt of the accused. Before the accused can be convicted of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the defense of accident either does not exist or has been disproved, and that the accused's (inherently dangerous) (culpably) (negligent) conduct was a proximate cause of the (death) (bodily harm) (_____) (state name of the victim).

NOTE 5: Different degrees of culpability raised by lesser included offenses. The military judge must be especially attentive in applying this instruction when lesser included offenses involve different degrees of culpability. The instructions following NOTES 3 and 4 may have to be tailored to apply to lesser included offenses. For example, if an accused is charged with unpremeditated murder, the evidence may raise the lesser included offenses of Article 118(3) murder, voluntary manslaughter, involuntary manslaughter, and negligent homicide. The degrees of culpability would then include a willful or intentional act, an inherently dangerous act, culpable negligence, and simple negligence.

REFERENCES:

(1) RCM 916(f).

(2) United States v. Tucker, 38 C.M.R. 349 (C.M.A. 1968); United States v. Hubbard, 33 C.M.R. 184 (C.M.A. 1963); United States v. Bull, 14 C.M.R. 53 (C.M.A. 1954).

5–5. DURESS (COMPULSION OR COERCION)

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on the issue of duress when it is raised by some evidence. Duress is not a defense to homicide. Generally, the defense of duress applies if the accused reasonably feared immediate death or great bodily harm to himself or another. The following instruction, appropriately tailored, may be appropriate in such cases:

The evidence has raised the issue of duress in relation to the offense(s) of (state the alleged offense(s)). Duress means compulsion or coercion. It is causing another person to do something against his/her will by the use of either physical force or psychological coercion. (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

To be a defense, the amount of duress used on the accused, whether physical or psychological, must have been sufficient to cause a reasonable fear that if (he)(she) did not commit the offense, (he)(she) (another) would be immediately killed or would immediately suffer serious bodily injury. The amount of coercion or force must have been sufficient to have caused a person of normal strength and

courage to give in. The fear which caused the accused to commit the offense(s) must have been fear of immediate death or immediate serious bodily injury, and not simply fear of injury to reputation or property. The threat and resulting fear must have continued throughout the commission of the offense(s). If the accused had a reasonable chance to avoid committing the offense(s) without subjecting (himself)(herself) (another family member) to the threatened danger, the defense of duress does not exist.

(You should consider here the opportunity, or lack of opportunity, the accused may have had to report the threat to the authorities, (and whether the accused reasonably believed that a report would protect (him)(her) (another) from the threatened danger).) The burden is on the prosecution to establish the accused's guilt beyond a reasonable doubt. Duress is a complete defense to the offense(s) of (state the alleged offense(s)). If you are convinced beyond a reasonable doubt that the accused did not act under duress, the defense of duress does not exist.

NOTE 2: Limitations of use of the defense. Military courts have held that the defense of duress may apply to escape from confinement or absence without authority offenses where the accused escapes or absents himself in order to avoid physical harm. See

United States v. Blair*, 36 C.M.R. 413 (1966). *See also United States v. Guzman*, 3 M.J. 740 (N.M.C.M.R. 1977). The Supreme Court has held that the defense of duress is not available to one who commits a continuing offense unless the offending activity (such as continued absence from custody) is terminated as soon as the circumstances compelling the illegal behavior have ceased to exist. *See United States v. Bailey*, 44 U.S. 394 (1980). When such an issue is raised, the preceding instructions should be appropriately tailored.

REFERENCES: RCM 916(h).

5–6. ENTRAPMENT

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on the issue of entrapment when there is some evidence that the suggestion or inducement for the offense originated with a government agent and some evidence exists that the accused was not predisposed to commit the offense. Military judges should err on the side of caution and give this instruction whenever there is some evidence the accused was not predisposed. Entrapment may be a defense even though the accused denies commission of the offense alleged. Each instruction should be carefully tailored with due regard to the particular facts of the case and any proposed instructions by counsel. In such cases, the military judge should instruct substantially as follows:

The evidence has raised the issue of entrapment in relation to the offense(s) of (state the alleged offense(s)). (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

Entrapment is a defense when government agents, or people cooperating with them, cause an innocent person to commit a crime which otherwise would not have occurred. The accused cannot be convicted of the offense(s) of (state the alleged offense(s)) if (he)(she) was entrapped.

An “innocent person” is one who is not predisposed or inclined to readily accept the opportunity furnished by someone else to commit the offense charged. It means that the accused must have committed the offense charged only because of inducements, enticements, or urging by representatives of the government. You should carefully note that if a person has the predisposition, inclination, or intent to commit an offense or is already involved in unlawful activity which the government is trying to uncover, the fact that an agent provides opportunities or facilities or assists in the commission does not amount to entrapment. You should be aware that law enforcement agents can engage in trickery and provide opportunities for criminals to commit an offense, but they cannot create criminal intent in otherwise innocent persons and thereby cause criminal conduct.

The defense of entrapment exists if the original suggestion and initiative to commit the offense originated with the government, not the accused, and the accused was not predisposed or inclined to commit the offense(s) of (state the alleged offense(s)). Thus, you must balance the accused’s resistance to temptation against the amount of government inducement. The focus is on the accused’s

latent predisposition, if any, to commit the offense, which is triggered by the government inducement.

(The latitude given the government in inducing the criminal act is considerably greater in contraband cases than would be permissible as to other crimes.) In deciding whether the accused was entrapped you should consider all evidence presented on this matter (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The prosecution's burden of proof to establish the guilt of the accused applies to the elements of the offense(s) of (state the alleged offense(s)) (and) the lesser included offense(s) of (state the lesser included offense(s) raised), but also to the issue of entrapment. In order to find the accused guilty, you must be convinced beyond a reasonable doubt that the accused was not entrapped.

NOTE 2: Relevant factors and predisposition. Relevant factors on the issue of entrapment may include the circumstances surrounding the alleged transaction (e.g., the nature and number of enticements by government agents to the accused or the accused's apparent willingness or reluctance to engage in the activity involved) as well as evidence of other acts of misconduct similar to those charged to establish

predisposition. The following cases might be helpful in tailoring instructions: Responding to advertisements for child pornography not entrapment, United States v. Tatum, 36 M.J. 302 (C.M.A. 1993); nine-year-old non-judicial punishment for sale of cocaine admissible to show predisposition, United States v. Rayford, 33 M.J. 747 (A.C.M.R. 1991); Knowing price of drugs and where they can be bought can be predisposition, United States v. Lubitz, 40 M.J. 165 (C.M.A. 1994) cert. denied 523 U.S. 1043; A 'ready response' may indicate predisposition, United States v. Bell, 38 M.J. 358 (C.M.A. 1993); Repeated requests do not in and of themselves constitute inducement, United States v. Howell, 36 M.J. 354 (C.M.A. 1993).

NOTE 3: "Due process" entrapment defense. Federal Circuit Courts of Appeals have recognized a due process entrapment defense when inducements of government agents area "shocking police abuse that have been 'outrageous, fundamentally unfair, and shocking to the universal sense of justice'." The due process entrapment defense would exonerate an accused who was predisposed. It is unclear whether the U.S. Court of Appeals for the Armed Forces has adopted this defense or only recognized the 'shocking' police practices on the issue of the propriety of the inducement. Equally unclear is whether this defense is one for the military judge to decide or a question of fact for the members. The unsettled nature of the law in this matter makes a definitive instruction inappropriate; but, military judges should be attentive to the issue. See United States v. Bell, 38 M.J.. 358 (C.M.A. 1993) and United States v. Lemaster, 40 M.J. 178 (C.M.A. 1994).

REFERENCES:

(1) R.C.M. 916(g).

(2) United States v. Howell, 36 M.J. 354 (C.M.A. 1993); United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982); United States v. Tatum, 36 M.J. 302 (C.M.A. 1992); United States v. Rayford, 33 M.J. 747 (A.C.M.R. 1991); United States v. Lubitz, 40 M.J. 165 (C.M.A. 1994) cert. Denied 523 U.S. 1043; United States v. Bell, 38 M.J. 358 (C.M.A. 1993); United States v. Lemaster, 40 M.J. 178 (C.M.A. 1994); United States v. Cooper, 33 M.J. 356 (C.M.A. 1991), upheld on reconsideration, 35 M.J. 417 (1992), cert. denied, 513 U.S. 985 (1993); and United States v. Harris, 41 M.J. 433 (1995).

5–7. DEFENSE OF PROPERTY

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on defense of property when it has been raised by some evidence. It should be noted, however, that this defense, likely does not apply to violations of the law of war. See Instruction 5-A-6 (which concerns defenses under the law of war that may apply to pre-capture offenses). Defense of property contemplates that a person is justified in using reasonable force to protect his real or personal property from trespass or theft, when the person reasonably believes that his property is in immediate danger of an unlawful interference, and that the use of such force is necessary to avoid the danger. Depending on the situation, reasonable force could also include the use of deadly force. The following instruction may be used:

The evidence has raised the issue of defense of property in relation to the offense(s) of (state the alleged offense(s)). (There has been (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).) Defense of property is a complete defense to the offense(s) of (state the alleged offense(s)).

For defense of property to exist, the accused must have had a reasonable belief that (his)(her) (real) (personal) property was in

immediate danger of (trespass) or (theft) and that (he)(she) must have actually believed that the force (he)(she) used was necessary to prevent the (trespass to) (theft of) (his)(her) (real) (personal) property.

In other words, the defense of property has two parts. First, the accused must have had a reasonable belief that (his)(her) (real) (personal) property was in immediate danger of (trespass) (theft). The test here is whether, under the same facts and circumstances as in this case, any reasonably prudent person, faced with the same situation, would have believed that (his)(her) property was in immediate danger of unlawful interference. Secondly, the accused must have actually believed that the amount of force (he)(she) used was required to protect (his)(her) property. To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors in determining the accused's actual belief about the amount of force required to protect (his)(her) property. No requirement exists for the accused to have requested that (state the name of the alleged victim) stop interfering with

(his)(her) property before resorting to force to protect (his)(her) property.

(In protecting (his)(her) property, the accused cannot use force which is likely to produce death or grievous bodily harm unless two factors exist: (1) the danger to the property actually must have been of a forceful, serious, or aggravated nature; and (2) the accused honestly believed the use of deadly force was necessary to prevent loss of the property.) The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense, but also to the issue of defense of property. In order to find the accused guilty of the offense(s) of (state the alleged offense(s)), you must be satisfied beyond a reasonable doubt that the accused did not act in defense of property.

NOTE 2: Possible application of self-defense instructions. If the accused's reasonable force in protection of his property is met with an attack upon the accused's own person, then the defense of self-defense may also be in issue, which could potentially give rise to the lawful use of deadly force. See the Self-Defense instructions (Instructions 5-2, 5-2-1, 5-2-2, and 5-2-3).

NOTE 3: Ejecting someone from the premises. A person, who is lawfully in possession or in charge of premises, and who requests another to leave whom he or she has a right to request to leave, may lawfully use as much force as is reasonably necessary to

remove the person, after allowing a reasonable time for the person to leave. The person who refuses to leave after being asked to do so, becomes a trespasser and the trespasser may not resist if only reasonable force is employed in ejecting him. United States v. Regalado, 33 C.M.R. 12 (C.M.A. 1963).

REFERENCES: United States v. Lee, 13 C.M.R. 57 (C.M.A. 1953); United States v. Gordon, 33 C.M.R. 489 (A.B.R. 1963).

5–8–1. OBEDIENCE TO ORDERS—UNLAWFUL ORDER

NOTE 1: Using this instruction. Use this instruction when the defense of obedience to an unlawful order is raised. Instruction 5-8-2 should be used when the defense of obedience to a lawful order is raised. Obedience to an order is a complete defense unless the order was illegal and the accused actually knew it was illegal or a person of ordinary sense and understanding would, under the circumstances, know the order was illegal. Whether the order in question was legal is an interlocutory question to be resolved by the military judge. In cases where the order is found to be illegal, the following may be useful as a guide in preparing an instruction:

The evidence has raised an issue of obedience to orders in relation to the offense(s) of (state the alleged offense(s)). In this regard, there has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides). An order to (state performance allegedly required by order(s)) (if you find such an order was given) would be an unlawful order. Obedience to an unlawful order does not necessarily result in criminal responsibility of the person obeying the order. The acts of the accused if done in obedience to an unlawful order are excused and carry no criminal responsibility unless the accused knew that the order was unlawful or

unless the order was one which a person of ordinary common sense, under the circumstances, would know to be unlawful.

You must first decide whether the accused was acting under (an) order(s) to (state performance allegedly required of accused). You should consider (summarize evidence and contentions of parties concerning whether an order was issued, and its terms, as appropriate).

If you are convinced beyond a reasonable doubt that the accused was not acting under orders to (state performance allegedly required of accused), then the defense of obedience to orders does not exist.

If you find that the accused was acting under order(s) you must next decide whether the accused knew the order(s) to be illegal. You must resolve this issue by looking at the situation subjectively, through the eyes of the accused. You should consider the accused's (age) (education) (training) (rank) (background) (experience) (_____). If you are convinced beyond a reasonable doubt that the accused actually knew the order(s) to be illegal, then the defense of obedience to orders does not exist. If you are not convinced beyond a reasonable doubt that the accused actually knew the

order(s) to be unlawful, you must then determine whether, under the same circumstances as are present in this case, a person of ordinary common sense would have known that the order(s) (was) (were) unlawful. In resolving this issue, you should consider (summarize evidence and contentions of parties concerning whether the orders was/were issued, and its/their terms, as appropriate). If you are convinced beyond a reasonable doubt that a person of ordinary common sense would have known that the order was unlawful, the defense of obedience to orders does not exist, even if the accused did not in fact know that the order was unlawful.

The burden of proof is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused was not acting pursuant to orders to (state performance allegedly required of accused), OR that the accused knew such order(s) to be unlawful, OR that a person of ordinary common sense would have known the order(s) to be unlawful, then the accused will not avoid criminal responsibility based on obedience to orders.

5–8–2. OBEDIENCE TO ORDERS—LAWFUL ORDER

NOTE: Using this instruction. Use this instruction when the defense of obedience to a lawful order is raised. Instruction 5-8-1 should be used when the defense of obedience to an unlawful order is raised. Obedience to a lawful order is an absolute defense. Factual issues might remain, such as whether the order was issued, or whether the accused was acting pursuant to that order. The military judge should instruct on such issues, sua sponte, when they arise. A sample instruction follows:

The evidence has raised an issue of obedience to orders in relation to the offense(s) of (state the alleged offense(s)). In this regard, there has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides). An order to (state the performance allegedly required by order(s)) is an absolute defense to the offense(s) of (state the alleged offense(s)), if the accused committed the act(s) charged in obedience to such an order. You must decide whether (such an order was given) (and) (whether the accused was acting pursuant to such an order at the time of the alleged offense(s)).

The prosecution must establish the guilt of the accused beyond a reasonable doubt. If you are convinced beyond a reasonable doubt

that the accused (had not received) (was not acting pursuant to) an order to (state the performance allegedly required by order(s)), the accused will not avoid criminal responsibility based on obedience to an order.

5–9–1. PHYSICAL IMPOSSIBILITY

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on the issue of physical impossibility if the issue is raised by some evidence. Physical inability (see Instruction 5-9-2) is distinguished from physical impossibility in that under the former it may have been possible for the accused to perform, but the accused chose not to perform because of his belief that he was not physically able to perform.

The evidence has raised an issue of physical impossibility in relation to the offense(s) of (state the alleged offense(s)). In this regard, there has been (evidence) (testimony) tending to show that the accused suffered from (describe injury, ailment, or disability) which [made it physically impossible for (him)(her) to (obey the order to _____) (perform)] [caused (him)(her) to _____]. (Here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides.)

If the accused's physical condition made it impossible for (him)(her) to [obey the order to _____) (perform_____)] [caused (him)(her) to _____], (his)(her) conduct is excusable. Physical impossibility is a defense if the physical condition was a proximate cause of the (failure to act) (act) charged. The physical condition is a

proximate cause if it is a direct cause or a material factor, meaning an important factor, contributing to the charged misconduct.

The burden of proof to establish the accused's guilt is on the prosecution. If you are convinced beyond a reasonable doubt that at the time of the charged offense(s) it was physically possible for the accused to (obey the order to _____) (perform _____) (refrain from _____), the defense of physical impossibility does not exist.

NOTE 2: <u>Physical inability also raised</u>. If physical inability has also been raised by the evidence, then the military judge must separately instruct on that defense, using Instruction 5-9-2. That instruction should be prefaced with the following instruction where both defenses are in issue:

If you are convinced beyond a reasonable doubt that it was physically possible for the accused to (_____), you must also consider whether (he)(she) was reasonably justified in not (_____) because of physical inability.

5–9–2. PHYSICAL INABILITY

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on the issue of physical inability if the issue is raised by some evidence. Physical inability is distinguished from physical impossibility in that under the former it may have been possible for the accused to perform, but the accused chose not to perform because of the accused's belief that he was not physically able to perform. Physical inability is a complete defense provided the accused had a reasonable belief that he was not physically able to perform.

The evidence has raised the issue of physical inability in relation to the offense(s) of (state the alleged offense(s)). In this regard there has been (evidence) (testimony) that the accused suffered from (describe injury, ailment, or disability) which (he)(she) (believed would be severely aggravated) (_____) if (he)(she) (obeyed the order to _____) (performed _____).

Physical inability will justify the accused's (failure) (refusal) to (comply with the order) (perform the duties of _____) (_____) if the (failure) (refusal) was reasonably justified in light of the nature and extent of the (injury) (ailment) (disability), its relation to what may have been required of the accused, and all the surrounding circumstances (including but not limited to (here the military judge

may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden of proof to establish the accused's guilt is upon the prosecution. If you are convinced beyond a reasonable doubt that at the time of the offense(s) charged the accused did not reasonably believe (he)(she) was justified in (failing) (refusing) to (carry out an order given by _____) (_____) because of physical inability, the defense of physical inability does not exist.

NOTE 2: Physical impossibility also raised. If both impossibility and inability are raised, give Instruction 5-9-1, Physical Impossibility, first.

5–10. FINANCIAL AND OTHER INABILITY

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on financial or other inability when the issue is raised by some evidence. The defense most frequently arises in cases where disobedience of an order or failure to perform some military duty is alleged. The following instruction is designed for cases in which the inability is financial. If the alleged inability is the result of other causes (except for physical causes, see Instructions 5-9-1 and 5-9-2), the following instruction should be appropriately modified:

The evidence has raised the issue of financial inability in relation to the offense(s) of (state the alleged offense(s)). (In this regard, there has been (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The inability of an accused through no fault of (his)(her) own to (comply with the terms of an order) (perform a military duty) is an absolute defense. If the accused was prevented from obeying the order to (_____) because of some circumstances which (he)(she) could not control, (his)(her) (failure to obey) (_____) is not a crime. Thus, if the (failure to obey) (_____) was because of the accused's financial condition, and if the condition was

a circumstance which (he)(she) could not control at the time, financial inability is a defense. However, to be a defense, the financial inability must not have been the accused's fault after (he)(she) had knowledge of the order to (_____). Additionally, the financial condition must have been of such nature that it could not be corrected by timely, reasonable, and lawful actions of the accused to obtain the necessary funds.

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that at the time of the offense(s) charged the accused was financially able to (_____), then the defense of financial inability does not exist.

5–11. IGNORANCE OR MISTAKE OF FACT OR LAW—GENERAL DISCUSSION

This is a general introduction to the defenses of ignorance or mistake and not an instruction.

An issue of ignorance or mistake of fact may arise in cases where any type of knowledge of a particular fact is necessary to establish an offense. This issue must be instructed upon, *sua sponte*, when raised by some evidence.

The standard for ignorance or mistake of fact varies with the nature of the elements of the offense involved. If the ignorance or mistake concerns an element of an offense involving specific intent (*e.g.*, desertion, larceny), willfulness (*e.g.*, willful disobedience of an order), knowledge (*e.g.*, assault upon a commissioned officer, failure to obey a lawful order), or premeditation, the ignorance or mistake need only exist in the mind of the accused. Generally, for crimes not involving specific intent, willfulness, knowledge, or premeditation, (*e.g.*, AWOL) ignorance or mistake must be both honest (actual) and reasonable. Extreme care must be exercised in using this test, however, as ignorance or mistake in some "general intent" crimes need only be honest to be a defense. (*See*, *e.g.*, Instruction 5-11-4, *Ignorance or Mistake in Drug Offenses*.) Moreover, in some "specific intent" crimes, the alleged ignorance or mistake may not go to the element requiring specific intent or knowledge, and thus may have to be both reasonable and honest. Consequently, the military judge must carefully examine the elements of the offense, affirmative defenses, and relevant case law, in order to determine what standard applies. See also Instruction 5-A-8 (providing an analogous discussion, with appropriate examples, in the law of war context).

Some elements of some offenses require no type of knowledge, such as the existence of a lawful general regulation, so that ignorance or mistake as to that fact is no defense. Also, if the alleged ignorance or mistaken belief is not one which would exonerate the accused if true, it is no defense. Some offenses require a special degree of prudence (*e.g.*, certain bad check or bad debt offenses, *see* Instruction 5-11-3), and ignorance or mistake standards must be adjusted accordingly. See also Instruction 5-A-8 (providing an analogous discussion, with appropriate examples, in the law of war context).

Ignorance or mistake of law is generally not a defense. However, when actual knowledge of a certain law or of the legal effect of certain known facts is necessary to establish an offense, ignorance or mistake of law or legal effect will be a defense. Also, such unawareness may be a defense to show the absence of a criminal state of mind when actual knowledge is not necessary to establish the offense. For example, an honest belief the accused was, under the law, the rightful owner of an automobile is a defense to larceny even if the accused was mistaken in that belief.

The following are the instructions relating to ignorance or mistake:

Instruction 5-11-1. Ignorance or mistake when specific intent or actual knowledge is in issue.

Instruction 5-11-2. Ignorance or mistake when only general intent is in issue.

Instruction 5-11-3. Ignorance or mistake in check offenses under Article 134.

Instruction 5-11-4. Ignorance or mistake in drug offenses.

5–11–1. IGNORANCE OR MISTAKE—WHERE SPECIFIC INTENT OR ACTUAL KNOWLEDGE IS IN ISSUE

NOTE: Using this instruction. The military judge should review Instruction 5-11, the general discussion on the area of ignorance or mistake of fact or law, prior to using this instruction.

The evidence has raised the issue of (ignorance) (mistake) on the part of the accused concerning (state the asserted ignorance or mistake) in relation to the offense(s) of (state the alleged offense(s)).

I advised you earlier that to find the accused guilty of the offense(s) of (state the alleged offense(s)), you must find beyond a reasonable doubt that the accused (had the specific intent to _____) (knew that _____) (_____).

If the accused at the time of the offense was (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake) then (he)(she) cannot be found guilty of the offense(s) of (state the alleged offense(s)).

The (ignorance) (mistake), no matter how unreasonable it might have been, is a defense. In deciding whether the accused was (ignorant of the fact)

(under the mistaken belief) that (state the asserted ignorance or mistake), you should consider the probability or improbability of the evidence presented on the matter.

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that at the time of the alleged offense(s) the accused was not (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake), then the defense of (ignorance) (mistake) does not exist.

5–11–2. IGNORANCE OR MISTAKE—WHEN ONLY GENERAL INTENT IS IN ISSUE

NOTE 1: Using this instruction. The military judge should review the general discussion on the area of ignorance or mistake of fact or law, in Instruction 5-11.

The evidence has raised the issue of (ignorance) (mistake) on the part of the accused concerning (state the asserted ignorance or mistake) in relation to the offense(s) of (state the alleged offense(s)).

The accused is not guilty of the offense of (_____) if:

(1) (he)(she) ((did not know) (mistakenly believed)) that (state the asserted ignorance or mistake) and

(2) if such (ignorance) (belief) on (his)(her) part was reasonable.

To be reasonable the (ignorance) (belief) must have been based on information, or lack of it, which would indicate to a reasonable person that _____. (Additionally, the (ignorance) (mistake) cannot be based on a negligent failure to discover the true facts.)

(Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused was not (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake), the defense of (ignorance) (mistake) does not exist. Even if you conclude that the accused was (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake), if you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused's (ignorance) (mistake) was unreasonable, the defense of (ignorance) (mistake) does not exist.

NOTE 2: <u>Voluntary intoxication in evidence</u>. If there is evidence the accused may have been under the influence of an intoxicant, the following instruction should ordinarily be given:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary prudent sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

e. REFERENCES:

(1) RCM 916(j).

(2) <u>United States v. True</u>, 41 M.J. 424 (1995).

5–11–4. IGNORANCE OR MISTAKE—DRUG OFFENSES

NOTE 1: Using this instruction. The military judge should review Instruction 5-11, the general discussion on the area of ignorance or mistake of fact or law, prior to using this instruction. Actual knowledge by the accused of the presence and nature of contraband drugs is necessary for a finding of guilty in possessory and other drug offenses. Ignorance can arise with respect to the presence of drugs, and mistake can be raised as to knowledge of their identity. Ignorance or mistake of the fact that a particular substance is contraband (i.e., that its possession, distribution, use, etc., was forbidden by law, regulation or order) is not a defense. When such issues are raised, the military judge must instruct upon them, sua sponte. A suggested guide follows:

The evidence has raised the issue of (ignorance) (mistake of fact) in relation to the offenses(s) of (state the alleged offense(s)). There has been (evidence) (testimony) tending to show that, at the time of the alleged offenses(s), the accused (did not know that (he)(she) had (state name of substance) (on (his)(her) person) (in (his)(her) belongings) (_____)) (did not know that (state name of substance) was in (his)(her) (food or drink) _____)) (was under the mistaken belief that the substance (he)(she) (used) (possessed) (distributed) (manufactured) (imported) (exported) (introduced) (_____) was _____) (was unaware that the substance (he)(she) (used) (possessed) (distributed)

(manufactured) (imported) (exported) (introduced) (_____) was _____).

(I advised you earlier that possession must be knowing and conscious.) If the accused was in fact (ignorant of (the presence of (state name of substance) in (his)(her) belongings) (_____)) (under the mistaken belief that the substance (he)(she) (used) (possessed) (distributed) (manufactured) (imported) (exported) (introduced) (_____) was _____), then (he)(she) cannot be found guilty of the offenses(s) of (state the alleged offense(s)). The accused's actual (unawareness) (erroneous belief), no matter how unreasonable, is a defense.

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's (age) (education) (experience) (_____), along with the other evidence in this case (including (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the guilt of the accused. If you are satisfied beyond a reasonable doubt that the accused was not

(ignorant of the fact that _____) (under the mistaken belief that _____), then the defense of (mistake) (ignorance) does not exist.

NOTE 2: <u>When the accused believed the substance to be a different contraband from the one charged</u>. The accused's belief that the substance possessed, used, distributed, etc., was a contraband substance different from the one charged is no defense. An instruction to this effect should be given when the evidence raises the issue as to whether the accused had such belief.

5–12. VOLUNTARY INTOXICATION

NOTE 1: Applicability of this instruction to general intent offense. When the ignorance or mistake of fact defense is raised with respect to a general intent offense or a general intent element, the government must prove the accused's belief was either not honest or not reasonable. In such cases, voluntary intoxication is not a factor for the members to consider in deciding whether the accused's belief was a reasonable one and Instruction 5-12 is not applicable. The instruction following Note 2 in instruction 5-11-2 maybe applicable.

NOTE 2: Using this instruction. Voluntary intoxication from alcohol or drugs may negate the elements of premeditation, specific intent, willfulness, or knowledge. The military judge must instruct, sua sponte, on this issue when it is raised by some evidence in the case. Instructions on the elements of any lesser included offenses placed into issue should be given in such instances, and the relationship of those offenses with the principal offense and the defense of intoxication explained. Voluntary intoxication not amounting to legal insanity is not a defense to 'general intent' crimes, nor is it a defense to unpremeditated murder. Voluntary intoxication, by itself, will not reduce unpremeditated murder to a lesser offense. When the below instruction is applicable, the instruction following Note 4 is also given. The instruction following Note 3 may be given.

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). I advised you earlier

that one of the elements of the offense(s) of (state the alleged offense(s)) is that the accused (entertained the premeditated design to kill) (had the specific intent to _____) (knew that _____). In deciding whether the accused (entertained such a premeditated design) (had such a specific intent at the time) (had such knowledge at the time) you should consider the evidence of voluntary intoxication.

The law recognizes that a person's ordinary thought process may be materially affected when (he)(she) is under the influence of intoxicants. Thus, evidence that the accused was intoxicated may, either alone, or together with other evidence in the case cause you to have a reasonable doubt that the accused (premeditated) (had the specific intent to _____) (knew _____).

On the other hand, the fact that a person may have been intoxicated at the time of the offense does not necessarily indicate that (he)(she) was unable to (premeditate) (have the specific intent to _____) (know that _____) because a person may be drunk yet still be aware at that time of (his)(her) actions and their probable results.

In deciding whether the accused (entertained a premeditated design to kill) (had the specific intent to _____ at the time of the offense) (knew that _____ at the time of the offense) you should consider the effect of intoxication, if any, as well as the other evidence in the case. (In determining the possible effect on the accused of (his)(her) prior use, if any, of intoxicants, you should consider (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

NOTE 3: Amnesia due to alcoholism or drug addiction raised. The following instructions may be appropriate when evidence has been presented concerning amnesia or the disease of alcoholism or drug addiction on the part of the accused at the time of the offense:

The inability to remember because of intoxication, sometimes called "alcoholic amnesia" or "blackouts," is not in itself a defense. It is, however, one of the factors you should consider when deciding the extent and the effect, if any, of the accused's intoxication.

(Alcoholism is recognized by the medical profession as a disease involving a compulsion toward intoxication. As a matter of law,

however, intoxication from drinking as a result of the compulsion of alcoholism is regarded as voluntary intoxication. Alcoholism is not in itself a defense and the above instructions apply whether or not the accused was an alcoholic.)

NOTE 4: <u>Concluding mandatory instruction</u>. The following instruction should be given as the concluding instruction on this defense, regardless of whether the instruction following NOTE 2 is given:

The burden of proof is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused in fact (entertained the premeditated design to kill) (had the specific intent to _____) (knew that _____), the accused will not avoid criminal responsibility because of voluntary intoxication.

REFERENCES:

(1) RCM 916(j).

(2) <u>United States v. True</u>, 41 M.J. 424 (1995).

5–13. ALIBI

NOTE: Normally the military judge has no duty to instruct on alibi, sua sponte, but the judge must do so upon a defense request when the issue is raised. The issue is raised when there is evidence which may tend to establish that the accused was not at the scene of the offense charged, unless it appears that the actual presence of the accused at a particular time or place is not essential for commission of the offense.

The evidence has raised the defense of alibi in relation to the offenses(s) of (state the alleged offense(s)). "Alibi" means that the accused could not have committed the offense(s) charged (or any lesser included offense) because the accused was at another place when the offenses(s) occurred. Alibi is a complete defense to the offense(s) of (state the alleged offense(s)). (In this regard, there has been evidence that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused was present at the time and place of the alleged offense, then the defense of alibi does not exist.

5–14. CHARACTER

If evidence of a pertinent good character trait of the accused has been introduced for its bearing on the general issue of guilt or innocence, the court should ordinarily be instructed on its effect, and must be so instructed upon request. Instruction 7-8, properly tailored, should be used to prepare a character instruction.

5–15. VOLUNTARY ABANDONMENT

NOTE: Using this instruction. Voluntary abandonment is an affirmative defense to a completed attempt. When raised by the evidence, the military judge must instruct sua sponte on this defense. The defense is raised when the accused abandons his effort to commit a crime under circumstances manifesting a complete and voluntary enunciation of his criminal purpose. The defense is available only when the accused abandons the intended crime because of a change of heart. Thus, where the abandonment results from fear of immediate detection or apprehension, the decision to await a better opportunity for success, or inability to commit the crime, the defense is not available. Similarly, where injury results from the accused's attempt, a subsequent abandonment is not a defense.

The defense of voluntary abandonment has been raised by the evidence with respect to the offense(s) of attempted (state the alleged offense(s)). In determining this issue, you must consider all the relevant facts and circumstances (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

If you are satisfied beyond a reasonable doubt of each of the elements of attempted (state the alleged offense(s)), you may not find

the accused guilty of this offense if, prior to the completion of (state the offense intended), the accused abandoned (his)(her) effort to commit that offense (or otherwise prevented its commission) under circumstances manifesting a complete and voluntary renunciation of the accused's criminal purpose.

Renunciation of criminal purpose is not voluntary if it is motivated in whole or in part by circumstances not present or apparent at the inception of the accused's attempt that increases the probability of detection or apprehension or makes more difficult the accomplishment of the criminal purpose. Renunciation is not voluntary if it is motivated in whole or in part by fear of immediate detection or apprehension, by the resistance of the victim, or by the inability to commit the crime.

Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time (or to transfer the criminal effort to another but similar objective or victim).

(When an attempted (murder) (_____) has proceeded to the extent that (injury) (offensive touching of another) (_____) occurs, voluntary abandonment is no longer a defense.) The burden

is on the prosecution to establish the accused's guilt beyond a reasonable doubt. Consequently, unless you are satisfied beyond a reasonable doubt that the accused did not completely and voluntarily abandon (his)(her) criminal purpose, you may not find the accused guilty of attempted (state the alleged offense(s).)

REFERENCES: United States v. Schoof, 37 M.J. 96 (C.M.A. 1993), United States v. Rios, 33 M.J. 436 (C.M.A. 1991), United States v. Byrd, 24 M.J. 286 (C.M.A. 1987), United States v. Collier, 36 M.J. 501 (A.F.C.M.R. 1992).

5–17. EVIDENCE NEGATING MENS REA

NOTE 1: Relationship between this instruction and the defense of lack of mental responsibility under Article 50a and RCM 916(k). Notwithstanding RCM 916(k)(1) and (2), evidence of a mental disease, defect, or condition is admissible if it is relevant to the elements of premeditation, specific intent, knowledge, or willfulness. Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988); United States v. Berri, 33 M.J. 337 (C.M.A. 1991).

NOTE 2: When to use this instruction. DO NOT use this instruction if the evidence has raised the defense of lack of mental responsibility. If the defense of lack of mental responsibility has been raised, use the instructions in Chapter 6 including, if applicable, Instruction 6-5, Partial Mental Responsibility. Use the instructions below when premeditation, specific intent, willfulness, or knowledge is an element of an offense, and there is evidence tending to establish a mental or emotional condition of any kind, which, although not amounting to lack of mental responsibility, may negate the mens rea element. The military judge has a sua sponte duty to instruct on this issue. When such evidence has been admitted, the following should be given:

The evidence in this case has raised an issue whether the accused had a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____) and the required state of mind with respect to the offense(s) of (state the alleged offense(s)).

You must consider all the relevant facts and circumstances (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides, to include any expert evidence admitted).

One of the elements of (this) (these) offense(s) is the requirement of (premeditation) (the specific intent to _____) (that the accused knew that _____) (that the accused's acts were willful (as opposed to only negligent)) (_____).

An accused, because of some underlying (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____), may be mentally incapable of (entertaining (the premeditated design to kill) (specific intent to _____)) (having the knowledge that _____) (acting willfully) (_____).

You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____) of such consequence and degree as to deprive

(him)(her) of the ability to (act willfully) (entertain the (premeditated design to kill) (specific intent to _____)) (know that _____) (_____).

The burden of proof is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Unless in light of all the evidence you are satisfied beyond a reasonable doubt that the accused, at the time of the alleged offenses(s) was mentally capable of (entertaining (the premeditated design to kill) (a specific intent to _____)) (knowing that _____) (acting willfully in _____) (_____), you must find the accused not guilty of (that) (those) offense(s).

NOTE 3: <u>Distinguishing mens rea negating evidence and a lack of mental responsibility defense</u>. If there is a need to explain that mens rea negating evidence should not be confused with the defense of lack of mental responsibility (Article 50a), the following may be given:

This evidence was not offered to demonstrate or refute whether the accused is mentally responsible for (his)(her) conduct. Lack of mental responsibility, that is, an insanity defense, is not an issue in this case. (What is in issue is whether the government has proven beyond a

reasonable doubt that the accused had the ability to (act willfully) (entertain the (premeditated design to kill) (specific intent to _____)) know that _____) (_____).)

NOTE 4: Expert witnesses. When there has been expert testimony on the issue, Instruction 7-9-1, Expert Testimony, should be given.

NOTE 5: Evaluating testimony. Evidence supporting or refuting the existence of mens rea negating evidence may be clear and the members may not need any special instructions on how the evidence should be evaluated. If additional instructions may be helpful in evaluating the evidence, the following may be given:

You may consider evidence of the accused's mental condition before and after the alleged offense(s) of (state the alleged offense(s)), as well as evidence as to the accused's mental condition on the date of the alleged offense. The evidence as to the accused's condition before and after the alleged offense was admitted for the purpose of assisting you to determine the accused's condition on the date of the alleged offense(s).

(You have heard the evidence of (psychiatrists) (and) (psychologists) (and) (_____) who testified as expert witnesses. An expert in a particular field is permitted to give (his)(her) opinion. In this

connection, you are instructed that you are not bound by medical labels, definitions, or conclusions. Whether the accused had a (mental condition) (_____) and the effect, if any, that (condition) (_____) had on the accused, must be determined by you.)

(There was (also) testimony of lay witnesses with respect to their observations of the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts. In weighing the testimony of such lay witnesses, you may consider the circumstances of each witness, their opportunity to observe the accused and to know the facts to which the witness has testified, their willingness and capacity to expound freely as to their observations and knowledge, the basis for the witness' opinion and conclusions, and the time of their observations in relation to the time of the offense(s) charged.)

(You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into

account the extent of the witness' observation of the accused and the nature and length of time of the witness' contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a mental condition and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.)

(You are not bound by the opinions of (either) (expert) (or) (lay) witness(es). You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight you believe it is fairly entitled to receive.)

NOTE 6: <u>Lesser included offenses</u>. When there are lesser included offenses raised by the evidence that do not contain a mens rea element, the military judge may explain that the mens rea negating evidence instruction is inapplicable. The following may be helpful:

Remember that (<u>state the lesser included offense raised</u>) is a lesser included offense of (<u>state the alleged offense(s)</u>). This lesser included offense does not contain the element that the accused (had the premeditated design to kill) (specific intent to _____) (knew

that _____) (willfully _____) (_____). In this regard, the instructions I just gave you with respect to the accused's mental ability to (premeditate) (know) (form the specific intent) (act willfully) (_____) do not apply to the lesser included offense of (state the lesser included offense raised).

NOTE 7: Voluntary intoxication. When there is evidence of the accused's voluntary intoxication, Instruction 5-12, Voluntary Intoxication, is ordinarily applicable with respect to elements of premeditation, specific intent, willfulness, or knowledge.

5–18. CLAIM OF RIGHT

NOTE 1: Using this instruction. Although the claim of right defense is not listed in the Manual for Courts-Martial, the courts have acknowledged that it constitutes an affirmative defense in some cases involving a wrongful taking, withholding, or obtaining, e.g., robbery, larceny, or wrongful appropriation. The military judge must instruct, sua sponte, on the issue when it is raised by some evidence. The claim of right defense arises in two different scenarios where an accused typically takes property under 'self-help': (1) when a person takes, withholds, or obtains property under a claim of right either as security for, or in satisfaction of, a debt (see Note 2); or (2) when a person takes, withholds, or obtains property under an honest belief that the property belongs to him (see Note 3).

NOTE 2: Claim of right as security for, or in satisfaction of, a debt. The claim of right defense where an accused takes, withholds, or obtains property from another for the purposes of obtaining security or satisfying a debt exists when three criteria co-exist: (1) the accused takes, withholds, or obtains property under an honest belief that the accused is entitled to the property as security for, or in satisfaction of, a debt owed to the accused; (2) such taking, withholding, or obtaining is based upon a prior agreement between the accused and the alleged victim providing for the satisfaction or the security of the debt by the use of self-help; and (3) the taking, withholding, or obtaining is done in the open, not surreptitiously. The following instruction may be used as a guide in such circumstances:

The evidence has raised the defense of claim of right in relation to the offense(s) of (state the alleged offense(s)) (and the lesser included offenses(s) of (state the lesser included offense(s) raised) (in that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

A (taking) (withholding) (obtaining) of property belonging to another is not wrongful if it done under claim of right. The defense of claim of right exists when three criteria co-exist: (1) the accused and (state the name of the victim) had a prior agreement that permitted the accused to (take) (withhold) (obtain) the property (to satisfy a debt) (as security for a debt); (2) the accused (took) (withheld) (obtained) the property (to satisfy a debt) (as security for a debt) in accordance with the prior agreement, and (3) the (taking) (withholding) (obtaining) by the accused was done in the open, not surreptitiously or by stealth.

In deciding whether the defense of claim of right applies in this case, you should consider all the evidence presented on the matter. The burden is on the prosecution to establish the accused's guilt beyond a reasonable doubt. You must be convinced beyond a reasonable doubt that the accused did not act under a claim of right before you

can convict the accused of (state the name of the offenses and lesser included offenses to which claim of right applies).

NOTE 3: Claim of right under an honest belief of ownership not involving satisfaction of, or security for, a debt. The claim of right defense where an accused takes, withholds, or obtains property from another not involving satisfaction of, or security for a debt exits where the accused honestly believes (1) that he has a claim of ownership to the property which he has taken, withheld, or obtained and (2) claim of ownership is equal to or greater than the right of the one from whose possession the property is taken, withheld, or obtained. In this situation, the accused's belief, even if mistaken, in ownership of the property may negate the wrongfulness of the taking. The following instruction may be used as a guide in such circumstances:

The evidence has raised the defense of claim of right in relation to the offense(s) of (state the alleged offense(s)) (and the lesser included offenses(s) of (state the lesser included offense(s) raised) (in that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

I advised you earlier that to find the accused guilty of the offense(s) of (state the alleged offense(s)), you must find beyond a reasonable doubt that the accused's (taking) (withholding) (obtaining) of the (property) (_____) was wrongful. If the accused at the time of the offense

was under the honest belief, even if mistaken, that (he)(she) ((owned the property) (had the authority to (take) (withhold) (obtain) the property)) and had, at least the same or, a greater right of possession in the property than the person from whom the property was (taken) (withheld) (obtained), then (he)(she) cannot be found guilty of the offense(s) of (state the alleged offense(s)).

The accused's honest belief, even if the accused was mistaken in that belief, is a defense. In deciding whether the accused was under the honest belief that (he)(she) ((owned the property) (had the authority to (take) (withhold) (obtain) the property)) and had, at least the same or, a greater right of possession in the property than the person from whom the property was (taken) (withheld) (obtained), you should consider the probability or improbability of the evidence presented on the matter. You should consider the accused's (age) (education) (experience) (the prior agreement existing between the accused and _____) (the circumstances of the property leaving the accused's possession) (the accused's testimony) (the accused's credibility) (_____) along with all other evidence on this issue.

The burden is on the prosecution to establish the guilt of the accused.

If you are convinced beyond a reasonable doubt that at the time of

the alleged offense(s) the accused did not have the honest belief that: (1) (he)(she) ((owned the property) (had the authority to (take) (withhold) (obtain) the property)) and (2) had at least the same or a greater right of possession in the property than the person from whom the property was (taken) (withheld) (obtained), then the defense of claim of right does not exist.

NOTE 4: <u>Taking in excess of what is due</u>. When the evidence raises the claim of right defense and that the accused may have taken, withheld, or obtained more than that to which the accused was entitled, the following should be given in conjunction with NOTE 2:

Under the defense of claim of right, the accused may only (take) (withhold) (obtain) that amount of (property) (money) (_____) reasonably approximating that (to) which the accused honestly thought ((he)(she) was entitled) (was the amount of the debt owed to the accused).

If you find that the value of the (property) (money)(_____) alleged to have been (taken) (withheld) (obtained) by the accused exceeded the value of the (property) (money) (_____) to which the accused honestly believed (he)(she) was entitled, you may

infer that the accused had the intent to wrongfully (take) (withhold) (obtain) the amount in excess of (that which (he)(she) was entitled) (the debt owed to the accused). The drawing of this inference is not required. If you conclude that the accused had the intent to wrongfully (take) (withhold) (obtain) the amount in excess of (that to which (he)(she) was entitled) (the debt owed to the accused), your findings must reflect that the wrongful (taking) (withholding) (obtaining) was only as to the (amount) (property) (_____) that was in excess of the amount to which the accused was entitled.

NOTE 5: <u>Claim of Right defense--aiding or conspiring with another to act under a claim of right</u>. The defense of claim of right is also available to an accused who assists or conspires with another in taking property when the accused honestly believes that the person being helped has a claim of right. It is the bona fide nature of the accused's belief as to the existence of the claim of right by the person being helped, and not the actual legitimacy of the debt or claim, that is in issue. These instructions must be tailored when the accused is not the one who has the claim of right.

NOTE 6: <u>Robbery and other offenses where larceny or wrongful appropriation is a component</u>. Because robbery is a compound offense combining larceny and assault, if the claim of right issue arises in a robbery case, the defense of claim of right may negate the wrongfulness of the taking, but it is not a defense to the assault component. In such cases, the military judge must ensure that the members are aware that the defense exists to robbery and, if in issue, its lesser included offense of larceny. It will

not, however, apply to the lesser included offense of assault. The defense of claim of right also applies to other offenses where larceny or wrongful appropriation is a component of the charged offense, e.g., burglary with intent to commit larceny, or housebreaking with the intent to commit larceny or wrongful appropriation.

NOTE 7: Claim of right to contraband. The defense of claim of right does not apply when an accused has no legal right to possess the property to which the accused asserts a claim of right, e.g., illegal drugs. The defense also does not exist when the accused takes under a purported claim of right the value of the contraband property. United States v. Petrie, 1 M.J. 332 (C.M.A. 1976).

NOTE 8: Mistake of Fact. The military judge must be alert to evidence that the accused had a mistaken belief concerning the amount of the debt the accused believed the victim owed, or concerning the value of the property. In such cases, a tailored version of Instruction 5-11, Mistake of Fact, may be appropriate. The accused's belief need only be honest; it need not be reasonable.

REFERENCES: United States v. Smith, 8 C.M.R. 112 (C.M.A. 1953); United States v. Kachougian, 21 C.M.R. 276 (C.M.A. 1956); United States v. Dosal-Maldonado, 31 C.M.R. 28 (C.M.A. 1961); United States v. Eggleton, 47 C.M.R. 920 (C.M.A. 1973); United States v. Smith, 14 M.J. 68 (C.M.A. 1982); United States v. Birdsong, 40 M.J. 606 (A.C.M.R. 1994); United States v. Gunter, 42 M.J. 292 (1995); United States v. Jackson, 50 M.J. 868 (Army Ct. Crim. App. 1999).

5–19. LACK OF CAUSATION, INTERVENING CAUSE, OR CONTRIBUTORY NEGLIGENCE

NOTE 1: General. Some offenses require a causal nexus between the accused's conduct and the harm that is the subject of the specification. For example, if the accused's omission is alleged to have suffered the loss of military property, the prosecution must prove beyond a reasonable doubt that the omission caused the loss. Other offenses may also raise this issue, e.g. homicides, hazarding a vessel. When raised by some evidence, the military judge must instruct, sua sponte, on proximate cause, joint causes, intervening cause, and contributory negligence. When a Benchbook instruction on a punitive article does not include such instructions, the following instructions may be used with appropriate tailoring.

NOTE 2: Using this instruction. If causation is in issue, the military judge must instruct that the accused's conduct must be a proximate cause of the alleged harm.

a. If there is no evidence that there was an intervening, independent cause and no evidence that anyone other than the accused had a role in the alleged harm, give the instructions following NOTE 3.

b. If there is evidence that an independent, intervening event might have been a proximate cause of the alleged harm, or that anyone other than the alleged victim and accused had a role in the alleged harm, give the instructions following NOTE 4. That instruction must be tailored depending on whether there is evidence of an

independent, intervening cause (NOTE 5) or another had a role in the alleged harm (NOTE 6), or both.

c. If contributory negligence of the alleged victim is in issue, give either the instructions following NOTES 3 or 4, as appropriate and also the instructions following NOTE 7.

NOTE 3: <u>Proximate cause in issue; intervening cause or acts or omissions of someone other than the accused NOT in issue</u>.

To find the accused guilty of the offense(s) of (<u>state the alleged offense(s)</u>), you must be convinced beyond a reasonable doubt that the accused's (conduct) ((willful) (intentional) (inherently dangerous) act) (omission)) ((culpable) negligence)) (_____) was a proximate cause of the (injury to _____) (loss of _____) (destruction of _____) (damage to _____) (grievous bodily harm to _____) (death of _____) (_____). This means that the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____) must have been the natural and probable result of the accused's (conduct) (act) (omission) (negligence) (_____). A proximate cause does not have to be the only cause, nor must it be the immediate cause. However, it must be a direct or contributing cause

that plays a material role, meaning an important role, in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____).

In determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause, you must consider all relevant facts and circumstances, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to prove proximate cause. Unless you are satisfied beyond a reasonable doubt that the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the alleged harm, you may not find the accused guilty of the offense(s) of (state the alleged offense(s)).

NOTE 4: Proximate cause in issue; independent, intervening cause and/or acts or omissions of others in issue.

To find the accused guilty of the offense(s) of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that

the accused's (conduct) ((willful) (intentional) (inherently dangerous) act) (omission)) ((culpable) negligence)) (_____) was a proximate cause of the (injury to _____) (loss of _____) (destruction of _____) (damage to _____) (grievous bodily harm to _____) (death of _____) (_____). This means that the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____) must have been the natural and probable result of the accused's (conduct) (act) (omission) ((culpable) (negligence)) (_____). A proximate cause does not have to be the only cause, nor must it be the immediate cause. However, it must be a direct or contributing cause that plays a material role meaning an important role, in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____).

NOTE 5: <u>Intervening cause</u>. If intervening cause, give the following instruction:

If some other unforeseeable, independent, intervening event that did not involve the accused was the only cause that played any important part in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____), then the accused's

(conduct) (act) (omission) (negligence) (_____) was not the proximate cause of the alleged harm.)

NOTE 6: <u>More than one contributor to proximate cause</u>. If there was more than one contributor, give the following instruction:

(In addition) It is possible for the (conduct) (act) (omission) (negligence) (_____) of two or more persons to contribute each as a proximate cause of the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____). If the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the alleged harm, the accused will not be relieved of criminal responsibility because some other person's (conduct) (act) (omission) (negligence) (_____) was also a proximate cause of the alleged harm. An (act) (omission) is a proximate cause of the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____) even if it is not the only cause, as long as it is a direct or contributing cause that plays a material role, meaning an important role, in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____).

In determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause and the role, if any, of (other events) (or) (the acts or omissions of another), you must consider all relevant facts and circumstances, (including, but not limited to, (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to prove proximate cause. Unless you are satisfied beyond a reasonable doubt that the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the alleged harm as I have defined that term for you, you may not find the accused guilty of the offense(s) of (state the alleged offense(s)).

You are reminded that to find the accused's (conduct) (act) (omission) (negligence) (_____) to be a proximate cause also requires you to find beyond a reasonable doubt that (any other intervening, independent event that did not involve the accused) (and) (the (act) (conduct) of another) (was) (were) not the only cause(s) that played any material role, meaning an important role, in

bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____).

NOTE 7: <u>Contributory negligence</u>. If there is evidence that the victim of an injury or death may have been contributorily negligent, the following instruction should be given. The military judge should consider whether there are situations other than homicide, assault, or injury in which contributory negligence can be a defense:

There is evidence raising the issue of whether the (<u>name of person(s) allegedly harmed/killed</u>) failed to use reasonable care and caution for (his)(her) own safety. If the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the (injury) (death), the accused is not relieved of criminal responsibility because the negligence of (<u>name of person(s) allegedly harmed/killed</u>) may have contributed to (his)(her) own (injury) (death). The conduct of the (injured) (deceased) person should be considered in determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the (injury) (death). (Conduct) (An act) (An omission) (Negligence) is a proximate cause of (injury) (death) even if it is not the only cause, as long as it is a direct or contributing cause that plays a material role, meaning an important role, in bringing about the (injury) (death). (An act) (An

omission) (Negligence) is not a proximate cause if some other unforeseeable, independent, intervening event, which did not involve the accused's conduct, was the only cause that played any important part in bringing about the (injury) (death). If the negligence of (name of victim) looms so large in comparison with the (conduct) (act) (omission) (negligence) (_____) by the accused that the accused's conduct should not be regarded as a substantial factor in the final result, then the conduct of (name of victim) is an independent, intervening cause and the accused is not guilty.

Finding the accused's (conduct) (act) (omission) (negligence) (_____) to be the proximate cause also requires you to find beyond a reasonable doubt that the (act) (conduct) of the alleged victim was not the only cause that played any material role, meaning an important role, in bringing about the (injury) (death).

NOTE 8: Relationship to accident defense. The evidence that raises lack of causation, intervening cause, or contributory negligence may also raise the defense of accident. See Instruction 5-4, Accident.

NOTE 9: Different degrees of culpability raised by lesser included offenses. The military Judge must be especially attentive in applying this instruction when lesser included offenses involve different degrees of culpability. The instructions may have to be

tailored differently for certain lesser included offenses. For example, if an accused is charged with unpremeditated murder, the evidence may raise the lesser included offenses of Article 118(3) murder, voluntary manslaughter, involuntary manslaughter, and negligent homicide. The respective degrees of culpability would then include an intentional act or omission, an inherently dangerous act, an intentional act or omission, culpable negligence, and simple negligence.

REFERENCES: United States v. Lingenfelter, 30 M.J. 302 (C.M.A. 1990); United States v. Reveles, 41 M.J. 388 (1995); United States v. Taylor, 44 M.J. 254 (1996); United States v. Cooke, 18 M.J. 152 (C.M.A. 1984); United States v. Moglia, 3 M.J. 216 (C.M.A. 1977); United States v. Romero, 1 M.J. 227 (C.M.A. 1975); United States v. Klatil, 28 C.M.R. 582(A.B.R. 1959).

Chapter 5-A

DEFENSES UNDER THE LAW OF WAR

5–A–1. GENERAL INFORMATION ABOUT INSTRUCTIONS IN THIS CHAPTER

a. The defenses in Subchapter 5-A are the defenses under the law of war and may be applicable in a trial by general court-martial of EPWs for pre-capture criminal offenses under the LOW.

b. *Defenses in trials by Military Commission.* The pattern instructions for defenses in subchapters 5-A, are also applicable in trials by military commission conducted under Military Order of 13 November 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (16 Nov. 2001) (President's Military Order); Military Commission Order No. 1 (21 Mar. 2002) (MCO 1). The Military Commission Orders and Instructions do not enunciate defenses that may apply to specific offenses. Rather, Military Commission Instruction 2 § 4(B) states simply that an accused may raise any defense that is available under the law of armed conflict and that defenses may include self defense, mistake of fact, and duress. Further, MCI 2 provides that it is the accused's burden to go forward with evidence of an applicable defense. Once the defense raises an applicable defense (aside from lack of mental responsibility), the burden shifts to the prosecution to establish beyond a reasonable doubt that the defense does not apply.

c. As in Chapter 3, instructional language in Subchapter 5-A which follows a note is to be given only when the note applies to the facts and circumstances of the offense.

5–A–2. DEFENSE OF SELF

***NOTE 1**: The instruction for defense of self, therefore, is patterned after Article 31(1)(c) of the Rome Statute of the International Criminal Court (ICC), which is based on customary international law. **See** Geert-Jan G.J. Knoops, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW at 84-85 (explaining that self defense is recognized in customary international law and has developed into a "concept in the area of international criminal law war tribunals"; noting also that ICC Statute is based on this customary rule).*

The evidence has raised the issue of self-defense in relation to the offense(s) of (state the alleged offense(s)). (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

Self-defense is a complete defense to the offense(s) of (state the alleged offense(s)).

For self-defense to exist, the accused must have acted reasonably to defend (himself)(herself) against an immediate and unlawful use of force. Further, the accused must have done so in a manner that is proportional to the degree of danger presented.

NOTE 2: Regarding self defense, customary international law, as reflected in Article 31(1)(c) of the ICC Statute, applies an objective standard for perceived danger and use of force. See Geert-Jan G.J. Knoops, DEFENSES IN CONEMPORARY INTERNATIONAL CRIMINAL LAW at 85.

In other words, self-defense has two parts. First, the accused must have acted reasonably to defend (himself)(herself) from an immediate and unlawful use of force. The test here is whether, under the same facts and circumstances present in this case, an ordinary prudent adult person faced with the same situation would have believed that there were grounds to fear immediate death or serious bodily harm and would have reacted similarly in defending (himself)(herself). Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant. Secondly, the accused must have used only such force that was proportional to the degree of danger presented. Again, the test here is objective. That is, whether under the same facts and circumstances as in this case, any reasonably prudent person, faced with the same situation, would have defended (himself)(herself) with a similar amount of force and believed it to be proportional to the danger presented. As I just mentioned, because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant.

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the alleged offense(s)) (and) (the lesser included offense(s) of (state the lesser included offense(s) raised)), but also to the issue of self-defense. In order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.

NOTE 3: Defensive operation. The following additional instruction may be appropriate if there is evidence that the accused acted as part of a defensive operation conducted by forces. See ICC, art. 31(1)(c).

The fact that the accused was involved in a defensive operation conducted by forces does not alone exclude criminal responsibility based on self defense.

5–A–3. DEFENSE OF ANOTHER

NOTE 1: Using this instruction. The military judge should instruct, on defense of another when it has been raised by some evidence. The following instruction, properly tailored, may be helpful.

The evidence has raised the issue of defense of another in relation to the offense(s) of (state the alleged offense(s)). (There has been some (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides). Defense of another requires that the accused must have acted reasonably to protect (state name or description of other person) against an immediate and unlawful use of force. Further, the accused must have used only so much force that is proportional to the degree of danger presented.

NOTE 2: Regarding defense of another, as with self defense, customary international law, as codified in Article 31(1)(c) of the ICC Statute, applies an objective standard for perceived danger and use of force. See Geert-Jan G.J. Knoops, DEFENSES IN CONEMPORARY INTERNATIONAL CRIMINAL LAW at 85. By contrast, R.C.M. 916 applies a mixed objective/subjective standard to the self defense analysis.

In other words, defense of another has two parts. First, the accused must have acted reasonably to defend (state name or description of other person) from an immediate and unlawful use of force. The test here is whether, under the same facts and circumstances present in this case, an ordinary prudent adult person faced with the same situation would have believed that there were grounds to fear that (state name or description of other person) was in danger of immediate death or serious bodily harm and would have reacted similarly in defending him/her. Because this test is

objective, such matters as intoxication or emotional instability of the accused are not relevant. Secondly, the accused must have used only such force that was proportional to the degree of danger presented. Again, the test here is objective. That is, whether under the same facts and circumstances as in this case, any reasonably prudent person, faced with the same situation, would have defended the other person with a similar amount of force and believed it to be proportional to the danger presented. As I just mentioned, because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant.

The burden is on the prosecution to establish the guilt of the accused. Unless you are satisfied beyond a reasonable doubt that the accused did not act in defense of another, the accused must be acquitted of the offense(s) of (_____).

NOTE 3: <u>Defensive operation</u>. The following additional instruction may be appropriate if there is evidence that the accused acted as part of a defensive operation conducted by forces.

The fact that the accused was involved in a defensive operation conducted by forces does not alone exclude criminal responsibility based on defense of another.

5–A–4. ACCIDENT

NOTE 1: Using this instruction. When accident has been raised concerning an offense requiring the accused's conduct to be intentional, willful, inherently dangerous, or culpably negligent, great care must be taken to explain how accident relates to the offense's required degree of culpability. In such cases, the instructions following NOTE 2 should be given. When proximate cause is in issue, an instruction may help to explain why the accused's negligence could negate an accident defense but not be a proximate cause of the charged harm. The instructions following NOTE 3 accomplish this purpose.

The evidence has raised the issue of accident in relation to the offense(s) of (state the alleged offense(s)). In determining this issue, you must consider all the relevant facts and circumstances (including, but not limited to: (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

Accident is a complete defense to the offense(s) of (state the alleged offense(s)).

If the accused was doing a lawful act in a lawful manner free of any negligence on (his)(her) part, and (an) unexpected (death) (bodily harm) (_____) occurs, the accused's conduct is not wrongful and (he)(she) is not criminally liable. The defense of accident has three parts. First, the accused's (act(s)) (and) (or) (failure to act) resulting in the (death) (bodily harm) (_____) must have been lawful. Second, the accused must not have been negligent. In other words, the accused must have been acting with the amount of care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances.

Third, the (death) (bodily harm) (_____) must have been unforeseeable and unintentional.

The burden is on the prosecution to establish the guilt of the accused. Consequently, unless you are convinced beyond a reasonable doubt that the (death) (bodily harm) (_____) was not the result of an accident, the accused may not be convicted of (state the alleged offense(s)).

NOTE 3: Intentional, willful, inherently dangerous, or culpably negligent act/failure to act. When an intentional, willful, or inherently dangerous act (applicable only to the offenses of terrorism and murder by an unprivileged belligerent), or culpable negligence is an element, the military judge may instruct that while the panel may have found the accused was negligent, simple negligence does not establish the degree of culpability required to find the accused guilty of the offense in issue. In such cases, the following should be tailored and given:

You are satisfied beyond a reasonable doubt that the accused did not act with the amount of care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances, the defense of accident does not exist. However, this does not necessarily mean that the accused is guilty of (state the alleged offense(s)). To find the accused guilty of (this) (these) offense(s) the accused's conduct must have amounted to more than simple negligence. As I earlier instructed, to convict the accused of (state the alleged offense(s)), one of the elements the prosecution must prove beyond a reasonable doubt is that the accused ((intentionally) (willfully)) [(killed (state name or description of alleged victim(s))) (inflicted bodily harm on (state name or description of alleged victim(s)))] [engaged in an act that is inherently dangerous to another and evinces a wanton disregard for human life].

(Simple negligence is the failure to act with the care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances). An act inherently dangerous to another is one that is characterized by heedlessness of the probable consequences of the act, indifference to the likelihood of death or great bodily harm, and clearly demonstrates a total disregard for the known probable results of death or great bodily harm.

To summarize on this point, a finding of simple negligence will deprive the accused of the accident defense; however, simple negligence is not enough to find the accused guilty of the offense(s) of (state the alleged offense(s)).

NOTE 4: When the issue of proximate cause is raised, the following should be tailored and given:

If you find that the accused committed an inherently dangerous act evincing a wanton disregard for human life and, thus, not protected from criminal liability by the defense of accident, it may not convict unless it is also found beyond a reasonable doubt that the (inherently dangerous act) was a proximate cause of the (death) (bodily harm) (_____).

Proximate cause means that the (death) (bodily harm) (_____) must have been the result of the accused's inherently dangerous act. A proximate cause does not have to be the only cause, but it must be a direct or contributing cause which plays a material role, meaning an important role, in bringing about the (death) (bodily harm) (_____). If some other unforeseeable, independent, intervening event, which did not involve

the accused, was the only cause which played any important part in bringing about the (death) (bodily harm) (_____), then the accused may not be convicted of the offense(s) of (state the alleged offense(s)).

The burden is on the prosecution to establish the guilt of the accused. Before the accused can be convicted of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the defense of accident either does not exist or has been disproved, and that the accused's (inherently dangerous) conduct was a proximate cause of the (death) (bodily harm) (_____).

5–A–5. DURESS (COMPULSION OR COERCION)

NOTE 1: Using this instruction. The military judge should instruct on the issue of duress when it is raised by some evidence. Generally, the defense of duress applies if the accused reasonably feared immediate death or great bodily harm to himself or another. The following instruction, appropriately tailored, may be helpful in such cases. One point worthy of note, however, is the debate concerning the availability of this duress as a defense to homicide. **See Geert-Jan G.J. Knoops, DEFENSES IN CONEMPORARY INTERNATIONAL CRIMINAL LAW at 61-67 (discussing tension between absolutist view (denying the defense in cases of willful killing) and utilitarian view (permitting the defense)); see also Prosecutor v. Erdemović, (ICTY) Case No. IT-96-22-A. Appeals Judgment (1997) (holding that duress does not provide a complete defense for soldier charged w/ offenses involving willful killing). But see Law Reports of Trials of War Criminals, U.N. War Crimes Comm'n (1949) Vol. XV, p. 174 ("No Court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever) (quoting Nuremburg International Military Tribunal in Einsatzgruppen Trial.).**

The evidence has raised the issue of duress in relation to the offense(s) of (state the alleged offense(s)). Duress means compulsion or coercion. It is causing another person to do something against his/her will by the use of either physical force or psychological coercion. (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

To be a defense, the amount of duress used on the accused, whether physical or psychological, must have been sufficient to cause a reasonable

fear that if (he)(she) did not commit the offense, (he)(she) (another) would be immediately killed or would immediately suffer serious bodily injury. The amount of coercion or force must have been sufficient to have caused a person of normal strength and courage to give in. The fear which caused the accused to commit the offense(s) must have been fear of immediate death or immediate serious bodily injury, and not simply fear of injury to reputation or property. The threat and resulting fear must have continued throughout the commission of the offense(s). If the accused had a reasonable chance to avoid committing the offense(s) without subjecting (himself)(herself) (another family member) to the threatened danger, the defense of duress does not exist.

Finally, the defense of duress is only available if the harm that the accused intended to cause is not greater that the harm that (he)(she) sought to avoid.

The burden is on the prosecution to establish the accused's guilt beyond a reasonable doubt. Duress is a complete defense to the offense(s) of (state the alleged offense(s)). If you are convinced beyond a reasonable doubt that the accused did not act under duress, the defense of duress does not exist.

REFERENCES:

1. Geert-Jan G.J. Knoops, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW.

2. ICC Statute, art. 31(1)(d) (providing that duress must result from a threat of death or continuing or imminent serious bodily harm).

3. Prosecutor v. Erdemović, (ICTY) Case No. IT-96-22-A (evaluating Post Word War II UN War Crimes Comm'n case law and determining that duress requires an act done to avoid immediate danger – both serious and irreparable and with "no adequate means of escape" and also discussing requirement of proportional force).

4. U.N. War Crimes Comm'n (1949), Vol. XV, p. 174.

5–A–6. DEFENSE OF PROPERTY

NOTE 1: In the LOW context, defense of property arguably could extend to property essential for accomplishing a military mission. See ICC Statute, art. 31(1)(c). However, the ICC approach, which extends the defense to this situation, is controversial. See Geert-Jan G.J. Knoops, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW at 87 (explaining that scholars argue that "no political, military or national interest or necessity can justify a war crime."); see also Antonio Cassese, The Statute of the ICC: Some Preliminary Reflections, Eur. J. of Int'l L.154-55 (1999) ("[I]t is highly questionable to extend [the defense] to the need to protect property which is essential for accomplishing a military mission."). This provision of the ICC Statute stems from a 1998 U.S. proposal to include "military necessity as a separate ground for excluding criminal responsibility." Geert-Jan G.J. Knoops, supra, at 88 (citing Albin Eser, Article 32, Margin No. 28, in Commentary on the Rome Statute (Otto Triffterer, ed. 1999)). Ultimately, however, the ICC Drafting Committee incorporated the military necessity concept into the Article 31(1)(c)'s provision relating to defense of property. See id. .

NOTE 2. The following instruction may be helpful if the evidence presented at trial raises the defense of property.

> The evidence has raised the issue of defense of property in relation to the offense(s) of (state the alleged offense(s)). (There has been (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).) Defense of property is a complete defense to the offense(s) of (state the alleged offense(s)).

For defense of property to exist, the accused must have acted reasonably to defend [(property essential to (his)(her) survival) (survival of another person)] [property essential for accomplishing a military mission] against an immediate and unlawful use of force. Further, the accused must have done so in a manner that is proportionate to the degree of danger presented.

NOTE 3. Regarding defense of property, customary international law, as reflected in Article 31(1)(c) of the ICC Statute, applies an objective standard for perceived danger and use of force. <u>See</u> Knoops at 85. By contrast, R.C.M. 916 applies a mixed objective/subjective standard to the self analysis.

In other words, the defense of property has two parts. First, the accused must have acted reasonably to defend [(property essential to (his)(her) survival) (survival of another person)] [property essential for accomplishing a military mission] from an immediate and unlawful use of force. The test here is whether, under the same facts and circumstances as in this case, any reasonably prudent person, faced with the same situation, would have believed that the property was in immediate danger from an unlawful se of force. Secondly, the accused must have used only such force that was proportional to the degree of danger presented. Again, the test here is objective. That is, whether under the same facts and circumstances as in this case, any reasonably prudent person, faced with the same situation, would have defended the property with a similar amount of force and believed it to be proportional to the danger presented. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant.

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense, but also to the issue of defense of property. In order to find the accused guilty of the offense(s) of (state the alleged offense(s)), therefore, you must be satisfied beyond a reasonable doubt that the accused did not act in defense of property as I have just explained it.

NOTE 4: Possible application of self-defense instructions. If the accused's reasonable force in protection of property is met with an attack upon the accused's own person, then the defense of self-defense may also be in issue. See the Self-Defense instructions (Instructions 5-2 and 5-2-1).

NOTE 5: "Property essential for accomplishing a military mission" is akin to the concept of "military necessity," which means that the property was crucial to secure the complete submission of the enemy as soon as possible.

NOTE 6: Defensive operation. The following additional instruction may be appropriate if there is evidence that the accused acted as part of a defensive operation conducted by forces.

The fact that the accused was involved in a defensive operation conducted by forces does not alone exclude criminal responsibility based on defense of property.

5–A–7. OBEDIENCE TO SUPERIOR ORDERS

NOTE 1: Although permitted in domestic courts-martial, see R.C.M. 916(d), the acceptance of superior orders as a defense under the international law of armed conflict is unsettled. Superior orders is not addressed in the Hague or Geneva Conventions and this defense generally has not been available in war crimes tribunals. For example, Article 8 of the International Military Tribunal at Nuremberg provided that superior orders may not be asserted as a complete defense, though it may be considered "in mitigation of punishment." IMT Statute, art. 8. Likewise, superior orders is not available as a defense under the statutes for the International Criminal Tribunals for Yugoslavia or Rwanda. However, as with the IMT Statute, it may be considered as mitigation of punishment under each. See ICTY Statute, art. 7(4); ICTR Statute, art. 6(4). On the other hand, Article 33(1) of the ICC Statute provides that superior orders may be a complete defense if: 1) the accused was under a legal obligation to obey the orders of the government or the superior in question, 2) he did not know that the order was unlawful, and 3) the order was not manifestly unlawful. To the extent that the defense is deemed available and raised by the evidence, the following instruction, which is based on the ICC model and which largely comports with R.C.M. 916(d), may be helpful.

The evidence has raised an issue of obedience to superior orders in relation to the offense(s) of (state the alleged offense(s)). In this regard, there has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).

In determining whether the defense of superior orders exists, you must first decide whether the accused was, at the time of the offense, acting under (an) order(s) to (state performance allegedly required of accused). You should consider (summarize evidence and contentions of parties concerning whether an order was issued, and its terms, as appropriate).

Further, the order(s) must have been given to the accused by a superior whom the accused was under a legal obligation to obey.

You are convinced beyond a reasonable doubt that the accused was not acting under orders to (state performance allegedly required of accused), then the defense of obedience to superior orders does not exist.

If you find that the accused was acting under order(s) it must next decide whether the accused knew the order(s) to be illegal. This issue is resolved by looking at the situation subjectively, through the eyes of the accused. In this regard, you should consider the accused's (age) (education) (training) (rank) (background) (experience) (_____). If you are convinced beyond a reasonable doubt that the accused actually knew the order(s) to be illegal, then the defense of obedience to orders does not exist. If you are not convinced beyond a reasonable doubt that the accused actually knew the order(s) to be unlawful, you must then determine whether the order(s) (was) (were) manifestly unlawful. An order is manifestly unlawful if, under the same circumstances as are present in this case, a person of ordinary common sense would have known it to be unlawful. In resolving this issue, you should consider (summarize evidence and contentions of parties concerning whether the orders was/were issued, and its/their terms, as appropriate). If you are convinced beyond a reasonable doubt that a person of ordinary common sense would have known that the order was unlawful, the defense of obedience to orders does not exist, even if the accused did not in fact know that the order was unlawful.

The burden of proof is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused was not acting pursuant to orders to (state performance allegedly required

of accused), OR that the accused knew such order(s) to be unlawful, OR that a person of ordinary common sense would have known the order(s) to be unlawful, then the accused will not avoid criminal responsibility based on obedience to superior orders.

5–A–8. IGNORANCE OR MISTAKE OF FACT OR LAW—GENERAL DISCUSSION

This is a general introduction to the defenses of ignorance or mistake and not an instruction. The discussion is based on traditional concepts of ignorance or mistake, which, as noted by the citations below, are likewise applicable in the LOW context.

An issue of ignorance or mistake of fact may arise in cases where any type of knowledge of a particular fact is necessary to establish an offense. This issue should be instructed upon, sua sponte, when raised by some evidence.

The standard for ignorance or mistake of fact varies with the nature of the elements of the offense involved. If the ignorance or mistake concerns an element of an offense involving specific intent (*e.g.*, torture), willfulness (*e.g.*, willful killing of protected persons), knowledge (*e.g.*, attacking protected property), or premeditation, the ignorance or mistake need only exist in the mind of the accused**.** See Knoops at 106 (explaining that mistake of fact in international criminal law need only be honest "if it negates some special element required for guilt of the offense, such as intent or knowledge," otherwise the mistake must be honest and reasonable); cf. ICC Statute, art. 32(1) (recognizing mistake of fact defense only if it negates an element of a crime). Generally, for crimes not involving specific intent, willfulness, knowledge, or premeditation, (*e.g.*, rape) ignorance or mistake must be both honest (actual) and reasonable.

Also, if the alleged ignorance or mistaken belief is not one which would exonerate the accused if true, it is no defense.

Ignorance or mistake of law is generally not a defense. However, when actual knowledge of a certain law or of the legal effect of certain known facts is necessary to establish an offense, ignorance or mistake of law or legal effect will be a defense**.** This standard is recognized under the law of armed conflict. See Scuttled U-Boats Case (discussed in Law Reports of Trials of War Criminals, Vol. XV at 182-83 (1949)) (involving accused's claim that he was unaware of surrender of German forces); ICC Statute, art. 32(2) (stating that mistake of law not generally a defense unless it negates an element required for commission of the crime or defensible in context superior orders). Also, such unawareness may be a defense to show the absence of a criminal state of mind when actual knowledge is not necessary to establish the offense. In that instance, the accused would avoid criminal responsibility because (his)(her) conduct would not be considered wrongful. For example, an honest belief the accused had, under the law, validly requisitioned certain property is a defense to pillaging, even if the accused was mistaken in that belief. Another example would be an accused who was ordered to execute a POW and who honestly believed that it was a legal execution pursuant to a death sentence issued by a properly instituted court. In this example, mistake of law would be a defense to willful killing of protected persons. See Kriangsak Kittichaisaree, International Criminal Law 265 (Oxford University Press 2001).

The following are the instructions relating to ignorance or mistake:

5-8-1. Ignorance or mistake when specific intent or actual knowledge is in issue.

5-8-2. Ignorance or mistake when only general intent is in issue.

5–A–8–1. IGNORANCE OR MISTAKE OF FACT—WHEN SPECIFIC INTENT OR ACTUAL KNOWLEDGE IS IN ISSUE

NOTE: Using this instruction. The military judge should review Instruction 5-8, the general discussion on the area of ignorance or mistake of fact or law, prior to using this instruction.

The evidence has raised the issue of (ignorance) (mistake) on the part of the accused concerning (state the asserted ignorance or mistake) in relation to the offense(s) of (state the alleged offense(s)).

I advised you earlier that to find the accused guilty of the offense(s) of (state the alleged offense(s)), you must find beyond a reasonable doubt that the accused (had the specific intent to _____) (knew that _____) (_____).

If the accused at the time of the offense was (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake) then (he)(she) cannot be found guilty of the offense(s) of (state the alleged offense(s)).

The (ignorance) (mistake), no matter how unreasonable it might have been, is a defense. In deciding whether the accused was (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake), you should consider the probability or improbability of the evidence presented on the matter.

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including but not limited to (here the military judge may specify significant evidentiary

factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that at the time of the alleged offense(s) the accused was not (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake), then the defense of (ignorance) (mistake) does not exist.

5–A–8–2. IGNORANCE OR MISTAKE OF FACT—WHEN ONLY GENERAL INTENT IS IN ISSUE

NOTE 1: Using this instruction. The military judge should review the general discussion on the area of ignorance or mistake of fact or law, in Instruction 5-8.

The evidence has raised the issue of (ignorance) (mistake) on the part of the accused concerning (state the asserted ignorance or mistake) in relation to the offense(s) of (state the alleged offense(s)).

The accused is not guilty of the offense of (_____) if:

(1) (he)(she) ((did not know) (mistakenly believed)) that (state the asserted ignorance or mistake) and

(2) if such (ignorance) (belief) on (his)(her) part was reasonable.

To be reasonable the (ignorance) (belief) must have been based on information, or lack of it, which would indicate to a reasonable person that (_____).

(Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused was not (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake), the defense of (ignorance) (mistake) does not exist. Even if you conclude that the accused was (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake), if it is proven beyond a reasonable doubt that, at the time of the charged offense(s), the accused's (ignorance) (mistake) was unreasonable, the defense of (ignorance) (mistake) does not exist.

5–A–9. ALIBI

NOTE: The issue of alibi is raised when there is evidence which may tend to establish that the accused was not at the scene of the offense charged, unless it appears that the actual presence of the accused at a particular time or place is not essential for commission of the offense. The following instruction may be helpful when alibi is raised.

The evidence has raised the defense of alibi in relation to the offenses(s) of (state the alleged offense(s)). "Alibi" means that the accused could not have committed the offense(s) charged (or any lesser included offense) because the accused was at another place when the offenses(s) occurred. Alibi is a complete defense to the offense(s) of (state the alleged offense(s)). (In this regard, there has been evidence that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused was present at the time and place of the alleged offense, then the defense of alibi does not exist.

5–A–10. EVIDENCE NEGATING MENS REA

NOTE 1: The following instructions may be helpful to explain the impact of mental disease, defect, or condition on the elements of premeditation, specific intent, knowledge, or willfulness. This instruction should NOT be used, however, if the evidence has raised the defense of lack of mental responsibility. In that instance, the presiding officer should use the instructions in Chapter 6 including, if applicable, Instruction 6-4, Partial Mental Responsibility. The presiding officer should use the instructions below when premeditation, specific intent, willfulness, or knowledge is an element of an offense, and there is evidence tending to establish a mental or emotional condition of any kind, which, although not amounting to lack of mental responsibility, may negate the mens rea element.

The evidence in this case has raised an issue whether the accused had a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____) which may have impacted on the required state of mind with respect to the offense(s) of (state the alleged offense(s)).

You must consider all the relevant facts and circumstances (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides, to include any expert evidence admitted).

One of the elements of (this) (these) offense(s) is the requirement of (premeditation) (the specific intent to _____) (that the accused knew that _____) (that the accused's acts were willful (as opposed to only negligent)) (_____).

An accused, because of some underlying (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder)

(_____), may be mentally incapable of (entertaining (the premeditated design to kill) (specific intent to _____)) (having the knowledge that _____) (acting willfully) (_____).

You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____) of such consequence and degree as to deprive (him)(her) of the ability to (act willfully) (entertain the (premeditated design to kill) (specific intent to _____)) (know that _____) (_____).

The burden of proof is upon the prosecution to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Unless in light of all the evidence you are satisfied beyond a reasonable doubt that the accused, at the time of the alleged offenses(s) was mentally capable of (entertaining (the premeditated design to kill) (a specific intent to _____)) (knowing that _____) (acting willfully in _____) (_____), you must find the accused not guilty of (that) (those) offense(s).

NOTE 3: Distinguishing mens rea negating evidence and a lack of mental responsibility defense. If there is a need to explain that mens rea negating evidence should not be confused with the defense of lack of mental responsibility, the following may be given:

This evidence was not offered to demonstrate or refute whether the accused is mentally responsible for (his)(her) conduct. Lack of mental responsibility, that is, an insanity defense, is not an issue in this case. (What is in issue is whether the prosecution has proven beyond a

reasonable doubt that the accused had the ability to (act willfully) (entertain the (premeditated design to kill) (specific intent to _____)) know that _____) (_____).)

NOTE 4: Expert witnesses. When there has been expert testimony on the issue, Instruction 7-9-1, Expert Testimony should be given.

NOTE 5: Evaluating testimony. Evidence supporting or refuting the existence of mens rea negating evidence may be clear and the members may not need any special instructions on how the evidence should be evaluated. If additional instructions would be helpful in evaluating the evidence, the following may be given:

The prosecution may consider evidence of the accused's mental condition before and after the alleged offense(s) of (state the alleged offense(s)), as well as evidence as to the accused's mental condition on the date of the alleged offense. The evidence as to the accused's condition before and after the alleged offense was admitted for the purpose of assisting you to determine the accused's condition on the date of the alleged offense(s).

(We have heard the evidence of (psychiatrists) (and) (psychologists) (and) (_____) who testified as expert witnesses. An expert in a particular field is permitted to give his/her opinion. In this connection, you are not bound by medical labels, definitions, or conclusions. Whether the accused had a (mental condition) (_____) and the effect, if any, that (condition) (_____) had on the accused, must be determined by you.)

(There was (also) testimony of lay witnesses with respect to their observations of the accused's appearance, behavior, speech, and actions. In weighing the testimony of such lay witnesses, you may consider the

circumstances of each witness, their opportunity to observe the accused and to know the facts to which the witness has testified, their willingness and capacity to expound freely as to their observations and knowledge, the basis for the witness' opinion and conclusions, and the time of their observations in relation to the time of the offense(s) charged.)

(You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, it is appropriate to take into account the extent of the witness' observation of the accused and the nature and length of time of the witness' contact with the accused. Members should bear in mind that an untrained person may not be readily able to detect a mental condition and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.)

(You are not bound by the opinions of (either) (expert) (or) (lay) witness(es) and you should not arbitrarily or capriciously reject the testimony of any witness. You should consider the testimony of each witness in connection with the other evidence in the case and each member should give it such weight you deem appropriate.)

NOTE 6: Lesser included offenses. When there are lesser included offenses raised by the evidence that do not contain a mens rea element, the presiding officer may explain that the mens rea negating evidence instruction is inapplicable. The following may be helpful:

Remember that (state the lesser included offense raised) is a lesser included offense of (state the alleged offense(s)). This lesser included

offense does not contain the element that the accused (had the premeditated design to kill) (specific intent to _____) (knew that _____) (willfully _____) (_____). In this regard, the instructions I just provided with respect to the accused's mental ability to (premeditate) (know) (form the specific intent) (act willfully) (_____) do not apply to the lesser included offense of (state the lesser included offense raised).

5–A–11. LACK OF CAUSATION, INTERVENING CAUSE, OR CONTRIBUTORY NEGLIGENCE

NOTE 1: General. Some offenses require a causal nexus between the accused's conduct and the harm that is the subject of the specification. For example, to establish the offense of maiming, the prosecution must prove that the accused's conduct caused death or seriously damaged or endangered the physical or mental health or appearance or appearance of another. When lack of causation is raised by some evidence, the following instructions may be used with appropriate tailoring.

NOTE 2: Using this instruction. If causation is in issue, the military judge should instruct that the accused's conduct must be a proximate cause of the alleged harm.

a. If there is no evidence that there was an intervening, independent cause and no evidence that anyone other than the accused had a role in the alleged harm, the presiding officer should give the instructions following NOTE 3.

b. If there is evidence that an independent, intervening event might have been a proximate cause of the alleged harm, or that anyone other than the alleged victim and accused had a role in the alleged harm, the presiding officer should give the instructions following NOTE 4. That instruction must be tailored depending on whether there is evidence of an independent, intervening cause (NOTE 5) or another had a role in the alleged harm (NOTE 6), or both.

c. If contributory negligence of the alleged victim is in issue, give either the instructions following NOTES 3 or 4, as appropriate and also the instructions following NOTE 7.

NOTE 3: Proximate cause in issue; intervening cause or acts or omissions of someone other than the accused NOT in issue.

To find the accused guilty of the offense(s) of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the accused's

(conduct) ((willful) (intentional) (inherently dangerous) act) (omission) (_____) was a proximate cause of the (injury to _____) (loss of _____) (destruction of _____) (damage to _____) (grievous bodily harm to _____) (death of _____) (_____). This means that the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____) must have been the natural and probable result of the accused's (conduct) (act) (omission) (_____). A proximate cause does not have to be the only cause, nor must it be the immediate cause. However, it must be a direct or contributing cause that plays a material role, meaning an important role, in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____).

In determining whether the accused's (conduct) (act) (omission) (_____) was a proximate cause, you must consider all relevant facts and circumstances, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to prove proximate cause. Unless you are satisfied beyond a reasonable doubt that the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the alleged harm, the accused may not be found guilty of the offense(s) of (state the alleged offense(s)).

NOTE 4: Proximate cause in issue; independent, intervening cause and/or acts or omissions of others in issue.

To find the accused guilty of the offense(s) of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the accused's (conduct) ((willful) (intentional) (inherently dangerous) act) (omission) (_____) was a proximate cause of the (injury to _____) (death of _____) (_____). This means that the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____) must have been the natural and probable result of the accused's (conduct) (act) (omission) (_____). A proximate cause does not have to be the only cause, nor must it be the immediate cause. However, it must be a direct or contributing cause that plays a material role -- meaning an important role -- in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____).

NOTE 5: Intervening cause. If there is evidence of an intervening cause, give the following instruction:

If some other unforeseeable, independent, intervening event that did not involve the accused was the only cause that played any important part in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____), then the accused's (conduct) (act) (omission) (_____) was not the proximate cause of the alleged harm.)

NOTE 6: More than one contributor to proximate cause. If there was more than one contributor, give the following instruction:

(In addition) It is possible for the (conduct) (act) (omission) (_____) of two or more persons to contribute each as a proximate cause of the (injury) (grievous bodily harm) (death) (_____). If the accused's (conduct) (act) (omission) (_____) was a proximate cause of the

alleged harm, the accused will not be relieved of criminal responsibility because some other person's (conduct) (act) (omission) (negligence) (_____) was also a proximate cause of the alleged harm. An (act) (omission) is a proximate cause of the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____) even if it is not the only cause, as long as it is a direct or contributing cause that plays a material role, meaning an important role, in bringing about the (injury) (grievous bodily harm) (death) (_____).

In determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause and the role, if any, of (other events) (or) (the acts or omissions of another), you must consider all relevant facts and circumstances, (including, but not limited to, (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to prove proximate cause. Unless you are satisfied beyond a reasonable doubt that the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the alleged harm as I have defined that term, it may not find the accused guilty of the offense(s) of (state the alleged offense(s)).

You are reminded that to find the accused's (conduct) (act) (omission) (negligence) (_____) to be a proximate cause also requires you to find beyond a reasonable doubt that (any other intervening, independent event that did not involve the accused) (and) (the (act) (conduct) of another) (was) (were) not the only cause(s) that played any material role, meaning an important role, in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____).

NOTE 7: Contributory negligence. If there is evidence that the victim of an injury or death may have been contributorily negligent, the following instruction may be helpful. This instruction, however, should be given with great caution.

There is evidence raising the issue of whether the (name of person(s) allegedly harmed/killed) failed to use reasonable care and caution for his/her own safety. If the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the (injury) (death), the accused is not relieved of criminal responsibility because the negligence of (name of person(s) allegedly harmed/killed) may have contributed to his/her own (injury) (death). The conduct of the (injured) (deceased) person should be considered in determining whether the accused's (conduct) (act) (omission) (_____) was a proximate cause of the (injury) (death). (Conduct) (An act) (An omission) is a proximate cause of (injury) (death) even if it is not the only cause, as long as it is a direct or contributing cause that plays a material role, meaning an important role, in bringing about the (injury) (death). (An act) (An omission) is not a proximate cause if some other unforeseeable, independent, intervening event, which did not involve the accused's conduct, was the only cause that played any important part in bringing about the (injury) (death). If the negligence of (name of victim) looms so large in comparison with the (conduct) (act) (omission) (_____) by the accused that the accused's conduct should not be regarded as a substantial factor in the final result, then conduct of (name of victim) is an independent, intervening cause and the accused is not guilty.

Finding the accused's (conduct) (act) (omission) (_____) to be the proximate cause also requires you to find beyond a reasonable doubt that the (act) (conduct) of the alleged victim was not the only cause that played

any material role, meaning an important role, in bringing about the (injury) (death).

NOTE 8: Relationship to accident defense. The evidence that raises lack of causation intervening cause, or contributory negligence may also raise the defense of accident. See Instruction 5-4, Accident.

NOTE 9: Different degrees of culpability raised by lesser included offenses. The presiding officer must be especially attentive in applying this instruction when lesser included offenses involve different degrees of culpability.

Chapter 6

MENTAL CAPACITY AND RESPONSIBILITY

NOTE: The mental capacity and mental responsibility instructions retained in the Military Judges' Benchbook used in courts-martial should be used as a guide to tailor mental capacity and mental responsibility instructions in a trial by court-martial of EPWs. See Chapter 6, Military Judges' Benchbook, (DA Pam 27-9). The military judge, however, should be mindful of any specific guidance the DP may issue regarding mental capacity and mental responsibility and proceed accordingly.

6–1. SANITY INQUIRY

The actions and demeanor of the accused as observed by the court or the assertion from a reliable source that the accused may lack mental capacity or mental responsibility may be sufficient to cause an inquiry by the court. The military judge should remember, however, that the accused is presumed to be sane and that a mere assertion that the accused is insane is not necessarily sufficient to raise an issue of insanity. A request or other action to cause the court to make an inquiry may be initiated by the military judge or any member of the court, prosecution, or defense. A good faith, non-frivolous request for a sanity board should be granted. United States v. Nix, 36 C.M.R. 76 (C.M.A. 1965); United States v. Kish, 20 M.J. 652 (A.C.M.R. 1985).

If the defense proffers expert testimony as to the accused's mental responsibility or capacity, the accused can be required to submit to psychiatric evaluation by Government psychiatrists as a condition to the admission of defense psychiatric evidence. The military judge rules finally as to whether an inquiry should be made into the accused's mental capacity or mental responsibility. When the military judge believes that there is a reasonable basis for an inquiry, the matter will be referred to a board. The referral order must comport with the requirements of RCM 706.

No individual, other than the defense counsel, accused, or military judge, is permitted to disclose to the trial counsel any statement made by the accused to the board or any evidence derived from that statement.

Additional mental examinations may be directed at any stage of the proceedings. If a motion for inquiry into the accused's sanity is denied, the military judge will direct counsel to proceed with the trial. When the motion is granted, the military judge ordinarily should direct further action substantially as follows:

Because the motion for an inquiry into the accused's sanity has been granted, the proceedings in this trial are suspended. Based upon my judicial determination that an inquiry is essential, it is ordered that the accused be examined by a sanity board as provided in Rule for Courts-Martial 706. Priority must be given to this inquiry which should consider all reasonably available sources of relevant information. The officers conducting the examination should be notified that they may be called as witnesses at this trial if and when the court reconvenes.

The court is adjourned.

If the defense proffers expert testimony as to the accused's mental responsibility or capacity, the accused can be required to submit to psychiatric evaluation by Government psychiatrists as a condition to the admission of defense expert testimony. The provisions of MRE 302 prescribe additional rules and procedures governing this situation.

6–2. MENTAL CAPACITY AT TIME OF TRIAL

The military judge rules finally on the issue of mental capacity, which is an interlocutory matter. Any question of mental capacity should be determined as early in the trial as possible. In rare cases a situation may arise where the issue of mental capacity is raised more than once as a result of developing evidence. In this case, the issue should again be determined shortly after it arises. In every case, the issue of mental capacity must be finally determined by the military judge separately from the issue of guilt or innocence or the determination of an appropriate sentence. The standard of proof on this issue is whether the accused is presently suffering from a mental disease or defect rendering him/her mentally incompetent to the extent that he/she is unable to understand the nature of the proceedings or to cooperate intelligently in the defense of the case. When the military judge determines by a preponderance of the evidence that the accused is not competent to stand trial, further action should be directed substantially as follows:

> I have determined that the accused lacks the mental capacity to stand trial. The defense's motion for a stay of proceedings is granted. The record of these proceedings with a statement of my determination will be transmitted to the convening authority.
>
> The court is adjourned.

REFERENCES: RCM 909.

6–3. PRELIMINARY INSTRUCTIONS ON SANITY

NOTE 1: Using this instruction. When some evidence has been adduced which tends to show insanity of an accused, the military judge may, at the time the evidence is introduced, advise the members of the relevant legal concepts and applicable procedures. These instructions will facilitate the ability of the members to evaluate subsequent evidence on this issue. The preliminary instructions should be given only after consultation with counsel for both sides. The following preliminary instruction may be appropriate:

> There are indications from the (evidence presented so far) (state any other basis) that you may be required to decide the issue of the accused's sanity at the time of the offense. I will now instruct you on certain legal principles and procedures which will assist you in deciding this issue.

NOTE: Other instructions. See Instruction 6-4, Mental Responsibility at Time of Offense.

REFERENCES: RCM 916(k).

6–4. MENTAL RESPONSIBILITY AT TIME OF OFFENSE

NOTE 1: Using these instructions. Lack of mental responsibility (insanity) at the time of the offense is an affirmative defense which must be instructed upon, sua sponte, when the military judge presents final instructions. These instructions may be modified for use as preliminary instructions. See Instruction 6-3, Preliminary Instructions on Sanity. The following instruction is suggested:

The evidence in this case raises the issue of whether the accused lacked criminal responsibility for the offense(s) of (state the alleged offense(s)) as a result of a severe mental disease or defect. (In this regard, the accused (himself)(herself) has denied criminal responsibility because of a severe mental condition.)

You are not to consider this defense unless you have first found that the Government has proved beyond a reasonable doubt each essential element of the offense(s) of (state the alleged offense(s)). In other words, you should vote first on whether the Government has proved beyond a reasonable doubt each essential element of the offense(s). Unless at least two-thirds of the members, that is _____ members, find that each element has been proved, you

should return a finding of NOT GUILTY (as to that specification) and you need not consider the issue of mental responsibility.

If, however, two-thirds of the members are convinced beyond a reasonable doubt that the accused did the act(s) charged (in (the) Specification (___) of (the) (additional) Charge) (or committed a lesser included offense), then you must decide whether the accused was mentally responsible for the offense(s) (state the alleged offense(s)).

This will require a second vote, and each member must vote, regardless of your vote on the elements.

NOTE 2: When a sanity determination might be required in spite of a NOT GUILTY finding. It is possible to acquit of a greater offense and then find the accused NOT GUILTY only by reason of Lack of Mental Responsibility. Tailor instructions accordingly.

The accused is presumed to be mentally responsible. This presumption continues throughout the proceedings until you determine, by clear and convincing evidence, that (he)(she) was not mentally responsible. Note that, while the Government has the

burden of proving the elements of the offense(s) beyond a reasonable doubt, the defense has the burden of proving by clear and convincing evidence that the accused was not mentally responsible. As the finders of fact in this case, you must first decide whether, at the time of the offense(s) of (state the alleged offense(s)), the accused actually suffered from a severe mental disease or defect. The term severe mental disease or defect can be no better defined in the law than by the use of the term itself. However, a severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct or by non-psychotic behavior disorders and personality disorders. If the accused at the time of the offense(s) of (state the alleged offense(s)) was not suffering from a severe mental disease or defect, (he)(she) has no defense of lack of mental responsibility.

If you determine that, at the time of the offense(s) of (state the alleged offense(s)), the accused was suffering from a severe mental disease or defect, then you must decide whether, as a result of that severe mental disease or defect, the accused was unable to appreciate the nature and quality or wrongfulness of (his)(her) conduct.

If the accused was able to appreciate the nature and quality or the wrongfulness of (his)(her) conduct, (he)(she) is criminally responsible; and this is so regardless of whether the accused was then suffering from a severe mental disease or defect, (and regardless of whether (his)(her) own personal moral code was not violated by the commission of the offense(s)).

(On the other hand, if the accused had a delusion of such a nature that (he)(she) was unable to appreciate the nature and quality or wrongfulness of (his)(her) acts, the accused cannot be held criminally responsible for (his)(her) acts, provided such a delusion resulted from a severe mental disease or defect.)

To summarize, you must first determine whether the accused, at the time of (this) (these) offense(s), suffered from a severe mental disease or defect. If you are convinced by clear and convincing evidence that the accused did suffer from a severe mental disease or defect, then you must further consider whether (he)(she) was unable to appreciate the nature and quality or the wrongfulness of (his)(her) conduct. If you are convinced by clear and convincing evidence that

the accused suffered from a severe mental disease or defect, and you are also convinced by clear and convincing evidence that (he)(she) was unable to appreciate the nature and quality or wrongfulness of (his)(her) conduct, then you must find the accused not guilty only by reason of lack of mental responsibility. On the other hand, you may not acquit the accused on the ground of lack of mental responsibility, absent the accused suffering from a severe mental disease or defect, or if you believe that (he)(she) was able to appreciate the nature and quality and wrongfulness of (his)(her) conduct. Applying these principles to the accused's burden of establishing a lack of mental responsibility by clear and convincing evidence, you are finally advised that the accused, in order to be acquitted on the basis of lack of mental responsibility, is required to prove, by clear and convincing evidence, that the accused was not mentally responsible at the time of the offense(s). By clear and convincing evidence I mean that measure or degree of proof which will produce in your mind a firm belief or conviction as to the facts sought to be established. The requirement of clear and convincing evidence does not call for unanswerable or conclusive evidence. Whether the evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in

connection with all the facts and circumstances in evidence. The facts to which the witnesses have testified must be distinctly remembered and the witnesses themselves found to be credible. In deliberating on this issue, you should consider all the evidence, including that from experts (and laypersons), as well as your common sense, your knowledge of human nature, and the general experience of mankind that most people are mentally responsible.

NOTE3: <u>Other instructions</u>. See Instruction 6-5 for additional instructions which are frequently applicable when insanity is in issue.

6–5. PARTIAL MENTAL RESPONSIBILITY

NOTE 1: Using these instructions. RCM 916(k)(1) and (2) declare that except as relevant to the defense of lack of mental responsibility, a mental disease or defect is not a defense and evidence of same is inadmissible. This is not an accurate statement of the law. Notwithstanding RCM 916(k)(1) and (2), evidence of a mental disease, defect, or condition is admissible if it is relevant to the elements of premeditation, specific intent, knowledge, or willfulness. Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988); United States v. Berri, 33 M.J. 337 (C.M.A. 1991). Use this instruction only when the evidence has raised an Article 50a defense of lack of mental responsibility AND there is evidence that tends to negate any mens rea element. If there is evidence that the accused may have lacked the necessary mens rea but the Article 50a defense of lack of mental responsibility has not been raised, use Instruction 5-17, Evidence Negating Mens Rea.

An issue of partial mental responsibility has been raised by the evidence with respect to (state the applicable offense(s)).

In determining this issue you must consider all relevant facts and circumstances and the evidence presented on the issue of lack of mental responsibility (except _____). (You may also consider _____.)

One of the elements of (this) (these) offense(s) is the requirement of (premeditation) (the specific intent to _____) (that the accused knew that _____) (that the accused's acts were willful (as opposed to only negligent)) (_____).

An accused may be sane and yet, because of some underlying (mental (disease) (defect) (impairment) (condition) (deficiency) (character or behavior disorder) (_____), may be mentally incapable of (entertaining (the premeditated design to kill) (the specific intent to _____) (having the knowledge that _____) (acting willfully) (_____).

You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____) of such consequence and degree as to deprive (him)(her) of the ability to (act willfully) (entertain (the premeditated design to kill) (the specific intent to _____)) (know that _____) (_____).

The burden of proof is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Unless in light of all the evidence you are satisfied beyond a reasonable doubt that the accused, at the time of the alleged offenses(s) was mentally capable of ((entertaining (the premeditated design to kill) (the specific intent to _____)) (know that _____)) ((act willfully in _____) (_____), you must find the accused not guilty of (that) (those) offense(s).

It is essential that you remember that the defense of lack of mental responsibility—that is, insanity—and evidence the accused may have lacked the required state of mind are separate defenses although the same evidence may be considered with respect to both.

NOTE 2: Expert witnesses. When there has been expert testimony on the issue, Instruction 7-9-1, Expert Testimony, should be given.

NOTE 3: Lesser included offenses. When there are lesser included offenses raised by the evidence that do not contain a mens rea element, the military judge may explain that the partial mental responsibility instruction is inapplicable. The following may be helpful:

Remember that (state the lesser included offense raised) is a lesser included offense of the offense of (state the alleged offense). This lesser included offense does not contain the element that the accused (had the premeditated design to kill) (specific intent to _____) (knew that _____) (willfully _____) (_____). In this regard, the instructions I just gave you with respect to the accused's partial mental responsibility and ability to (premeditate) (know) (form the specific intent) (act willfully) (_____) do not apply to the lesser included offense of (state the lesser included offense raised).

The defense of a lack of mental responsibility, however, applies to both the offense(s) of (state the alleged offense(s)) and the lesser included offense(s) of (state the relevant lesser included offense(s)).

NOTE 4: Voluntary intoxication. When there is evidence of the accused's voluntary intoxication, Instruction 5-12, Voluntary Intoxication, is ordinarily applicable with respect to elements of premeditation, specific intent, willfulness, or knowledge.

6–6. EVALUATION OF TESTIMONY

NOTE: <u>Using these instructions</u>. The following instructions should normally be given to assist the members in evaluating evidence if the military judge instructs on the defense of lack of mental responsibility (Article 50a). The optional portions of the instruction contained in brackets should also be given if the military judge instructs on Partial Mental Responsibility, Instruction 6-5.

In considering the issue(s) of mental responsibility, (and partial mental responsibility,) you may consider evidence of the accused's mental disease or defect (and mental condition) before and after the alleged offense(s) of (<u>state the alleged offense(s)</u>), as well as the evidence as to the accused's mental disease or defect (and mental condition) on that date. The evidence as to the accused's mental disease or defect (and mental condition) before and after that date was admitted for the purpose of assisting you to determine the accused's mental disease or defect (and mental condition) on the date of the alleged offense(s).

You have heard the evidence of (psychiatrists) (and) (psychologists) (and) (_____) who testified as expert witnesses. An expert in a particular field is permitted to give (his)(her) opinion. In this

connection, you are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect. What psychiatrists (and psychologists) may or may not consider a severe mental disease or defect for clinical purposes, where their concern is treatment, may or may not be the same as a severe mental disease or defect for the purpose of determining criminal responsibility. Whether the accused had a severe mental disease or defect (or mental condition) must be determined by you.

(There was also testimony of lay witnesses, with respect to their observations of the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts. In weighing the testimony of such lay witnesses, you may consider the circumstances of each witness, their opportunity to observe the accused and to know the facts to which the witness has testified, their willingness and capacity to expound freely as to (his)(her) observations and knowledge, the basis for the witness' opinion and conclusions, and the time of their observations in relation to the time of the offense charged.)

(You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness' observation of the accused and the nature and length of time of the witness' contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a mental disease or defect (or mental condition) and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.)

You are not bound by the opinions of (either) (expert) (or) (lay) witness(es.) You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight you believe it is fairly entitled to receive.

6–7. PROCEDURAL INSTRUCTIONS ON FINDINGS (MENTAL RESPONSIBILITY AT ISSUE)

NOTE 1: <u>Using this instruction</u>. When the defense of lack of mental responsibility has been raised in a trial with members, the following procedural instruction on voting must be given instead of the voting instructions at 2-5-14 and 8-3-13.

MJ: The following procedural rules will apply to your deliberation and must be observed: The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should properly include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret written ballot, and all members of the court are required to vote.

You vote on the Specification(s) under the Charge(s) before you vote on the Charge. With respect to (each) (the) specification, you vote first on whether the prosecution has proved the elements of the offense beyond a reasonable doubt, without regard to the defense of lack of mental responsibility. If the vote results in a finding that the prosecution has not proved the elements, then your vote constitutes a finding of not guilty, and you need not further consider the specification (that your vote concerned.)

If your vote results in a finding that the prosecution has proved the elements of the offense, you then vote on whether the accused has proven, by clear and convincing

evidence, lack of mental responsibility. (The order in which the several charges and specifications are to be voted on should be determined by the president subject to objection by a majority of the members.)

(If you find the accused guilty of any Specification under (the) (a) Charge, the finding as to (the) (that) Charge is guilty.)

The junior member collects and counts the votes. The count is checked by the president who immediately announces the result of the ballot to the members.

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding that the prosecution has proven the elements of the specification. Since we have ___ members, that means ___ members must concur in any such finding. If fewer than ___ members vote that the prosecution has proven the elements of the specification, then your vote has resulted in a finding of NOT GUILTY as to that specification (and you should move on to consider the remaining specification(s) (and) (Charge(s)).

Table 6–1
Votes Needed for a Finding of Guilty (Mental Responsibility)

No. of Members	Two-thirds
3	2
4	3
5	4
6	4
7	5
8	6
9	6
10	7
11	8
12	8

NOTE 2: Article 106 offenses. Modify the above instruction in the event of a Charge under Article 106, UCMJ.

MJ: If, however, ___ or more members vote that the prosecution has proved the elements of the specification, you must then vote on whether the accused has proven, by clear and convincing evidence, that he/she lacked mental responsibility. The concurrence of more than one-half of the members present when the vote is taken is required for any finding that the accused lacked mental responsibility. Since we have ___ members, that means ___ members must concur in any such finding.

Table 6–2
Votes Needed for Mental Responsibility

No. of Members	Two-thirds
3	2
4	3
5	3
6	4
7	4
8	5
9	5
10	6
11	6
12	7

NOTE 3: Article 106 offenses. Modify the above instruction in the event of a Charge under Article 106, UCMJ.

MJ: If your vote results in a finding of lack of mental responsibility, then your vote constitutes a finding of not guilty only by reason of lack of mental responsibility. If, however, less than a majority votes that the accused lacked mental responsibility, then you have rejected that defense and your first vote constitutes a finding of guilty.

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court, and the president should announce only that reconsideration of a finding has been proposed. Do not state: (1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or (2) which specification (and charge) is involved. I will then give you specific further instructions on the procedure for reconsideration.

NOTE 4: <u>Reconsideration instructions</u>. See Instruction 6-8 for detailed reconsideration instructions. Do not use the reconsideration instruction found in Chapter 2.

MJ: As soon as the court has reached its findings, and I have examined the Findings Worksheet, the findings will be announced by the president in the presence of all parties. As an aid in putting your findings in proper form and in making a proper announcement of the findings, you may use Appellate Exhibit ___, the Findings Worksheet (which the (Trial Counsel) (Bailiff) may now hand to the President).

NOTE 5: <u>Explanation of Findings Worksheet</u>. A suggested approach to explaining the Findings Worksheet follows:

MJ: (COL) (___) _____, as indicated on Appellate Exhibit(s) ___, the first portion will be used if the accused is completely acquitted of (the) (all) charge(s) and specification(s). The second part will be used if the accused is convicted, as charged, of (the) (all) charge(s) and specification(s); (and the third portion will be used if the accused is convicted of some but not all of the offenses). Once you have finished filling in what is applicable, please line out or cross out everything that is not applicable so that when I check your findings, I can ensure that they are in proper form. (The next page of Appellate Exhibit ___ would be used if you find the accused guilty of the lesser included offense of _____ by exceptions (and substitutions). This was (one of) (the) lesser included offense(s) I instructed you on.

You will note that the Findings Worksheet has been modified to reflect the words that would be deleted, (as well as the words that would be substituted therefore) if you found the accused guilty of the lesser included offense(s). (This) (These) modification(s) of the worksheet in no way

indicate(s) (an) opinion(s) by me or by either counsel concerning any degree of guilt of this accused. (They are) (It is) merely included to aid you in understanding what findings might be made in the case, and for no other purpose whatsoever. The worksheet(s) (is) (are) provided only as an aid in finalizing your decision.

Any questions about the Findings Worksheet?

MBRS: (Respond.)

MJ: If, during your deliberations, you have any questions, open the court, and I will assist you in that matter. The Uniform Code of Military Justice prohibits me or anyone else from entering your closed sessions. You may not consult the Manual for Courts-Martial or any other legal publication unless it has been admitted into evidence.

Do counsel object to the instructions given or request additional instructions?

TC/DC: (Respond.)

MJ: If it is necessary (and I mention this because there is no latrine immediately adjacent to your deliberation room), your deliberations may be interrupted by a recess. However, before you may leave your closed session deliberations, you must notify us, we must come into the courtroom, formally convene and then recess the court; and after the recess, we must reconvene the court, and formally close again for your deliberations. So, with that in mind, (COL) (___) _____ do you desire to take a brief recess before you begin your deliberations, or would you like to begin immediately?

PRES: (Respond.)

MJ: (Trial Counsel) (Bailiff), please hand to the president of the court Prosecution Exhibit(s) _____ (and Defense Exhibit(s) _____) for use during the court's deliberations.

TC/BAILIFF: (Complies.)

MJ: (COL) (___) _____, please do not mark on any of the exhibits, except the Findings Worksheet (and please bring all the exhibits with you when you return to announce your findings.)

The court is closed.

6–8. RECONSIDERATION INSTRUCTIONS (FINDINGS—MENTAL RESPONSIBILITY AT ISSUE)

NOTE 1: Using this instruction. An instruction substantially as follows must be given when any court member proposes reconsideration in a case in which the mental responsibility of the accused is at issue:

MJ: Once any finding has been reached and a reballot has been proposed by any member, the question is whether or not to reballot on the findings. This shall be determined by secret written ballot. If you have reached only a finding that the prosecution has proven the elements, but have not yet voted on the issue of mental responsibility, you must reconsider your finding if more than one-third of the members vote in favor of doing so.

NOTE 2: *Concurrence-Reconsideration of Findings*.

Table 6–3
Votes Needed for Reconsideration of Findings

No. of Members	Majority	More than one-third
3	2	2
4	3	2
5	3	2
6	4	3
7	4	3
8	5	3
9	5	4
10	6	4
11	6	4
12	7	5

As we have ___ members, ___ must vote in favor of reconsidering a prior finding that the prosecution has proven the elements.

If you have reached a finding that the prosecution has failed to prove the elements of the offense(s) beyond a reasonable doubt, that constitutes a finding of not guilty. A reballot must be taken on such a prior NOT GUILTY finding when a MAJORITY of the members vote in favor of reconsidering. So you would have to reballot such a NOT GUILTY finding if ___ members voted to reconsider.

If you have reached a finding that the prosecution has proven the elements of the offense, and have further found that the accused was mentally responsible at the time of the offense, that constitutes a finding of guilty.

In that circumstance a member may propose reconsideration as to either the finding on the elements or as to the finding on mental responsibility. The member proposing reconsideration must announce whether he or she desires reconsideration of the determination that the elements were proven or the determination that the accused does not lack mental responsibility, or both. In either case, a reballot must be taken on the proposed issue if more than one-third vote in favor of reconsideration. Since we have ___ members, you would have to reballot such findings if ___ vote to reconsider.

If you end up reballoting on the elements of the offense, and if fewer than two-thirds of the members vote that the elements of the offense(s) have been proven, then your reballot has resulted in a finding of NOT GUILTY. If, on the other hand, you reballot on the issue of lack of mental responsibility, and if a majority of the members find that the accused lacked mental responsibility,

then your reballot has resulted in a finding of NOT GUILTY only by reason of Lack of Mental Responsibility.

If you have reached a finding that the prosecution has proven the elements of the offense(s), and have further found that the accused was not mentally responsible at the time of the offense, that constitutes a finding of not guilty only by reason of lack of mental responsibility.

In that circumstance a member may propose reconsideration as to either the finding on the elements or as to the finding on mental responsibility. A reballot must be taken on the finding that the accused lacked mental responsibility if more than one-half of the members vote in favor of reconsideration. Again this would mean you would have to reballot if ___ voted in favor of reconsidering the finding of lack of mental responsibility.

On the other hand, if after a finding that the prosecution has proven the elements of the offense(s), but that the accused lacks mental responsibility, a member proposes reconsideration of the finding that the prosecution has proven the elements of the offense, you must reconsider your finding if more than one-third of the members vote in favor of doing so. Again, you would have to reballot if ___ members voted to reconsider.

If your vote indicates that reconsideration is not necessary, then, if you have not already done so, and if required because of a finding that the elements have been proven, then you should proceed to vote on the issue of mental responsibility. If you have already voted on mental responsibility, then you should (move on to vote on other specifications, if any remain, then) return to open court for the announcement of your findings. If reconsideration is required, you must adhere to all of my original instructions for determining whether the accused is guilty or not, to include the

procedural rules pertaining to your voting on the findings, the two-thirds vote required for determining whether the prosecution has proven the elements beyond a reasonable doubt, and the vote by more than one-half to determine whether the accused has proven lack of mental responsibility by clear and convincing evidence.

Do counsel have any objections to the instructions given or requests for additional instructions?

TC/DC: (Respond.)

MJ: Court will again be closed.

6–9. SENTENCING FACTORS

NOTE: Using this instruction. Presentence instructions on the mitigating effect of a mental condition or other impairment or deficiency, and on the mitigating or other effect of a condition classified as a personality (character or behavior) disorder should be given whenever any such evidence has been presented, whether before or after findings. Such instructions may be substantially as follows:

Although you have found the accused guilty of the offense(s) charged and, therefore, mentally responsible (you should consider as a mitigating circumstance evidence tending to show that the accused was suffering from a mental condition) (you should consider a condition classified as a (personality) (character or behavior) disorder as a (mitigating) factor tending to explain the accused's conduct.) (I refer specifically to matters including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

Chapter 7

EVIDENTIARY INSTRUCTIONS

NOTE: The evidentiary instructions retained in the Military Judges' Benchbook used in courts-martial should be used as a guide to tailor evidentiary instructions in a trial by court-martial of EPWs. See Chapter 7, Military Judges' Benchbook, (DA Pam 27-9). The military judge, however, should be mindful of any specific guidance the DP may issue regarding evidentiary and proceed accordingly.

7–1. VICARIOUS LIABILITY—PRINCIPALS AND CO-CONSPIRATOR

If the evidence at trial indicates that a person other than the accused committed the substantive criminal acts charged against the accused and that the prosecution is asserting criminal liability against the accused on a theory of vicarious or imputed liability, the theory of liability will usually rest on one or two bases: the law of principals and/or the rule of co-conspirators. The law of principals allows conviction of the accused for a substantive offense upon proof that the accused aided, abetted, counseled, commanded, or procured the commission of the offense by the actual perpetrator, or caused an illegal act to be done. The rule of co-conspirators allows conviction of the accused for a substantive offense upon a showing that the accused was a member of an unlawful conspiracy, and that while the accused continued to be a member of that conspiracy the offense charged was committed in furtherance of the conspiracy or was an object of the conspiracy.

While the two theories of liability are distinct, they are closely related and, in most cases, both theories will apply to the facts of the case. Occasionally, however, the facts will only support one theory or the other.

The military judge may, in the exercise of discretion, choose to instruct on one or both theories. Prior to deciding upon the appropriate instructions, the military judge may wish to question the trial counsel as to the theory being relied upon by the prosecution.

Instructions 7-1-1, 7-1-2, and 7-1-3 may be used as general guides in drafting instructions explaining the provisions of Article 77, which defines the term “principal.” An appropriate instruction on the law of principals should be given to supplement the statement of the elements of the offense charged whenever it appears that an accused is being tried upon the theory that the accused is a principal because he aided,

abetted, counseled, commanded, or procured the commission of the offense, or because the accused caused an act to be done which, if directly performed by him, would have been an offense. These instructions (Instructions 7-1-1, 7-1-2, and 7-1-3) should be carefully tailored to reflect that the accused is charged as a principal and should not be in language that would indicate that the accused was the active perpetrator. For example, such tailoring is required when an accused is charged with an offense of escape from confinement (Article 95, UCMJ) but the prosecution's theory is that the accused did not escape, but aided and abetted another prisoner to escape. Before giving instructions on the applicable law of principals, an instruction such as the following on the elements, tailored to reflect the theory of the prosecution, should be given:

1. That (state the name of the fellow prisoner) was duly placed in confinement;

2. That (state the time and place alleged) (state the name of the fellow prisoner) freed (himself) (herself) from the physical restraint of (his) (her) confinement before (he) (she) had been released by proper authority; and

3. That (state the name of the accused) aided and abetted (state the name of the fellow prisoner) in freeing (himself)(herself) from the restraint by knowingly and in furtherance of a common criminal purpose unlocking the door to the cell of (state the name of the fellow prisoner).

When the offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must ordinarily establish that the aider or abettor had the requisite intent or state of mind or that the accused knew that the perpetrator had the requisite intent or state of mind. There is no requirement, however, that the accused agree with, or even have knowledge of, the means by which the perpetrator is to carry out the criminal intent. It is possible that the aider or abettor, although sharing a

common purpose with the perpetrator, may entertain a different intent or state of mind, either more or less culpable than that of the perpetrator, in which event the accused may be guilty of an offense of either greater or lesser seriousness than the perpetrator. Thus, when a homicide is committed, the actual perpetrator may act in the heat of sudden passion caused by adequate provocation and be guilty of manslaughter, while the aider and abettor who hands a weapon to the perpetrator during the encounter with shouts of encouragement for him to kill the victim may be guilty of murder. On the other hand, if two persons share a common purpose to commit robbery in a particular place, and one of the two acts as lookout, sharing only the criminal purpose of the perpetrator to commit robbery, and if the perpetrator, with out the knowledge of the lookout, seizes a victim and rapes her after the robbery, the perpetrator will be guilty of rape and robbery but the aider and abettor will be guilty only of the robbery. In a case when the intent of the alleged aider or abettor differs or may differ from that of the alleged perpetrator, instructions explaining this must be drawn with great care, with particular attention to all possible lesser included offenses and in light of all relevant decisional law.

7–1–1. PRINCIPALS—AIDING AND ABETTING

NOTE: <u>Using this instruction</u>. The following are customary instructions which may be used as applicable, appropriately tailored:

Any person who actually commits an offense is a principal. Anyone who knowingly and willfully aids or abets another in committing an offense is also a principal and equally guilty of the offense. An aider or abettor must knowingly and willfully participate in the commission of the crime as something (he)(she) wishes to bring about and must aid, encourage, or incite the person to commit the criminal act.

(Presence at the scene of the crime is not enough (nor is failure to prevent the commission of an offense); there must be an intent to aid or encourage the persons who commit the crime.) (If the accused witnessed the commission of the crime and had a duty to interfere, but did not because (he)(she) wanted to protect or encourage (<u>state the name of the person who actually committed the crime</u>), (he)(she) is a principal.)

(Although the accused must consciously share in the actual perpetrator's criminal intent to be an aide and abettor, there is no

requirement that the accused agree with, or even have knowledge of, the means by which the perpetrator is to carry out that criminal intent.)

(If you find that the accused was an aider or abettor you may also find that (he)(she) had a (specific intent) (or) (state of mind) (more) (less) criminal than that of (state the name of the perpetrator(s)). If this is the case, then the accused may be guilty of a (greater) (lesser) offense than that committed by (state the name of the alleged perpetrator(s)). The offense of (state the name of the offense) which (state the name of the perpetrator(s)) may have committed requires (state the state of mind or specific intent required). (Then enumerate the alleged greater or any lesser offenses, as applicable, detailing their elements and explaining how they are related to the offense allegedly committed by the perpetrator).

If you are satisfied beyond a reasonable doubt that (state the name of the accused) aided or abetted the commission of the offense(s) of (state the name of the offense(s) with which (he)(she) is charged) (_____) (and that (he)(she) specifically intended (_____) (_____), you may find (him)(her) guilty of that offense even

though (he)(she) was not the person who actually committed the crime.

(However, if you are not satisfied beyond a reasonable doubt that (state the name of the accused) (specifically intended to _____) (_____), but are satisfied beyond a reasonable doubt that (he)(she) is guilty of a lesser included offense, then you may find (him)(her) guilty of only the lesser included offense.)

7–1–2. PRINCIPALS—COUNSELING, COMMANDING, OR PROCURING

NOTE: <u>Using this instruction</u>. The following is a suggested instruction when counseling, commanding, or procuring is the government's theory of the accused's liability as a principal:

Any person who commits an offense is a principal. Any person who knowingly and willfully (counsels) (commands) (procures) another to commit an offense is also a principal and is just as guilty as the person who actually committed the offense. (Presence at the scene of the crime is not required.) ("Counsel" means to advise, recommend, or encourage.) ("Command" means an order given by one person to another, who, because of the relationship of the parties, is under an obligation or sense of duty to obey the order.) ("Procure" means to bring about or cause.) (If the offense is committed, even if it is accomplished in a different manner from that (counseled) (commanded) (procured), the person who (counseled) (commanded) (procured) the commission of the offense is guilty of the offense.) Once the act (counseled) (commanded) (procured) by a person is done, (he)(she) is criminally responsible for all the likely results that may occur from the doing of that act.

If you are satisfied beyond a reasonable doubt that (state the name of the accused to whom this instruction applies) knowingly and willfully (counseled) (commanded) (procured) the commission of an offense with which (he)(she) is charged (or a lesser included offense), you may find (him)(her) guilty of that offense even though (he)(she) was not the person who actually committed the crime.

7–1–3. PRINCIPALS—CAUSING AN ACT TO BE DONE

NOTE: <u>Using this instruction</u>. The following is a suggested instruction when the government's theory of liability is that the accused caused an act to be done:

Any person who commits an offense is a principal. Anyone who willfully causes an act to be done which, if actually performed by (him)(her) would be a criminal offense, is a principal and is just as guilty of the offense as if (he)(she) had done the act (himself)(herself). (Once an act is done, a principal is criminally responsible for all the likely results that may occur from the doing of that act.)

If you are satisfied beyond a reasonable doubt that (<u>state the name of the accused to whom this instruction applies</u>) willfully caused an act which (amounted to an offense) (resulted in an offense with which (he)(she) is charged) (or a lesser included offense) to be done, you may find (him)(her) guilty of that offense, even though (he)(she) was not the person who actually did the act. An act is willful if done voluntarily and intentionally and with the specific intent to do something the law forbids or to fail to do something the law requires.

7–1–4. VICARIOUS LIABILITY—CO-CONSPIRATORS

NOTE 1: <u>Using this instruction</u>. The instructions in this section may be used as general guides in drafting instructions explaining the vicarious liability of co-conspirators for substantive offenses committed by another conspirator. Co-conspirators are criminally liable for any substantive offense committed by any member of the conspiracy in furtherance of the conspiracy or as an object of the conspiracy while the accused remained a member of the conspiracy. While the accused need not be formally charged with conspiracy, the existence of the conspiracy must be shown before the accused may be convicted of a substantive offense under this theory. Unlike the law of principals, the accused need not play any role in the commission of the substantive offense, nor must he have any particular state of mind regarding the offense, nor must he be aware of the commission of the offense. The instructions normally encompass three parts: instructions on the elements of conspiracy, instructions on the elements of the substantive offense, and instructions explaining vicarious liability of co-conspirators. The instructions should be carefully tailored to reflect this theory and should not be in language that would indicate that the accused was the active perpetrator. If the offense which was the original object of the conspiracy is different from the substantive offense charged against the accused, this distinction should be emphasized to avoid confusion. For example, if the accused is charged with larceny (Article 121, UCMJ) but the prosecution's theory is not that the accused stole anything, but instead that the accused entered into a conspiracy to steal, and that a co-conspirator actually committed the larceny, then instructions such as the following, tailored to reflect the theory of the prosecution, should be given (the use of elements relating to larceny is for illustrative purposes only):

With regard to (identify the appropriate charge and specification), the prosecution is alleging that, while the accused was a member of a conspiracy, the offense of (state the offense alleged) was committed by another conspirator in furtherance of that conspiracy. A member of a conspiracy is criminally responsible under the law for any offense which was committed by any member of the conspiracy in furtherance of the conspiracy or as an object of the conspiracy, even if (he)(she) was neither a principal nor an aider and abettor in the offense.

In order to find the accused guilty of this offense, you must first be satisfied beyond a reasonable doubt that, at the time that this offense was committed, the accused had entered into and continued to be a member of an unlawful conspiracy (as I have already defined to you) (as follows:)

(1) That (state the time and place raised by the evidence), the accused entered into an agreement with (state the name(s) of the co-conspirator(s)) to commit (state the offense alleged), an offense under (the Uniform Code of Military Justice) (_____);

((2) That the accused knew of the unlawful purpose of the agreement and entered into the agreement willfully, that is, with intent to further the unlawful purpose;)

(3) That, while the agreement continued to exist, and while the accused remained a party to the agreement, (state the name of the coconspirator allegedly performing the overt act(s)) performed (one or more) overt act(s), that is, (state the overt act(s) raised by the evidence), for the purpose of bringing about the object of the agreement.

(The agreement in a conspiracy does not have to be in any particular form or expressed in formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy, and this may be proved by the conduct of the parties. The agreement does not have to express the manner in which the conspiracy is to be carried out or what part each conspirator is to play.)

NOTE 2: The second element, which requires that the accused know of the unlawful agreement and enter into it willfully, may be required in a LOW violation.

NOTE 3: Overt act. The overt act or acts which prove the conspiracy may be, but need not be, the commission of the substantive offense charged against the accused. If a LOW offense, see Instructions 3-C-6-1 and -2 (discussing the overt act requirement further).

If you are satisfied beyond a reasonable doubt that the accused had entered into and continued to be a member of this conspiracy, then you must next determine whether the evidence establishes beyond a reasonable doubt that the offense with which we are concerned, that is, (state the offense alleged) was committed by a member of the conspiracy. The elements of (state the offense alleged) are as follows (state the elements of the offense alleged.

NOTE 4: Including definitions and other instructions. Additional instructions found in Chapter 3, such as definitions and explanations may need to be given to fully advise the court members of the law relating to the substantive offense alleged.

NOTE 5: Concluding instructions on conspiracy offenses. The following instruction should be given after the elements of the substantive offense and any necessary definitions or explanations:

Finally, before you may find the accused guilty of this offense (under this theory), you must also be satisfied beyond a reasonable doubt

either that this offense was committed in furtherance of that conspiracy or that the offense was an object of the conspiracy.

If you are satisfied beyond a reasonable doubt that, at the time this offense was committed, the accused had entered into and continued to be a member of an unlawful conspiracy as I have defined that for you; and if you find beyond a reasonable doubt that this offense was committed while the conspiracy continued to exist and in furtherance of that unlawful conspiracy or was an object of that conspiracy; then you may find the accused guilty of this offense, as a co-conspirator, even though (he)(she) was not the person who actually committed the criminal offense, that is, a principal, and even though (he)(she) was not an aider and abettor of the person who committed the offense.

However, if you are not satisfied beyond a reasonable doubt that the accused was a continuing member of an unlawful conspiracy or that this offense was committed in furtherance of an unlawful conspiracy or was an object of that conspiracy, then you must find the accused not guilty of this offense (unless you find beyond a reasonable doubt

that the accused was an aider and abettor, or a principal, as I have previously defined those terms).

REFERENCES: Paragraph 5c(5), Part IV, MCM; United States v. Gaeta, 14 M.J. 383 (C.M.A. (1983); United State v. Woodley, 13 M.J. 984 (A.C.M.R. 1982).

7–2. JOINT OFFENDERS

NOTE 1: Using this instruction. In a case involving multiple offenders (joint or common trial), the instructions must be carefully tailored to reflect the relationship between the alleged offenders. When two or more accused are tried at the same time for the same offenses, the following cautionary instruction should be given prior to instructing on the elements:

> (State the names of the accused) are charged with jointly committing the same offense(s) of (state the name of the offense(s)). You must consider the guilt or innocence of each accused separately. The guilt or innocence of any one accused must not influence your finding(s) as to the other accused.

NOTE 2: Subsequent instructions. The court should then be instructed on the elements of the offenses charged. When multiple accused are tried for the same offenses at the same trial, the elements of the offenses need not be repeated for each accused. A single instruction on the elements, modified as necessary to reflect the alleged joint commission of the offense, will suffice.

NOTE 3: Vicarious liability. If, in a joint trial, the evidence against one of the accused is predicated on the theory of aiding and abetting or some similar theory, the instruction on the elements should indicate the appropriate theory. After instructing on the elements and, if applicable, the law of principals, the following instruction should be

given, followed by specific instructions on the use of a properly tailored Findings Worksheet:

If you find one (or more) but not (both) (all) of the accused guilty of (any of) the joint offense(s) charged, but do not find the other accused guilty of (both) (all) of the offense(s) charged, you must modify your findings.

NOTE 4: <u>Separate trial on a jointly committed offense</u>. When an accused is being tried separately under a specification alleging that he committed an offense in conjunction with another person, the following instructions should be given instead of those above, except that an instruction on the law of principals should again be added as applicable:

The accused is charged with committing the offense(s) in conjunction with or together with (<u>state the name of the other alleged joint offender</u>). In order to find the accused guilty, it is not necessary that you also find (<u>state the name of the other alleged offender</u>) guilty, nor is it required that you find that the accused committed the offense in conjunction with (<u>state the name of the other alleged joint offender</u>). If you are satisfied beyond a reasonable doubt that the accused is guilty, but have reasonable doubt that the accused committed the offense in conjunction with (<u>state the name of the alleged joint offender</u>) you may still find (him)(her) guilty of the offense.

NOTE 5: Tailored Findings Worksheet. When appropriate, the military judge should ensure that the Findings Worksheet provides for a finding of guilty that excepts the phrase "in conjunction with."

NOTE 6: Confrontation problems in joint trials. Ordinarily evidence precluding confrontation by an accused such as a deposition at which the accused was not present or which he did not approve, or a stipulation in which he did not join, admitted for or against a co-accused, should not be received in evidence when that evidence implicates an accused being tried jointly, or in common. For exceptions, see Instruction 7-5, Depositions, and Instruction 7-4, Stipulations.

NOTE 7: Use of pretrial statements by one co-accused in joint trials. Pretrial statements of a co-accused implicating another accused must not be admitted at a joint or common trial and reference to or admission of such statements will, upon request, ordinarily require a mistrial as to the accused, and a severance of his trial from the trial of the coaccused who made the statement. However, if such statements are inadvertently referred to or brought before the court, particularly toward the close of a lengthy trial, the military judge in his sound discretion, in lieu of declaring a mistrial and severance, may emphatically instruct the court: (a) That the statements or references are stricken and are to be completely disregarded; and, (b) that no adverse conclusion whatever may be drawn from them as to any accused who did not make the statement. In this determination the military judge should consider such factors as the import and nature of the statements or references, their possible damaging effect, if any, and the views of counsel for the accused who did not make the statement.

NOTE 8: Inconsistent pleas by co-accused at a joint trial. If one accused in a joint or common trial pleads guilty, while a co-accused pleads not guilty, the military judge should state that he will entertain a motion for severance. If a motion is made by the defense counsel for the accused who pleaded not guilty, it must be granted. Such a motion by the defense counsel for the accused pleading guilty may be granted if cogent reasons are advanced by such counsel. In any event, a severance should be granted by the military judge, sua sponte, unless compelling reasons for continuation of the joint or common trial are advanced by the accused who pleads not guilty. In such exceptional cases, strong cautionary instructions are required to the effect that the guilty plea of one accused must not be considered as evidence of the guilt of the co-accused who pleaded not guilty.

REFERENCES: RCM 307(c)(5), 601(e)(3), 812, 906(b)(9), MCM; MRE 306.

7–3. CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is evidence which tends directly to prove or disprove a fact in issue. If a fact in issue was whether it rained during the evening, testimony by a witness that he/she saw it rain would be direct evidence that it rained.

On the other hand, circumstantial evidence is evidence which tends to prove some other fact from which, either alone or together with some other facts or circumstances, you may reasonably infer the existence or non-existence of a fact in issue. If there was evidence the street was wet in the morning, that would be circumstantial evidence from which you might reasonably infer it rained during the night.

There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the weight and value you believe it deserves.

NOTE 1: Justifiable inferences. If the military judge instructs the court members on a justifiable inference (i.e., an example of the use of circumstantial evidence), it should be

referred to as a non-mandatory inference. When a military judge desires to instruct concerning a permissible inference, the court may be advised substantially as follows:

In this case, evidence has been introduced that (property was wrongfully taken from a certain place at a certain time under certain circumstances, and was shortly thereafter found in the exclusive possession of the accused) (_____). Based upon this evidence you may justifiably infer that (the accused wrongfully took the property from that place and at that time and under those circumstances) (_____). The drawing of this inference is not required and the weight and effect of this evidence, if any, will depend upon all the facts and circumstances as well as other evidence in the case.

NOTE 2: <u>Proof of intent by circumstantial evidence</u>. When specific intent is an essential element, and circumstantial evidence has been introduced which reasonably tends to establish such intent, the circumstantial evidence instruction may be supplemented as follows:

I have instructed you that (<u>state the requisite intent</u>) must be proved beyond a reasonable doubt. Direct evidence of intent is often unavailable. The accused's intent, however, may be proved by circumstantial evidence. In deciding this issue, you must consider all

relevant facts and circumstances (including but not limited to (here the military judge may specify significant evidentiary factors bearing on intent and indicate the respective contentions of counsel for both sides)).

NOTE 3: Proof of knowledge by circumstantial evidence. When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., to refute an affirmative defense of lack of knowledge) and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, the circumstantial evidence instruction may be supplemented as follows:

I have instructed you that you must be satisfied beyond a reasonable doubt that the accused knew (state the required knowledge). This knowledge, like any other fact, may be proved by circumstantial evidence. In deciding this issue you must consider all relevant facts and circumstances (including but not limited to (here the military judge may specify significant evidentiary factors bearing upon the accused's knowledge and indicate the respective contentions of counsel for both sides)).

REFERENCES: United States v. Lyons, 33 M.J. 88 (C.M.A. 1991); RCM 918(c) (discussion).

7–4–1. STIPULATIONS OF FACT

NOTE 1: Using this instruction. Prior to receiving any written or oral stipulations, the military judge must determine that all parties to the stipulation join in the stipulation, and that the accused fully understands and agrees to what is involved. A suggested inquiry guide may be found at Instructions 2-2-2, 2-7-24, 2-7-25, or 8-2-2. Any party may withdraw from an agreement to stipulate or from a stipulation prior to its receipt into evidence.

The parties to this trial have stipulated or agreed that (state the matters to which the parties have stipulated or agreed). When counsel for both sides, with the consent of the accused, stipulate and agree to (a fact) (the contents of a writing), the parties are bound by the stipulation and the stipulated matters are facts in evidence to be considered by you along with all the other evidence in the case.

NOTE 2: Withdrawal from a stipulation. The military judge may, as a matter of discretion, permit a party to withdraw from a stipulation which has been received in evidence. When a stipulation is withdrawn or ordered stricken, the court must be instructed as follows:

The stipulation that (state the matter(s) to which the parties had stipulated) has been (withdrawn) (stricken) and must be completely disregarded by you.

NOTE 3: Joint or common trials. Generally, in joint or common trials, stipulations made by only one or some of the accused should not be received when there is any possibility that the stipulation could adversely affect those not joining in it, since the stipulation deprives the non-consenting party of the right of confrontation. However, in those rare cases in which there appears no possibility of prejudice in the admission of such stipulations, the following limiting instruction should be given:

This stipulation may be considered only as to (state the name(s) of the accused person(s) who joined in the stipulation), and may not in any way be considered as evidence as to (state the name(s) of the accused person(s) who did not join in the stipulation).

7–4–2. STIPULATIONS OF EXPECTED TESTIMONY

NOTE 1: Using this instruction. Prior to receiving any written or oral stipulations the military judge must determine that all parties to the stipulation join in the stipulation, and that the accused fully understands and agrees to what is involved. A suggested inquiry guide may be found at Instructions 2-2-2, 2-7-24, 2-7-25, or 8-2-2. Any party may withdraw from an agreement to stipulate or from a stipulation prior to its receipt into evidence. When the stipulation is one of testimony rather than fact, and is in writing, the written stipulation may only be orally read into evidence and may not be shown to the court. When a stipulation as to testimony is received, whether written or oral, the following instruction should be given:

> The parties have stipulated or agreed what the testimony of (state the name of the person whose testimony is being presented by stipulation) would be if (he)(she) were present in court and testifying under oath. This stipulation does not admit the truth of such testimony, which may be attacked, contradicted, or explained in the same way as any other testimony. You may consider, along with all other factors affecting believability, the fact that you have not had an opportunity to personally observe this witness.

NOTE 2: Withdrawal from a stipulation. The military judge may, as a matter of discretion, permit a party to withdraw from a stipulation which has been received in

evidence. When a stipulation is withdrawn or ordered stricken, the court must be instructed as follows:

The stipulation that (state the matter(s) to which the parties had stipulated) has been (withdrawn) (stricken) and must be completely disregarded by you.

NOTE 3: Joint or common trials. Generally, in joint or common trials, stipulations made by only one or some of the accused should not be received when there is any possibility that the stipulation could adversely affect those not joining in it, since the stipulation deprives the non-consenting party of the right of confrontation. However, in those rare cases in which there appears no possibility of prejudice in the admission of such stipulations, the following limiting instruction should be given:

This stipulation may be considered only as to (state the name(s) of the accused person(s) who joined in the stipulation), and may not in any way be considered as evidence as to (state the name(s) of the accused person(s) who did not join in the stipulation).

7–5. DEPOSITIONS

NOTE 1: Using this instruction. After being received in evidence, depositions will be read but not shown to the court members. They will be marked as exhibits and incorporated into the record. In any case in which a deposition has been admitted, the following instruction may be given:

> The testimony of (state the name of the deponent), who is unavailable, has now been read to you. His/Her testimony may be attacked, contradicted, or explained in the same way as all other live testimony. You may consider, along with all other factors affecting credibility, that you have not had an opportunity to observe the appearance of the witness while testifying. The deposition itself, since it is the testimony of a witness, will not be given to you as an exhibit. However, if you want to have any of the deposition testimony re-read to you, you may ask for it in open court.

NOTE 2: Use of deposition testimony. Deposition testimony may be received in evidence when offered by either the trial counsel or defense except that in a capital case it may be received only from or with the express consent of the defense. When both capital and non-capital offenses involving the same accused but different transactions are tried together, a deposition relevant to only the non-capital offense

may be introduced by the trial counsel. In such cases the following instruction should be given:

> The deposition of (state the name of the deponent) may be considered only as to the offense of (identify the non-capital offense). This deposition testimony may not be considered by you as to the offense of (identify the capital offense).

NOTE 3: Joint or common trials. Generally, in joint or common trials, depositions taken in the presence of or with the express approval of only one or some of the accused should not be received when there is any possibility that such deposition could adversely affect any other accused, since this would result in deprivation of the right of confrontation. However, in those rare instances in which there appears no possibility of prejudice in the admission of such depositions, the following limiting instruction should be given:

> The deposition of (state the name of the deponent) may be considered only as to (state the name(s) of the accused person(s) as to whom the deposition may be considered), and may not be considered as evidence as to (state the name(s) of the accused person(s) as to whom the deposition may not be considered).

7–6. JUDICIAL NOTICE

NOTE 1: <u>Using this instruction</u>. A judicially noticed adjudicative fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned. The judge may take judicial notice, whether requested or not, but the parties must be informed in open court when the judge takes judicial notice of an adjudicative fact essential to establishing an element of the case. The judge must take judicial notice of an adjudicative fact if requested by a party and supplied with the necessary information showing it is a fact capable of being judicially noticed. A party is entitled to be heard as to the propriety of taking judicial notice. In the absence of prior notification, the request may be made after judicial notice has been taken. If the military judge is not convinced that the matter should be judicially noticed, the judge may resort to any source of relevant information. The procedural requirements discussed herein also apply to judicial notice of domestic law insofar as domestic law is a fact of consequence to the determination of the action. Judicial notice may be taken at any stage of the trial. When the judge takes judicial notice, the following instruction should be given:

I have taken judicial notice that (<u>state the matter judicially noticed</u>). This means that you are now permitted to recognize and consider (those) (this) fact(s) without further proof. It should be considered by you as evidence with all other evidence in the case. You may, but are

not required to, accept as conclusive any matter I have judicially noticed.

NOTE 2: <u>Matter determined inappropriate for judicial notice</u>. If the military judge, after consideration of all relevant sources of information, is not convinced that the matter may be judicially noticed, the judge should rule that the matter will not be judicially noticed. The parties may then submit any competent evidence to the court on the matter, just as they would with respect to any issue of fact.

NOTE 3: <u>Writings used in judicial notice</u>. If a writing is used by the court in aiding it to take judicial notice of a matter, the record should indicate that the writing was so used and, unless it is a statute of the United States, an executive order of the President, or an official publication of the Department of Defense or a military department, or the Headquarters of the Marine Corps or Coast Guard, the writing, or pertinent extracts therefrom, should be included in the record of trial as an appropriately marked exhibit.

REFERENCES: MRE 201, 201A.

7–7–1. CREDIBILITY OF WITNESSES

NOTE 1: <u>Using this instruction</u>. The following instruction should be given upon request, or when otherwise deemed appropriate, and it must be given when the credibility of a principal witness or witnesses for the prosecution has been assailed by the defense:

You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court, (friendships) (and) (prejudices) (and) (character for truthfulness). Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict.

(In weighing (a discrepancy) (discrepancies) (by a witness) (or) (between witnesses), you should consider whether (it) (they) resulted from an innocent mistake or a deliberate lie.)

Taking all these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth. (The believability of each witness' testimony

should be your guide in evaluating testimony and not the number of witnesses called.) (These rules apply equally to the testimony given by the accused.)

NOTE 2: <u>Other instructions</u>. If character for truthfulness or untruthfulness has been raised, Instruction 7-8-1 or 7-8-3 normally should be given immediately following this instruction.

7–7–2. EYEWITNESS IDENTIFICATION AND INTERRACIAL IDENTIFICATION

NOTE 1: <u>Using this instruction</u>. If interracial identification is in issue, give the entire instruction. If only eyewitness identification, give only the instruction following this NOTE:

One of the most important issues in this case is the identification of the accused as the perpetrator of the crime.

The government has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness(es) be free from doubt as to the correctness of his/her/their statement(s). However, you the court members, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the accused before you may convict (him)(her). If you are not convinced beyond a reasonable doubt that the accused was the person who committed the crime, you must find the accused not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to

observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

1. Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

(In general, a witness bases any identification he/she makes on his/her perception through the use of his or her senses. Usually the witness identifies an offender by the sense of sight, but this is not necessarily so, and the witness may use his or her other senses.)

2. Are you satisfied that the identification made by the witness subsequent to the offense was the product of his/her own recollection?

You may take into account both the strength of the identification and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the accused was presented to him/her for identification, you should scrutinize the identification with great care. You may also consider the length of time that elapsed between the occurrence of the crime and the next opportunity of the witness to see the accused as a factor bearing on the reliability of the identification.

(You may also take into account that an identification made by picking the accused out of a group of similar individuals is generally more reliable than one which results from the presentation of the accused alone to the witness.)

(3. You may take into account any occasions in which the witness failed to make an identification of the accused, or made an identification that was inconsistent with his/her identification at trial.)

4. Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he/she is truthful, and consider whether the witness had the capacity and opportunity to make a reliable observation on the matter covered in his/her testimony.

NOTE 2: <u>Interracial identification in issue</u>. Give the next instruction only in the event of an interracial identification issue.

In this case (an) (the) identifying witness is of a different race than the accused. In the experience of many it is more difficult to identify members of a different race than members of one's own. If this is also your own experience, you may consider it in evaluating the witness' testimony. You must also consider, of course, whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of the accused's race that

he/she would not have greater difficulty in making a reliable identification.

NOTE 3: <u>Mandatory instruction</u>. Give the following instruction regardless of the type of eyewitness identification:

I again emphasize that the burden of proof on the government extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the accused as the perpetrator of the crime with which (he)(she) stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must acquit the accused.

7–8–1. CHARACTER—GOOD—OF ACCUSED TO SHOW PROBABILITY OF INNOCENCE

NOTE: <u>Using this instruction</u>. Evidence of a pertinent trait of character of the accused offered by an accused, or by the prosecution to rebut the same, is admissible to prove that the accused acted in conformity therewith on a particular occasion. When a pertinent character trait is in evidence, the court may be instructed substantially as follows:

To show the probability of (his)(her) innocence, the defense has produced evidence of the accused's:

(Character for (honesty) (truthfulness) (peaceableness) (_____)).

(In rebuttal the prosecution has produced evidence of _____.)

Evidence of the accused's character for _____ may be sufficient to cause a reasonable doubt as to (his)(her) guilt.

On the other hand, evidence of the accused's (good character for _____) may be outweighed by other evidence tending to show

the accused's guilt (and the prosecution's evidence of the accused's ((bad) (_____) (character for _____).

REFERENCES: United States v. Gagan, 43 M.J. 200 (1995).

7–8–2. CHARACTER—VICTIM—VIOLENCE OR PEACEABLENESS

NOTE 1: Using this instruction. When an issue of self-defense or defense of another exists in cases involving death or assault; and evidence of the violent or peaceable character of the accused's alleged victim has been introduced, the court may be instructed substantially as follows. This instruction requires careful tailoring, particularly in cases where conflicting evidence has been presented concerning the alleged victim's character.

The (defense) (prosecution) has introduced evidence to show that (state the name of the alleged victim) (is) (was) a (violent) (peaceable) person. This evidence is important on the issue of (adequate provocation) (self-defense) (defense of another). The law recognizes that a person with a (violent) (peaceable) character is (more) (less) likely to become an aggressor than is a person with a (peaceable) (violent) character. Evidence that the alleged victim (is) (was) a (violent) (peaceable) person should be considered by you in determining whether it is (probable) (improbable) that the alleged victim was the aggressor.

NOTE 2: Accused aware of victim's character. If it is also shown by the evidence that the accused was aware of the victim's violent or peaceable character, or entertained a belief with respect to that character, the following instruction should be added:

Evidence that the accused was aware that the alleged victim (is) (was) a (violent) (peaceable) person, or had a belief as to that character, should also be considered by you in determining the question of the reasonableness and extent of (passion) (apprehension of danger) on the part of the accused.

7–8–3. CHARACTER FOR UNTRUTHFULNESS

NOTE: <u>Using this instruction</u>. When a witness, including an accused who testifies, has been impeached by evidence of his bad character for truthfulness, an instruction substantially as follows may be given:

Evidence has been received as to the (accused's) (_____) bad character for truthfulness.

(Evidence of good character for truthfulness has also been introduced.)

You may consider this evidence in determining (the accused's) (_____) believability.

7–9–1. EXPERT TESTIMONY

NOTE 1: Using this instruction. If expert testimony has been received, an instruction substantially as follows should be given:

You have heard the testimony of (name of the expert(s)). (He/She is) (They are) known as (an) "expert witness(es)" because his/her/their knowledge, skill, experience, training, or education may assist you in understanding the evidence or in determining a fact in issue. You are not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness. You should, however, consider his/her/their qualifications as (an) expert(s).

NOTE 2: Lay testimony or member "expertise." In appropriate cases the court members should be reminded that the testimony of lay witnesses should not be ignored merely because expert testimony has been introduced. For example, lay testimony is admissible on issues such as sanity, drunkenness, and hand writing identification. In a case involving an issue as to handwriting, the following might be added to the preceding instruction:

(You are free, however, to make your own comparison of the handwriting exemplars with the questioned writing(s).)

NOTE 3: <u>Hypothetical questions</u>. When an expert witness has expressed an opinion on direct or cross-examination upon a hypothetical question based on facts which the proponent of the question states will later be introduced in evidence, but which are not later introduced in evidence, the hypothetical question and its answer should be excluded and the members instructed to disregard it. In all cases in which hypothetical opinions based upon facts purportedly in evidence are permitted, substantially the instruction below should be given. However, when the opinion is adduced on cross-examination solely for the purpose of testing the credibility of the witness, the requirement that it be based on facts which will be in evidence is not applicable.

When an expert witness answers a hypothetical question, the expert assumes as true every asserted fact stated in the question. Therefore, unless you find that the evidence establishes the truth of the asserted facts in the hypothetical question, you cannot consider the answer of the expert witness to that hypothetical question.

NOTE 4: <u>Limited purpose testimony—basis or weight of opinion</u>. If in the course of stating the data on which an expert's opinion is based, the expert refers to matters which, if offered as general purpose evidence in the case would be inadmissible, the court must be instructed to consider such matters only with respect to the specific limited purpose (e.g., weight to be given to the expert opinion), and for no other purpose whatsoever. The following may be appropriate:

You (heard testimony) (received evidence) that _____. You may consider this information only for the limited purpose (of evaluating the basis of the expert's opinion) (to illustrate the principle that _____) (in determining the weight to give the expert's opinion) (_____) and for no other purpose whatsoever.

(Specifically, you may not consider this information for its tendency, if any, to show that (_____)).

NOTE 5: Expert testimony on witness credibility or opinion on whether offense has been committed. A long line of Court of Military Appeals/Court of Appeals for the Armed Forces cases makes clear that an expert may not testify as to the credibility of the victim or opine whether an offense has been committed, and that to permit such testimony is error. United States v. Armstrong, 53 M.J. 76 (2000) (plain error for an expert to testify that the victim a) had been abused and b) the accused was the abuser, even after two sets of curative instructions); United States v. Birdsall, 47 M.J. 404 (1998) ("Normally, expert testimony that a victim's conduct or statements are consistent with sexual abuse or consistent with the complaints of sexually abused children is admissible...." However, error for expert to testify that the victim had been abused and that the accused was the abuser); United States v. Suarez, 35 M.J. 374 (C.M.A. 1992) (proper for an expert to testify a) on the characteristics of Child Sex Abuse Accommodation Syndrome and b) that the victims' behavior was consistent with the Syndrome. The military judge instructed after the witness testified and in closing instructions before findings. These instructions - although they "might have been

improved" - were quoted in the opinion); United States v. Harrison, 31 M.J. 330 (C.M.A. 1990) ("It is impermissible for an expert to testify about his belief that a child is telling the truth regarding an alleged incident of sexual abuse.") Asking the expert directly whether the expert thought the victim had been abused was error. "An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms."). The instructions following NOTES 6 and 7 may be used when such issues arise.

NOTE 6: Expert testimony that may be confused with an opinion on credibility, guilt, or innocence. When an expert has expressed an opinion that might be construed as an opinion concerning the credibility of the alleged victim or that an offense was or was not committed, the following instruction should be given in addition to the other instructions on expert testimony. The instruction should be given immediately after the expert testifies, and then repeated in the closing instructions:

> Only you, the members of the court, determine the credibility of the witnesses and what the facts of this case are. No expert witness (or other witness) can testify that the (alleged victim's) (a witness') account of what occurred is true or credible, that the (expert) (witness) believes the (alleged victim) (another witness), or that (a sexual encounter) (_____) occurred. To the extent that you believed that (name of witness) testified or implied that he/she believes the (alleged victim) (a witness), that a crime occurred, or that the (alleged victim) (a witness) is credible, you may not consider this

as evidence that a crime occurred or that the (alleged victim) (witness) is credible.

NOTE 7: <u>Where belief in victim's allegations testified to by an expert for a proper, limited purpose</u>. In limited cases, an expert may testify that he believed a victim to explain why the expert treated a victim or acted in a certain way. In such cases, the following may be appropriate and given immediately after the instruction following NOTE 6 above:

It may, however, be considered only for the limited purpose of explaining why (<u>name of expert</u>) acted as he/she did (in providing care or treatment to (<u>name of alleged victim</u>) (_____).

REFERENCES: MRE 701-706.

7–9–2. POLYGRAPH EXPERT

NOTE 1: Using this instruction. Notwithstanding the provisions of Mil. R. Evid. 707, there may be extremely unusual situations in which polygraph evidence could be admitted. United States v. Clark, 53 M.J. 280 (2000) (concurring opinions by Crawford and Everett, JJ., indicating that polygraph evidence might be admitted into evidence in spite of the language of Mil. R. Evid. 707). In those extremely unusual cases, judges may use this instruction in lieu of a variant of Instruction 7-9-1. If one or more polygraph experts testify, the following instruction may be useful:

You have heard the testimony of _____ as to a polygraph examination administered by him/her to _____. (You have also heard the testimony of _____). _____ (is a) (are both) qualified polygraph examiner(s). A qualified polygraph examiner is known in the law as an expert witness because of his/her particular knowledge, skill, training and education in his/her field. As with any witness, it is your responsibility to determine the believability of an expert witness and the weight, if any, you wish to give such testimony. You are not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness. You should, however, consider the qualifications of the expert witness(es).

NOTE 2: <u>Conflict among the experts</u>. When two polygraphers testify, and they disagree, the military judge may use the following instruction:

When there is disagreement between expert witnesses, as there is in this case, it becomes your responsibility to determine which witness, if either, you will believe as to an issue or issues upon which there is disagreement. When resolving these issues, you may accept all or a portion of an expert witness' testimony, or you may reject his/her entire testimony.

NOTE 3: <u>When the accused testifies about matters which the polygrapher also testifies</u>. If the accused testifies to matters which were also testified to by the polygrapher, use the following:

You may consider the opinion of a polygraph examiner as a matter bearing upon the believability of the testimony of the accused at the trial. However, I caution you that the questions posed by _____ to the accused and (his)(her) responses thereto are not evidence which directly relate to the guilt or innocence of the accused; but you may, if you wish, consider them along with the opinion of _____ as to the truthfulness of those responses at the time they were made, that is, at the time of the polygraph exam, when you are weighing the believability of the accused's testimony before you at trial. When you

are weighing this testimony, please keep in mind my general instructions as to the credibility of all witnesses, including the accused.

7–10. ACCOMPLICE TESTIMONY

NOTE: Using this instruction. Instructions on accomplice testimony should be given whenever the evidence tends to indicate that a witness was culpably involved in a crime with which the accused is charged. The instructions should be substantially as follows:

A witness is an accomplice if he/she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness' believability, that is, a motive to falsify his/her testimony in whole or in part, because of an obvious self-interest under the circumstances.

(For example, an accomplice may be motivated to falsify testimony in whole or in part because of his/her own self-interest in receiving (immunity from prosecution) (leniency in a forthcoming prosecution) (_____).)

In deciding the believability of (state the name of the witness), you should consider all the relevant evidence (including but not limited to (here the military judge may specify significant evidentiary factors

bearing on the issue and indicate the respective contentions of counsel for both sides)).

Whether (state the name of the witness), who testified as a witness in this case, was an accomplice is a question for you to decide. If (state the name of the witness) shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved himself/herself with the offense with which the accused is charged, he/she would be an accomplice.

As I indicated previously, it is your function to determine the credibility of all the witnesses, and the weight, if any, you will accord the testimony of each witness. Although you should consider the testimony of an accomplice with caution, you may convict the accused based solely upon the testimony of an accomplice, as long as that testimony was not self-contradictory, uncertain, or improbable.

7–11–1. PRIOR INCONSISTENT STATEMENT

NOTE 1: Using this instruction. When evidence that a witness made a statement which is inconsistent with the witness' testimony at trial is admitted only for the purpose of impeachment, the following limiting instruction should be given:

> You have heard evidence that the witness (state the name of the witness) made a statement prior to trial that (may be) (is) inconsistent with his/her testimony at this trial, (specifically, that (highlight any materially significant inconsistencies)). If you believe that an inconsistent statement was made, you may consider the inconsistency in evaluating the believability of the testimony of (state the name of the witness).
>
> (You may not, however, consider the prior statement as evidence of the truth of the matters contained in that prior statement.)

NOTE 2: Inconsistent statement as substantive evidence. If evidence of an inconsistent statement is admissible to establish the truth of the matter asserted, as when (1) it is evidence of a voluntary confession of a witness who is the accused, (2) it is a statement of the witness which is not hearsay such as a prior statement made by the witness under oath subject to perjury at a trial, hearing, or other proceeding, or in a deposition, (3) it is a statement of the witness otherwise admissible as an exception to the hearsay

rule, or (4) the witness testifies that his inconsistent statement is true and thus adopts it as part of his testimony, the last sentence of the above instruction should not be given. In such a case the judge should explain to the court members the additional purpose for the admission of such evidence as may be applicable.

7–11–2. PRIOR CONSISTENT STATEMENT—RECENT FABRICATION

NOTE: Using this instruction. When a party seeks to impeach a witness on the ground of recent fabrication, improper influence or motive, and evidence of a prior statement consistent with the witness' trial testimony is offered in rebuttal, the following instruction should be given:

You have heard evidence that (state the name of the witness(es)) made (a) statement(s) prior to trial that may be consistent with his/her/their testimony at this trial. If you believe that such (a) consistent statement(s) (was) (were) made, you may consider (it) (them) for (its) (their) tendency to refute the charge of (recent fabrication) (improper influence) (improper motives). You may also consider the prior consistent statement as evidence of the truth of the matters expressed therein.

7–12. ACCUSED'S FAILURE TO TESTIFY

NOTE: <u>Using this instruction</u>. When the accused has not testified, the military judge should determine, outside the hearing of the court, that the accused has been advised of his testimonial rights and whether the defense desires an instruction on the effect of the failure of the accused to testify. If the defense requests it, the instruction will be given; but the defense may request that such an instruction not be given, and that election is binding on the military judge unless the judge determines the instruction is necessary in the interests of justice. When appropriate, an instruction substantially as follows may be used:

The accused has an absolute right to remain silent. You will not draw any inference adverse to the accused from the fact that (he)(she) did not testify as a witness (except for the purpose of _____). The fact that the accused has not testified (on any other matter) must be disregarded by you.

7–13–1. OTHER CRIMES, WRONGS, OR ACTS EVIDENCE

NOTE 1: <u>The process of admitting other acts evidence</u>. Whether to admit evidence of other crimes, wrongs, or acts is a question of conditional relevance under MRE 104(b). In determining whether there is a sufficient factual predicate, the military judge determines admissibility based upon a three-pronged test: (1) Does the evidence reasonably support a finding by the court members that the accused committed the prior crimes, wrongs, or acts? (2) Does the evidence make a fact of consequence more or less probable? (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or any other basis under MRE 403? If the evidence fails any of the three parts, it is inadmissible.

NOTE 2: <u>Using these instructions</u>. If the accused requests, trial counsel is required to provide reasonable notice, ordinarily in advance of trial, before offering evidence of other crimes, wrongs, or acts under MRE 404(b). When evidence of a person's commission of other crimes, wrongs, or acts is properly admitted prior to findings as an exception to the general rule excluding such evidence (See NOTE 1 on the process of admitting such evidence), the limiting instruction following this NOTE must be given upon request or when otherwise appropriate. When evidence of prior sexual offenses or child molestation has been admitted, the instructions following NOTES 3 and 4 may be appropriate in lieu of the below instruction.

You may consider evidence that the accused may have (state the evidence introduced for a limited purpose) for the limited purpose of its tendency, if any, to:

(identify the accused as the person who committed the offense(s) alleged in _____)

(prove a plan or design of the accused to _____)

(prove knowledge on the part of the accused that _____)

(prove that the accused intended to _____)

(show the accused's awareness of (his)(her) guilt of the offense(s) charged)

(determine whether the accused had a motive to commit the offense(s))

(show that the accused had the opportunity to commit the offense(s))

(rebut the contention of the accused that (his)(her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))

(rebut the issue of _____ raised by the defense); (and)

(_____)

You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies and that (he)(she), therefore committed the offense(s) charged.

NOTE 3: <u>Sexual assault and child molestation offenses—MRE 413 or 414 evidence</u>. In cases in which the accused is charged with a sexual assault or child molestation offense, Military Rules of Evidence 413 and 414 permit the prosecution to offer, and the court to admit, evidence of the accused's commission of other sexual assault or child molestation offenses on any matter to which relevant. Unlike misconduct evidence that is not within the ambit of MRE 413 or 414, the members may consider this evidence on any matter to which it is relevant, to include the issue of the accused's propensity or predisposition to commit these types of crimes. The government is required to disclose to the accused the MRE 413 or 414 evidence that is expected to be offered under the rule at least 5 days before trial. When evidence of the accused's commission of other

offenses of sexual assault under MRE 413, or of child molestation under MRE 414, is properly admitted prior to findings as an exception to the general rule excluding such evidence, the MJ should give the following appropriately tailored instruction upon request or when otherwise appropriate.

You have heard evidence that the accused may have previously committed (another) (other) offense(s) of (sexual assault) (child molestation). You may consider the evidence of such other act(s) of (sexual assault) (child molestation) for (its) (their) tendency, if any, to show the accused's propensity to engage in (sexual assault) (child molestation), as well as (its) (their) tendency, if any, to:

(identify the accused as the person who committed the offense(s) alleged in _____)

(prove a plan or design of the accused to _____)

(prove knowledge on the part of the accused that _____)

(prove that the accused intended to _____)

(show the accused's awareness of (his)(her) guilt of the offense(s) charged)

(determine whether the accused had a motive to commit the offense(s))

(show that the accused had the opportunity to commit the offense(s))

(rebut the contention of the accused that (his)(her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))

(rebut the issue of _____ raised by the defense); (and)

(_____)

You may not, however, convict the accused merely because you believe (he)(she) committed (this) (these) other offense(s) or merely because you believe (he)(she) has a propensity to engage in (sexual assault) (child molestation). The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of (each) (the) offense(s) charged.

NOTE 4: <u>Use of Charged MRE 413 / 414 Evidence</u>. There will be circumstances where evidence relating to one charged sexual assault or child molestation offense is relevant to another charged sexual assault or child molestation offense. If so, the following instruction may be used, in conjunction with NOTE 3, as applicable.

(Further), evidence that the accused committed the (sexual assault) (act of child molestation) alleged in [<u>state the appropriate specification(s) and Charge(s)</u>] may be considered by you as evidence of the accused's propensity, if any, to commit the (sexual assault) (act of child molestation) alleged in [<u>state the appropriate specification(s) and Charge(s)</u>]. You may not, however, convict the accused of one offense merely because you believe (he)(she) committed (this) (these) other offense(s) or merely because you believe (he)(she) has a propensity to commit (sexual assault) (child molestation). Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one (sexual assault) (act of child molestation) creates no inference that the accused is guilty of any other (sexual assault) (act of child molestation). However, it may demonstrate that the accused has a propensity to commit that type of offense. The prosecution's burden of proof to establish the accused's

guilt beyond a reasonable doubt remains as to each and every element of each offense charged.

NOTE 5: Use of other acts evidence in sentencing proceedings. When evidence has been admitted on the merits for a limited purpose raising an inference of uncharged misconduct by the accused, there is normally no sua sponte duty to instruct the court members to disregard such evidence in sentencing, or to consider it for a limited purpose. Although the court in sentencing is ordinarily permitted to give general consideration to such evidence, it should not be unnecessarily highlighted. Evidence in aggravation, however, must be within the scope of RCM 1001(b). A limiting instruction on sentencing may be appropriate sometimes, for example, when evidence of possible uncharged misconduct has been properly introduced but subsequently completely rebutted, or when the inference of possible misconduct has been completely negated. For example, if there were inquiry of a merits character witness whether that witness knew the accused had been arrested for an uncharged offense, to impeach that witness' opinion, and it was then shown that the charges underlying the arrest were dismissed or that the accused was acquitted, it may be appropriate on sentencing to instruct that the arrest be completely disregarded in determination of an appropriate sentence. In such case, there is actually no proper evidence of uncharged misconduct remaining at all, and the court members might improperly consider the inquiry regarding the arrest alone as being adverse to the accused. Instruction 7-18, "Have You Heard" Questions To Impeach Opinion, is appropriate when "have you heard/do you know questions" regarding uncharged misconduct have been asked.

REFERENCES: MRE 105, 403, 404(b), 413, and 414; Application of Federal Rules of Evidence and Military Rules of Evidence 413 and 414: United States v. Wright, 53 M.J. 476 (2000); United States v. Henley, 53 M.J. 488 (2000); United States v. Parker, 54 M.J. 700 (Army Ct. Crim. App. 2001) (disclosure requirements); and United States v. Myers, 51 M.J. 570 (N.M. Ct. Crim. App. 1999); Test for admissibility under MRE 404(b): United States v. Mirandez-Gonzalez, 26 M.J. 411 (C.M.A. 1988); United States v. Reynolds, 29 M.J. 105 (C.MA. 1989); and Huddleston v. United States, 485 U.S. 681 (1988).

7–13–2. PRIOR CONVICTION TO IMPEACH

NOTE: Using this instruction. When evidence that the accused was convicted of a crime involving moral turpitude or otherwise affecting the accused's credibility is admitted to impeach his credibility as a witness, the following instruction should be given:

The evidence that the accused was convicted of (state the offense(s)) by a (civil) (military) court may be considered by you for the limited purpose of its tendency, if any, to weaken the credibility of the accused as a witness. You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that (he)(she), therefore, committed the offense(s) charged.

7–14. PAST SEXUAL BEHAVIOR OF NON-CONSENSUAL SEX VICTIM

NOTE: Using this instruction. In a prosecution for a non-consensual sexual offense, evidence of the victim's past sexual behavior is generally inadmissible. Other evidence, however, of the victim's past sexual behavior except reputation or opinion evidence may be admissible under MRE 412. If the accused desires to present evidence of specific instances of the victim's past sexual behavior, the military judge and trial counsel must receive notice accompanied by an offer of proof. If the judge determines that the offer of proof contains evidence described in subdivision (b) of MRE 412, the judge must conduct a hearing (which must be closed) outside the presence of the court members to determine if the evidence is (a) constitutionally required; (b) evidence of past sexual behavior with persons other than the accused on the issue of whether or not the accused was the source of semen or injury; or (c) evidence of past sexual behavior with the accused on the issue of whether the alleged victim consented to the offense charged. When such evidence has been adduced and admitted, the following instruction should be given either upon request or when otherwise deemed appropriate:

Evidence has been introduced indicating that (state the name of the alleged victim) has engaged in past acts of (specify the specific instances of past sexual behavior) with (the accused) (_____). This evidence should be considered by you (on the issue of whether (state the name of the alleged victim) consented to the sexual act(s) with which the accused is charged) (on the issue of whether or not the accused was the source of (semen) (and) (injury) to the victim) (and) (_____).

7–15. VARIANCE—FINDINGS BY EXCEPTIONS AND SUBSTITUTIONS

NOTE 1: <u>Using this instruction</u>. Whenever the evidence indicates that an alleged offense may have been committed, but at a time, place, or in another aspect different from that alleged, the court members should be instructed substantially as follows:

If you have doubt about the (time) (place) (manner in which the injuries described in the specification were inflicted) (_____) but you are satisfied beyond a reasonable doubt that the offense (or a lesser included offense) was committed (at a time) (at a place) (in a particular manner) (_____) which differs slightly from the exact (time) (place) (manner) (_____) in the specification, you may make minor modifications in reaching your findings by changing the (time) (place) (manner in which the alleged injuries described in the specification were inflicted) (_____) described in the specification, provided that you do not change the nature or identity of the offense (or the lesser included offense).

NOTE 2: <u>Modifying findings by exceptions and substitutions</u>. The following form is also appropriate for use in giving the court members instructions on modifying their findings in any case in which the court make findings by exceptions, or exceptions and substitutions. The Findings Worksheet should provide alternative language for findings by exceptions and substitutions and any lesser included offenses.

As to (the) Specification (_____) of (the) (additional) Charge (_____), if you have doubt that _____, you may still reach a finding of guilty so long as all the elements of the offense (or a lesser included offense) are proved beyond a reasonable doubt, but you must modify the specification to correctly reflect your findings.

7–16. VALUE, DAMAGE OR AMOUNT—VARIANCE

NOTE 1: <u>Using this specification</u>. Depending upon the content of the specification and the evidence in a case involving an offense under Articles 103, 108, 109, 121, 123a, 126, 132, or 134 (knowingly receiving stolen property), it may be advisable for the court, after being instructed on the elements of the offense, to be further advised concerning the element of value or damages as follows:

If you have a reasonable doubt that the (property was of the value alleged) (damages amounted to the sum stated), but you are satisfied beyond a reasonable doubt that the (property was of a lesser value) (damages amounted to a lesser sum), and that all other elements have been proved beyond a reasonable doubt, you may still reach a finding of guilty. Should this occur, you must modify the specification to correctly reflect your findings. (You may change the amount described in the specification and substitute any lesser specific amount as to which you have no reasonable doubt (or you may change the amount described in the specification and substitute (one of) the following phrase(s): (more than $100.00) ($100.00 or less) (some value).)

NOTE 2: <u>Official price list used</u>. When the property involved is an item issued or procured from government sources or evidence has been received showing the price

listed in an official publication for that property at the time alleged in a specification, the court should be instructed:

Value is a question of fact. The price listed in an official publication is evidence of its value at the time of the offense provided the item was in the same condition as the item listed in the official price list. (The price listed in an official price list does not necessarily prove the value of an item. In determining the actual value of the item you must consider all the evidence concerning condition and value.)

NOTE 3: <u>Mandatory instruction</u>. Whether or not proof of value includes evidence of a price listed in an official publication, the court should be instructed:

In determining the question of value in this case, you should consider (the expert testimony you have heard) (evidence as to the selling price of similar property on the legitimate market) (the purchase price recently paid on the legitimate market by the owner) (age and serviceability of the property) (_____) and all other evidenced in the specification on (<u>state the time and place of the offense</u>). (The value of property is determined by its fair market value at the time and place of the offense described in the specification.) (If this property, because of (its character) (or) (the place where it was) had

(no fair market value at the time and place alleged) (no easily discoverable value at the time and place described in the specification) its value may be determined by its fair market value in the United States at the time of the offense described in the specification, or by its replacement cost at that time, whichever is the lesser) concerning the fair market value of the property described.

7–17. "SPILL-OVER"—FACTS OF ONE CHARGED OFFENSE TO PROVE ANOTHER

NOTE 1: Using this instruction. When unrelated but similar offenses are tried at the same time, there is a possibility that the court members may use evidence relating to one offense to convict of another offense. Another danger is that the members could conclude that the accused has a propensity to commit crime. In United States v. Hogan, 20 M.J. 71 (C.M.A. 1985), the Court of Military Appeals recommended that an instruction be given to preclude this spill-over effect. The following instruction should be given whenever there is a possibility that evidence of an offense might be improperly considered with respect to another offense:

An accused may be convicted based only on evidence before the court (not on evidence of a (general) criminal disposition). Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that (he)(she) committed any other offense. If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant. For example, if a person were charged with stealing a knife and later using that knife to commit another offense, evidence concerning the knife, such as that

person being in possession of it or that person's fingerprints being found on it, could be considered with regard to both offenses. But the fact a person's guilt may have been proven of stealing the knife is not evidence that the person also is guilty of any other offense. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

NOTE 2: Uncharged misconduct on the merits. Notwithstanding the instruction at NOTE 1 that proof of one offense may not be considered with respect to another and carries no inference of guilt of another offense, there are circumstances under MRE 404(b) when evidence relating to one charged offense may be relevant to a similar but unrelated charged offense. The following instruction, used in conjunction with the instruction following NOTE 1, may be used in lieu of Instruction 7-13-1, Uncharged Misconduct, for this evidence.

I just instructed you that you may not infer the accused is guilty of one offense because (his)(her) guilt may have been proven on another offense, and that you must keep the evidence with respect to each offense separate. However, there has been some evidence presented with respect to (state the offense) (as alleged in specification _____ of charge _____) which also may be

considered for a limited purpose with respect to (state the other offense) (as alleged in specification _____ of charge _____). This evidence, that (state the evidence that may be considered under MRE 404(b)) may be considered for the limited purpose of its tendency, if any, to:

a. (identify the accused as the person who committed the offense of _____);

b. (prove a plan or design of the accused to_____);

c. (prove knowledge on the part of the accused that_____);

d. (prove that the accused intended to _____);

e. (show the accused's awareness of (his)(her) guilt of the offense of _____);

f. (prove the motive of the accused to _____);

g. (show that the accused had the opportunity to commit the offense of _____);

h. (rebut the contention of the accused that his participation in the offense of _____ was the result of (accident) (mistake) (entrapment);

i. (rebut the issue of _____ raised by the defense); or

j. (_____) with respect to the offense of (state the offense) (as alleged in the specification _____ of Charge _____).

You may not consider this evidence for any other purpose and you may not conclude or infer from this evidence that the accused is a bad person or has criminal tendencies, and that therefore (he)(she) committed the offense(s) of (_____).

REFERENCES: MRE 403 and 404(b); United States v. Palacios, 37 M.J. 366 (C.M.A. 1993); United States v. Haye, 29 M.J. 213 (C.M.A. 1989).

7–18. "HAVE YOU HEARD" QUESTIONS TO IMPEACH OPINION

NOTE 1: Using this instruction. Counsel may ask "Did you know" or "Have you heard" questions to test an opinion or to rebut character evidence. There must be a good faith belief the matter asked about is true, and the military judge must balance the question under MRE 403. MRE 405(a) should also be consulted when the question is asked to rebut character evidence.

NOTE 2: Witness denies knowledge of the subject matter inquired into and no extrinsic evidence is admitted. When the question is permitted and the witness denies knowledge of the subject of the question, in the absence of extrinsic evidence of the subject matter, there is no evidence of the subject matter of the question. In such cases, the following instruction should be given:

During the testimony of (state the name of the witness), he/she was asked whether he/she (knew) (had heard) (was aware) (_____) that the accused (state the matter inquired into). That was a permissible question; however, there is no evidence that the accused (state the matter inquired into). This question was permitted to test the basis of the witness' opinion and to enable you to assess the weight you accord his/her testimony. You may not consider the question for any other purpose.

NOTE 3: <u>When the witness has knowledge of the subject matter inquired into</u>. When the witness indicates knowledge or awareness of the subject matter of the "Did you know" or "Have you heard" question, the following instruction must be given:

During the testimony of (<u>state the name of the witness</u>), he/she was asked whether he/she (knew) (had heard) (was aware) (_____) that the accused (<u>state the matter inquired into</u>). This was a permissible question. You may consider the question and answer only to (test the basis of the witness' opinion and to enable you to assess the weight you accord to his/her testimony) (and) (to rebut the opinion given). You may not consider the question and answer for any other purpose. You may not infer from this evidence that the accused is a bad person or has criminal tendencies and that the accused, therefore, committed the offense(s) charged.

NOTE 4: <u>Reference to matter during argument</u>. The military judge has a <u>sua sponte</u> duty to interrupt argument and give appropriate instructions when counsel refer to the subject matter of "Did you know" or "Have you heard" questions and there is no evidence of these matters.

NOTE 5: <u>AR 27-26, Rules of Professional Conduct for Lawyers</u>. Rule 3.4(e) states, "A lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence...."

REFERENCES: MRE 403, 404(b), and 405(a); Michelson v. United States, 335 U.S. 469 (1948); United States v. White, 36 M.J. 306 (C.M.A. 1993); United States v. Pearce, 27 M.J. 121 (C.M.A. 1988); United States v. Donnelly, 13 M.J. 79 (C.M.A. 1982); United States v. Pauley, 24 M.J. 521 (A.F.C.M.R. 1987); United States v. Kitching, 23 M.J. 601 (A.F.C.M.R. 1986), *pet. denied*, 24 M.J. 441 (1987).

7–19. WITNESS TESTIFYING UNDER A GRANT OF IMMUNITY OR PROMISE OF LENIENCY

NOTE 1: Using this instruction. When a witness testifies under a grant of immunity or promise of leniency, the following instructions should be given. Careful tailoring is required depending on the type and terms of immunity given or the leniency promised. One or more of the instructions following NOTES 2, 3, or 4 should be given. The instruction following NOTE 5 is always given. These instructions should be given immediately after the Instruction 7-7, Credibility of Witnesses.

NOTE 2: Witness granted use (testimonial) immunity. If the terms of the immunity are that the witness' testimony cannot be used against him, the following should be given:

> (Name of witness testifying under grant of immunity) testified under a grant of immunity. This means that this witness was ordered to testify truthfully by the convening authority. Under this grant of immunity, nothing the witness said, and no evidence derived from that testimony, can be used against that witness in a criminal trial.

NOTE 3: Witness granted transactional immunity. If the terms of the immunity are that the witness will not be prosecuted, the following should be given:

(Name of witness testifying under grant of immunity) testified under a grant of immunity. Under the terms of this grant, the witness was ordered to testify truthfully by the convening authority and cannot be prosecuted for any offense about which he/she testified.

NOTE 4: Witness promised leniency. When a witness has been promised leniency in exchange for testimony, the following instruction may be useful in preparing a tailored instruction:

(Name of witness testifying under promise of leniency) testified in exchange for a promise from the convening authority to ((reduce) (suspend) (_____) the sentence the witness received in another court-martial by _____) (_____).

NOTE 5: Mandatory instruction. The following instruction is always given:

If the witness did not tell the truth, the witness can be prosecuted for perjury. In determining the credibility of this witness, you should consider the fact this witness testified under a (grant of immunity) (promise of leniency) along with all the other factors that may affect the witness' believability.

NOTE 6: Accomplice instruction. Witnesses who testify under a grant of immunity or in exchange for leniency are often accomplices. When an accomplice testifies, Instruction 7-10, Accomplice Testimony, must be given upon request. United States v. Gillette, 35 M.J. 468 (C.M.A. 1992).

REFERENCES: MRE 301(c)(2) when the government must give notice that a witness has been granted immunity or leniency; RCM 704 as to grants of immunity generally.

7–20. CHAIN OF CUSTODY

NOTE: <u>Using this instruction</u>. This instruction may be useful in cases involving laboratory evidence, particularly in urinalysis cases.

The evidence in this case has placed into issue the question of the "chain of custody" of the sample of (urine) (_____) allegedly given by the accused.

The "chain of custody" of an exhibit is simply the path taken by the sample from the time it is given until it is tested in the laboratory. In making your decision in this case you must be satisfied beyond a reasonable doubt that the sample tested was the accused's, and that it was not tampered with or contaminated in any significant respect before it was tested and analyzed in the laboratory. You are also advised that the government is not required to maintain or show a perfect chain of custody. Minor administrative discrepancies do not necessarily destroy the chain of custody.

Similarly, you must be satisfied that the laboratory properly analyzed the sample and produced an accurate result.

You are entitled to infer that the procedures in the laboratory for handling and testing the sample were regular and proper unless you have evidence to the contrary. However, you are not required to draw this inference.

The weight and significance to be attached to this evidence is a matter for your determination.

7–21. PRIVILEGE

NOTE: <u>Using this instruction</u>. The following instruction may be useful when issues of testimonial privileges arise during the course of trial.

During the testimony of (the accused) (_____), the witness claimed what is known as the (attorney-client privilege) (clergy-penitent privilege) (husband-wife privilege). This is one of several privileges recognized in the law. These communications are protected because they support highly significant public policy interests by encouraging and protecting certain kinds of communications.

The assertion of a privilege is entirely proper. As a result, you may not draw any adverse inference against (the accused) (_____) because of the assertion of privilege. Further, you may not draw any inference against any party as a result of this assertion of privilege.

I caution you not to speculate as to what (the accused) (_____) would have testified to if the witness had not claimed the privilege. In your deliberations, you must set aside this matter of privilege and

decide the case on the evidence submitted to you by both the prosecution and the defense.

7–22. FALSE EXCULPATORY STATEMENTS

NOTE 1: <u>Using this instruction</u>. If evidence that the accused made a false exculpatory statement or gave a false explanation for the alleged offenses(s) has been introduced and the government contends that an inference of consciousness of guilt should be drawn from the evidence, the following instruction may be given. Ordinarily, Instruction 7-3, <u>Circumstantial Evidence</u>, should be given prior to giving the following:

There has been evidence that after the offense(s) (was) (were) allegedly committed, the accused may have (made a false statement) (given a false explanation) (_____) about the alleged offense(s), specifically (that (he)(she) told an investigator that (he)(she) was at another place when the crime was committed) (_____).

Conduct of an accused, including statements made and acts done upon being informed that a crime may have been committed or upon being confronted with a criminal charge, may be considered by you in light of other evidence in the case in determining the guilt or innocence of the accused.

If an accused voluntarily offers an explanation or makes some statement tending to establish (his)(her) innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt. You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish (his)(her) innocence. The drawing of this inference is not required. Whether the statement was made, was voluntary, or was false is for you to decide.

(You may also properly consider the circumstances under which the statement(s) (was) (were) given, such as whether they were given under oath, and the environment (such as (fear of law enforcement officers) (a desire to protect another) (a mistake) (_____)) under which (it was) (they were) given.)

Whether evidence as to an accused's voluntary explanation or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence, are matters for determination by you, the court members.

NOTE 2: Basis for instruction. First recognized in Wilson v. United States, 162 U.S. 613, 16 S.Ct. 895, (1896), this instruction has long been accepted by courts. United States v. McDougal, 650 F.2d 532 (4th Cir. 1981). The instruction has been validated in three military cases: United States v. Opalka, 36 C.M.R. 938 (A.F.B.R.), pet denied, 36 C.M.R. 541 (1966); United States v. Colcol, 16 M.J. 479 (C.M.A. 1983); and United States v. Mahone, 14 M.J. 521 (A.F.C.M.R. 1982).

NOTE 3: General denial of guilt. This instruction is not appropriate if the alleged false statement is a general denial of guilt. United States v. Colcol, supra, or the determination of the falsity of the statement turns on the ultimate question of guilt or innocence of the accused. Unless the alleged false statement is inherently incredible, independent evidence of the falsity of the statement should be required. United States v. Littlefield, 840 F.2d 143 (1st Cir. 1988), cert denied, 109 S.Ct. 155.

NOTE 4: Disclosure of statements required. The accused's exculpatory pretrial statements are required to be disclosed to the defense under MRE 304, and any motion to suppress should be litigated prior to trial. If the prosecution does not disclose the statement prior to arraignment, MRE 304(d)(2)(B) applies.

7–23. "CLOSED TRIAL SESSION," IMPERMISSIBLE INFERENCE OF GUILT

NOTE 1: Using this instruction. Whenever a court-martial, or a portion thereof, is closed to the public because purportedly classified evidence is to be presented, the military judge has the sua sponte duty to instruct the court members that the security measures taken at the trial will not permit any inference of guilt against the accused. The judge must give instructions similar to those at Notes 3 and 4, below. The term 'closed trial session' is used to distinguish sessions closed to the public for security reasons from closing the court for deliberations. Before excusing the members at the close of the trial, the instruction following Note 5 should also be given.

NOTE 2: Security briefings. A Security Officer may be required to brief the members about safeguarding and not revealing what is purportedly classified information. If this is done, that briefing must be held in the presence of all parties and the accused, and be part of the record. The contents of the security briefing will determine whether the briefing is given in an open or closed trial session. A copy of any documents the members are required to sign by virtue of being exposed to purportedly classified information must be included as an Appellate Exhibit. Finally, the military judge should review the Security Officer's briefing before it is given so that the Security Officer is not appearing to give evidence that the members WILL be exposed to classified information or that documents ARE classified in the manner classification markings would indicate.

NOTE 3: Prefatory instructions to members in trials where there will be a closed trial session. Give the following instruction at the beginning of the trial or prior to the first closed trial session.

Members of the court, we are about to have a closed trial session. That means this session of the court will not be open to the general public or to anyone else who does not have the appropriate security clearance and need to know the evidence that will be presented during this portion of the trial. A closed trial session to consider purportedly classified evidence is the most satisfactory method for resolving the competing needs of the Government for protection of the purportedly classified information and the rights of the accused to a public trial.

(I caution you that if you take notes during the closed trial session, then your notes must be secured. The way we will handle your notetaking during any closed trial session will be for you to put your notes into a sealed envelope with your signature across the seal. The designated Security Officer will secure those notes for you until the next closed trial session. You may also have these notes for your use during deliberations, but when you have completed your deliberations, the Security Officer must collect and destroy them.)

(The designated Security Officer is responsible for ensuring that all purportedly classified evidence is properly protected. If we are in an

open trial session and if it appears that classified information is being mentioned in an improper environment, the Security Officer will so indicate and we will either have a closed trial session at that point, or we will discuss the matter at another time when we do have a closed trial session. We will try to be economical in the use of closed trial sessions, for example, saving several issues for one closed trial session. Your patience and understanding about the need for these procedures is appreciated.)

As military members, you are aware of the sensitivity of purportedly classified matters and the need to protect them. You are advised that neither the marking of a particular classification on an item of evidence, nor the presentation of evidence in closed trial sessions, can be used to infer that the accused is guilty of any offense. You also may not infer from the classification markings or the closed trial session that the evidence or testimony during the closed trial session is either true or is in fact classified. You must evaluate open and closed session evidence and witnesses using the same standards.

In addition to the other instructions about not discussing the evidence until the appropriate time in the proceedings, you may not discuss what is presented during closed trial sessions at any time except, of

course, once you have heard all the evidence, heard argument of counsel, been instructed on the law, and the court has been closed for your deliberations. (You must also adhere to the instructions given to you during the security briefing you received earlier. In that regard, you are reminded that the security briefing is not evidence and the Security Officer is not a source of information from which you can conclude that information or documents are either true or are in fact classified.)

Do you have any questions about these matters?

NOTE 4: <u>Necessary instructions during findings</u>. Give the following instructions as a part of concluding instructions on findings.

I remind you that you may not infer that the accused is guilty of any offense from the use of a particular classification marking on an item of evidence, or the presentation of evidence in closed trial sessions. You also may not infer from the classification markings, security precautions, or the fact that a session of the trial was closed to the public that the evidence or testimony presented was either true or was in fact classified.

You must evaluate open and closed session evidence and witnesses using the same standards. Classified evidence also does not permit any inference as to the guilt of the accused. You may not infer from the fact that the evidence was presented in a closed trial session that the accused knew the evidence was (classified) (and) (or) (related to the national security of the United States).

Again, closed trial sessions to consider purportedly classified evidence are the most satisfactory method for resolving the competing needs of the Government for protection of the purportedly classified information and the rights of the accused to a public trial. You may not hold the fact there have been closed trial sessions in any way against the accused. Closed trial sessions do not erode the presumption of innocence which the law guarantees the accused.

NOTE 5: Instructing the members upon their excusal at the close of the trial. The following instruction should be given to the members when the trial is completed and the members are excused.

Court members, before I excuse you, let me advise you of one matter. In the event you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, the oath

prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. In addition, you are reminded (of the security briefing you received and) that you may not discuss or reveal anything that was presented in a closed trial session or any testimony or the contents of any exhibits that were identified or marked as classified. Thank you for your service. You are excused. Counsel and the accused will remain.

REFERENCES: United States v. Fleming, 38 M.J. 126 (C.M.A. 1993); United States v. Grunden, 2 M.J. 116 (C.M.A. 1977); and Military Rule of Evidence 505.

7–24. BRAIN DEATH

NOTE 1: <u>Death and brain death of victim in issue</u>. If the purported victim is still hospitalized or the evidence otherwise raises the question of when a victim died, brain death may be in issue. The victim is "dead" if the victim is brain dead. The following instruction should be given when brain death of the victim is in issue.

Death is defined as either the irreversible cessation of spontaneous respiration and circulatory functions or the irreversible cessation of all functions of the entire brain, including the brain stem. The irreversible cessation of the brain function occurs when, based upon ordinary and accepted standards of medical practice, there has been a total and irreversible cessation of spontaneous brain functions and further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions. The burden is on the Government to establish death beyond a reasonable doubt. This burden can be satisfied by proof beyond a reasonable doubt of either: (1) the irreversible cessation of spontaneous respiration and circulatory functions or (2) the irreversible cessation of all functions of the entire brain, including the brain stem.

NOTE 2: <u>Removal from life support</u>. When brain death is in issue and the victim has been removed from life support and then died, the evidence may raise the issue of whether the victim's removal from life support was an independent, intervening cause of death. If there is evidence that would allow the court members to conclude that removing the victim from life support was a proximate cause of death, give the instructions following NOTE 4 (proximate cause), NOTE 5 (independent, intervening cause), and NOTE 6 (more than one contributor to proximate cause) of Instruction 5-19. Additionally, the court may be instructed substantially as follows:

> If you determine beyond a reasonable doubt that death, as I have defined that term for you, occurred before the cessation of life support, then the removal of (<u>state the name of the alleged victim</u>) from life support was not a proximate cause of death.

REFERENCES: <u>United States v. Gomez</u>, 15 M.J. 954 (A.C.M.R.), *pet. denied sub nom.*, <u>United States v. Kamyal</u>, 17 M.J. 22 (C.M.A. 1983); <u>United States v. Taylor</u>, 44 M.J. 254 (1996); <u>Swafford v. Indiana</u>, 421 N.E. 2d 596 (Ind. 1981); *Black's Law Dictionary*; *Uniform Determination of Death Act*, Sec. 549.

Chapter 8

TRIAL PROCEDURE AND INSTRUCTIONS

FOR A CAPITAL CASE

This procedural guide outlines the sequence of events normally followed in any general courts martial case concerning an EPW, which has been referred capital. In addition to serving as a procedural guide in a capital case, it provides the majority of standard, non-evidentiary instructions on findings and sentencing in a capital case. The order in which the guide and instructions appear generally corresponds with the point in the trial when the particular wording or instruction is needed or is otherwise appropriate.

Section I

Initial Session Through Arraignment

8–1. PROCEDURAL GUIDE FOR ARTICLE 39(a) SESSION

MJ: Please be seated. This Article 39(a) session is called to order.

> ***NOTE: Use of an interpreter. The accused is entitled to the services of a competent interpreter, if necessary, in preparation for trial and at the trial. Art. 105, GC III. The military judge should proceed at a pace that allows the interpreter to translate the proceedings to the accused and to translate the accused's responses back to the court. Frequent pauses for translation will thus be necessary. If the accused requires a translator in order to communicate with counsel, an interpreter must be designated a member of the defense team.***
>
> ***NOTE: The GC III and UCMJ do not indicate who selects the interpreter. Presumably, the prosecution assigns an interpreter, and the interpreter may be regarded as a member of the accused's defense team. Cf. Yamashita transcript, Vol. I, at 4 (The***

prosecution assigned an interpreter, but the accused requested his own personal interpreter because he did not understand the assigned interpreter. The tribunal kept the assigned interpreter, but also allowed the accused's translator to be a part of the accused's defense team to provide a personal translation to the accused.).

(TC: The accused in this proceeding is entitled to the services of a competent interpreter [because (he)(she) (is not a native English speaker) (*state the reason, if any*)]). The prosecution requests that the proceedings be translated from English to _____ (*state accused's native language*) by _____ (*state the name of the interpreter(s)*).

MJ: The proceedings will be so translated. The interpreter(s) will now be sworn.

TC: Do you (swear) (affirm) that you will faithfully perform all the duties of interpreter in the case now in hearing (so help you God)?"

INT(S): (Respond.)

TC: This court-martial is convened by Court-Martial Convening Order Number _____, Headquarters _____, dated _____, (as amended by Court-Martial Convening Order Number _____, same Headquarters, dated _____,) and referred capital as reflected on the charge sheet; copies of which have been furnished to the military judge, counsel, and the accused, (which is in a language that (he)(she) understands,) and which will be inserted at this point in the record.

NOTE: The military judge should examine the convening order(s) and any amendments for accuracy. If not a capital case, GO TO CHAPTER 2, TRIAL PROCEDURE AND INSTRUCTIONS.

NOTE: Article 105, GC III, entitles the accused to a copy of documents in the language which he understands.

NOTE: <u>Capital case</u>. Article 100, GC III, requires that the accused and the Protecting Power (PP) "be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power" (DP). The GC III, however, does not indicate when or how this notification should occur. The DP should include this information in the initial notification to the PP as required by Article 104, GC III.

NOTE: <u>Protecting Power</u>. Generally, the PP would be designated pursuant to Article 8, GC III. Under certain circumstances (e.g., unwillingness by a party to request or to accept a PP, or during a period of occupation), however, there may not be a PP and a substitute organization such as a humanitarian organization (e.g., International Committee of the Red Cross), may be used. See Art. 10, GC III. The military judge should be mindful of any specific guidance that the Department of Defense (DoD) or the Department of State (DoS) may issue regarding the PP and proceed accordingly.

NOTE: <u>Detaining Power</u>. Under the GC III, the DP is responsible for satisfying various procedural functions. However, the GC III does not indicate whether such functions may be delegated to the prosecution. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding the delegation of the DP's functions and proceed accordingly.

(TC: The following corrections are noted in the convening orders:_____.)

NOTE: Only minor changes may be made at trial to the convening orders. Any correction which affects the identity of the individual concerned must be made by an amending or correcting order.

TC: The charges have been properly referred to this court for trial and were served on the accused (on _____ (*enter the date of service*)), _____ (*enter the name of the Protecting Power*) (on _____ (*enter the date of service*)), and the prisoners' representative on _____ (*enter the date of service*)). The prosecution is ready to proceed (with the arraignment) in the case of United States v. _____ (*state accused's name and rank, if applicable*).

NOTE: Charge sheet. EPW trials should use the same Charge Sheet (DD Form 458) used in trials of members of the U.S. armed forces. RCM 307. See Major Charles J. Baldree, War Crimes Trials: Procedural Due Process 29 (April 1967) (unpublished graduate course thesis, The Judge Advocate General's School, U.S. Army) (on file with U.S. Army Trial Judiciary).

NOTE: Date of service. The military judge must pay attention to the date of service. (When computing the days, do not count the day of service or day of trial).

a. Unlike the MCM, the GC III does not explicitly provide for an EPW accused's waiver of the service requirement. Cf. US v Garcia, 10 MJ 631, 633 (ACMR 1980) (date of service is not a bar to trial within the specified period, but merely provides a ground for accused to secure a continuance); US v Callahan, 1990 CMR Lexis 1216.

b. Article 104, GC III, states that the DP must "properly notify" the accused, the PP, and the prisoners' representative that it has decided to institute judicial proceedings

against the accused at least THREE weeks before the opening session of trial. In this regard, the military judge should be mindful of any specific guidance that DoD or DoS may issue concerning the procedure for the DP to notify the PP and proceed accordingly. Article 104 provides that the notification must contain the following:

(1) EPW's surname and first name, rank, army regimental, personal or serial number, date of birth, and profession or trade, if any;

(2) Place of internment or confinement;

(3) Specification of the charge or charges on which the EPW is to be arraigned, giving the legal provisions applicable; and

(4) Designation of the court which will try the case, likewise the date and place fixed for the opening of the trial.

A copy of the Staff Judge Advocate's (SJA) pre-trial advice (as required by Article 34, UCMJ) (i.e., a written and signed statement advising: (1) whether each specification on the charge sheet alleges an offense under the UCMJ; (2) whether each allegation is warranted by the evidence indicated in the report of investigation, if any;(3) whether a court-martial would have jurisdiction over the accused and the offense(s); and (4) what action to be taken by the convening authority.

c. Unless the prosecution presents satisfactory evidence of timely receipt of the required notice by the accused, the Protecting Power, and the prisoners' representative, the military judge must adjourn the trial (Art. 104, GC III) and report the matter to the convening authority.

TC: The accused and the following persons detailed to this court are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel;) ((and) _____,

Defense Counsel) ((and) _____, Assistant Defense Counsel) ((and) _____, Civilian Defense Counsel) ((and) _____ (*state name of selected prisoner comrade*), Defense Assistant) ((and) _____ (*state name of selected advocate*), (Assistant) (Associate) Defense Advocate). The members (and the following person(s) detailed to this court) are absent: _____.

NOTE: Security concerns may necessitate an alteration of the usual requirement of announcement in open court of the names of court members and the parties. An appellate exhibit containing their names may be substituted.

TC: _____ has been detailed reporter for this court and (has been previously sworn) (will now be sworn).

NOTE: Court reporter responsibilities. When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of the opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.

NOTE: Oath for reporter. When the reporter was not previously sworn, the following oath, as appropriate, will be administered by the trial counsel:

"Do you (swear) (affirm) that you will faithfully perform all the duties of court reporter in the case now in hearing (so help you God)?"

TC: (I) (All members of the prosecution) have been detailed to this court-martial by _____. (I am) (All members of the prosecution are) qualified and certified under Article 27(b) and sworn under

Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner which might tend to disqualify (me) (us) in this court-martial.

NOTE: Oaths for Counsel. When counsel for either side, including any prisoner comrade, advocate, associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the military judge:

"Do you (swear) (affirm) that you will faithfully perform all the duties of [(trial) (assistant trial) counsel] [(associate) (assistant) defense (counsel)] in the case now in hearing (so help you God)?"

8–1–1. RIGHTS OF THE ACCUSED

MJ: (*addressing the accused*) You have certain rights that are afforded to you under Article 105 of the Geneva Convention Relative to the Treatment of Prisoners of War. For example, Article 105 provides you with certain rights regarding representation by counsel. Has (*state name of detaining power*) advised you of these rights prior to this proceeding?

ACC: (Responds.)

NOTE: Article 105, GC III, states that the DP shall advise the accused of these rights, which are summarized in the following notes, "in due time" before trial. It does not, however, address the consequences if the DP fails to do so. In that instance, the MJ may wish to consider granting a continuance.

MJ: I will (again) discuss these rights with you now.

NOTE*: *Rights to counsel*. *See Articles 99 and 105, GC III.

a. Procedurally, the accused first has the right to the assistance of one of his prisoner comrades and to representation by a "qualified advocate or counsel" of his own choice. See Article, 105, GC III (requiring, ostensibly, that accused be represented and apparently giving him both the right to assistance by prisoner comrade AND representation by qualified counsel).

b. If the accused fails to select a qualified advocate or counsel, then the Protecting Power shall appoint an "advocate or counsel" to represent the accused.

c. If the Protecting Power does not appoint an advocate or counsel to represent the accused, then the Detaining Power shall appoint a "competent advocate or counsel" to represent the accused.

d. The advocate or counsel selected to represent the accused shall have at least two weeks before the opening of trial to prepare for the defense of the accused.

NOTE: "Qualified" advocate or counsel. Although the language of Article 105, GC III, uses different terms with reference to "advocate or counsel" (e.g., (1) the accused is entitled to representation by a "qualified" advocate or counsel; (2) the PP shall select an advocate or counsel; and (3) the DP shall appoint a "competent" advocate or counsel), the designated advocate or counsel should nonetheless be "qualified". Such an interpretation would be consistent with the tenor of Article 99, GC III ("No prisoner of war may be convicted without having had an opportunity to present his defense and the assistance of a qualified advocate or counsel"). The GC III, however, fails to define the term "qualified." On the one hand, these terms may have the same meaning

in different jurisdictions. On the other hand, these terms may distinguish between a person with a license to practice law and a person without a license to practice law, but familiar with the legal process. In the court-martial context, Article 38(b), UCMJ, permits the accused to be represented by civilian or military counsel. Notwithstanding, RCM 502(d)(3) requires that the civilian counsel be "(A) a member of the bar of a Federal court or of the bar of the highest court of a State; or (B) If not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial." If the purported "advocate or counsel" fails to satisfy this requirement, he may not be permitted to represent an accused in a court-martial. See Soriano v. Hosken, 9 MJ 221, 222 (1980) (citing US v. Nichols, 8 USCMA 119, 125 (1957))(acknowledging that a member of a local bar in a foreign country may be qualified to represent a military accused depending on his or her ability to demonstrate a fair standard of professional competence). Apart from failing to define "qualified," the GC III likewise does not address who would determine whether the advocate or counsel is qualified in the first instance. Finally, it should be noted that security grounds may justify not allowing a "selected" advocate/counsel to participate if other qualified advocate/counsel are available to assist the accused.

NOTE: Pro se representation. Unlike the MCM, the GC III does not contemplate pro se representation. Cf. US v. Moussaoui, 2002 US Dist. LEXIS 11135 (14 June 2002) (defendant's motion to proceed pro se granted).

NOTE: <u>Change in representation</u>. The GC III does not address whether the accused may change representation during the trial, e.g., accused changes his mind later that he wants the assistance/representation of his own prisoner comrade, advocate, or counsel; accused does not want the advocate/counsel selected/appointed by the Protecting Power or the Detaining Power. Because the accused may not proceed pro se, it appears that he must accept the selected/appointed advocate/counsel. However, the accused may be able to request a replacement advocate/counsel for good cause. The assumption is that this issue should be resolved by the Detaining Power before trial, or if this occurs at trial and for good cause, the court may grant a delay for the accused to obtain new representation.

MJ: _____, you have the right to select one of your prisoner comrades to assist you in your defense. You also have the right to select a qualified advocate or counsel of your choice to represent you. He/She is provided to you at no expense to you.

NOTE: The GC III does not discuss costs of "representation". Reasoning, however, that EPWs would have the same procedural rights under a GCM, it would seem that EPWs would only receive free military representation and incur their own costs for civilian (or non-military) representation. Notwithstanding, the GC III appears to place the financial burden on the DP for any representation. In contrast, that would be giving EPWs more rights than US military who bear their own costs for non-military representation. However, under 10 USC §1037, US may pay counsel costs of US military before foreign tribunals. Thus, arguably the same process for EPWs.

If you do not select a qualified advocate or counsel of your choice, _____ (*enter the name of the Protecting Power*) shall find a qualified advocate or counsel to represent you at no expense to you. _____ (*enter the name of the Protecting Power*) shall have at least one week at its disposal to find a qualified advocate or counsel to represent you. _____ (*enter the name of the Protecting Power*) may select a qualified advocate or counsel from a list of qualified persons submitted by _____ (*enter the name of the Detaining Power*), if so requested by _____ (*enter the name of the Protecting Power*).

If _____ (*enter the name of the Protecting Power*) does not appoint a qualified advocate or counsel to represent you within one week of its notification to appoint a qualified advocate or counsel, then _____ (*enter the name of the Detaining Power*) shall detail a military defense counsel to represent you at no expense to you.

(_____ (*state name of the appointed advocate or counsel*) has been appointed to represent you.)

> ***NOTE: The MCM affords the accused the right to select a different military lawyer. The GC III, however, does not address whether an EPW accused is able to request a different advocate or counsel who was appointed by the PP or DP. Arguably, the accused should be able to request a different advocate or counsel for good cause. Presumably, this issue should be resolved by the DP before trial begins, or if this occurs at trial and the accused presents good cause, the court may grant a delay for the accused to obtain a different advocate or counsel. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding a request for a different advocate or counsel and proceed accordingly.***

You also have the right to request a different military lawyer to represent you. If the person you request is reasonably available, he or she would be appointed to represent you free of charge.

If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are only entitled to one military lawyer. You may ask his/her superiors to let you keep your detailed counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would have to be provided by you at (no expense to _____ (*enter the name of the Detaining Power*)). If you are represented by a civilian lawyer, you can also keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer.

Do you understand your rights to counsel?

ACC: (Responds.)

MJ: Do you have any questions about your rights to counsel?

ACC: (Responds.)

MJ: In addition, the qualified advocate or counsel selected to represent you shall have at least two weeks before the opening of trial to prepare for trial. He or she shall also have available the necessary facilities to prepare your defense.

NOTE: Article 105, GC III, provides that the accused's advocate or counsel is entitled to the necessary facilities to prepare the accused's defense, to freely visit the accused and interview him in private, and to confer with witnesses for the defense including EPWs. See generally Zacarias Moussaoui case, U.S. District Court for the Eastern District of Virginia, Alexandria Division, Criminal Case No. 01-455-A (involving several pro se motions regarding defendant's rights to adequately prepare his defense, e.g., defendant's motion requesting access to witnesses held at Guantanamo Bay granted, but the government refused to follow the Court's order). Cf. Military Commission Order No. 1 (provides limited trial procedures to the accused).

You are also entitled to the services of a competent interpreter in preparation for trial and at the trial.

Lastly, representatives of _____ (*enter the name of the Protecting Power*) are entitled to attend the trial unless, in the interest of security, the sessions are to be closed. In the latter case, _____ (*enter the name of the Detaining Power*) shall notify _____ (*enter the name of the Protecting Power*) accordingly that the sessions are to be held in camera.

NOTE: Article 74, GCC. See Instruction 7-23, "Closed Trial Session", Impermissible Inference of Guilt, and RCM 804 and MRE 505 and 506.

Do you understand these rights?

ACC: (Responds.)

MJ: By whom will you be represented?

ACC: (Responds.)

MJ: By whom was your (advocate) (counsel) selected or appointed?

ACC: (Responds.)

NOTE: Appointment of a qualified advocate or counsel by the Protecting Power. The military judge must pay attention to the date the Protecting Power appoints a qualified advocate or counsel. If less than ONE week has elapsed from notification to the Protecting Power to appoint a qualified advocate or counsel to the date of appointment, the military judge must inquire. (When computing the days, do not count the day of service or day of trial.) If less than ONE week has elapsed, the military judge must grant a continuance.

NOTE: Opportunity to prepare for trial. The military judge must pay attention to the time period the advocate or counsel has to prepare for trial. If less than TWO weeks have elapsed from the time of appointment, the military judge must inquire. (When computing the days, do not count the day of service or day of trial.) If less than TWO weeks has elapsed, the military judge must grant a continuance. Art. 105, GC III.

MJ: When was the date of your selection or appointment?

DC: (Responds.)

MJ: Do you wish to be represented by (him/her) (them) alone?

ACC: (Responds.)

NOTE: Conflict of Interest: The military judge must be aware of any possible conflict of interest by counsel and, if a conflict exists, the military judge must obtain a waiver from the accused or order new counsel appointed for the accused. See applicable inquiry at INSTRUCTION 2–7–1, WAIVER OF CONFLICT-FREE COUNSEL.

MJ: Defense counsel will announce by whom (he/she) (they) (was) (were) detailed and (his/her) (their) qualifications.

NOTE: The military judge should require all defense counsel to place on the record their background(s) in detail, to specifically include capital litigation experience. In U.S. v. Murphy, 50 M.J. 4 (1999), C.A.A.F. suggests defense counsel place on the record the following: training, experience, how long admitted to bar, the number of cases tried, experience in contested felony cases with panel members, experience in requesting mental health evaluations, dealings with forensic psychiatrists, the kinds of investigative assistance or other resources that are available, and knowledge or experience in the use of collateral resources.

DC: (I) (All detailed members of the defense) have been detailed to this court-martial by _____. (I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense has) acted in any manner which might tend to disqualify (me) (us) in this court-martial.

CIVILIAN DC: I am an attorney and licensed to practice law in the (state(s)) (country) of _____. (I am a member in good standing of the _____ bar(s).) I have not acted in any manner which might tend to disqualify me in this court-martial.

(OATH FOR CIVILIAN COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?

CDC: (Responds.)

MJ: I have been properly certified, sworn, and detailed (myself) (by _____) to this court-martial. Counsel for both sides appear to have the requisite qualifications and all personnel required to be sworn have been sworn. Trial counsel will announce the general nature of the charge(s).

NOTE: Charges should allege nationality of accused, victim, accused's position, and that accused "violated the Law of Armed Conflict" or other codal provisions, if applicable. RCM 307(c)(2), Discussion, and 307(d).

TC: The general nature of the charge(s) in this case is _____. The charge(s) (was) (were) preferred by _____, (and) forwarded with recommendations as to disposition by _____; (and investigated by _____). (The Article 32 investigation was waived.)

NOTE: If the accused waived the Article 32 investigation, the military judge should inquire to ensure that it was a knowing and voluntary waiver. The script at

INSTRUCTION 2–7–4, PRETRIAL AGREEMENT: ARTICLE 32 WAIVER, may be used, but, if the waiver was not IAW a pretrial agreement (PTA) the first sentence of the first question should be omitted. A plea of guilty may not be received to an offense for which the death penalty may be imposed by the court-martial (R.C.M. 910).

TC: Your Honor, are you aware of any matter which might be a ground for challenge against you?

MJ: (I am not.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Responds.)

8–1–2. FORUM RIGHTS

MJ: _____, you have a right to be tried by a court consisting of at least five officer members (that is, a court composed of commissioned and/or warrant officers).

(IF ACCUSED IS ENLISTED:) MJ: Also, if you request it, you would be tried by a court consisting of at least one-third enlisted members.

You are also advised that no member of the court would be junior in rank to you. Do you understand what I have said so far?

ACC: (Responds.)

Because this case is referred to be tried as a capital case, that is, a case in which imposition of death may be a possible punishment if convicted, you may not be tried by military judge alone. Do you understand what I have said so far?

ACC: (Responds.)

MJ: Now, in a trial by court members, the members will vote by secret, written ballot and two-thirds of the members must agree before you could be found guilty of any offense. If you were found guilty, then two-thirds must also agree in voting on a sentence. If that sentence included confinement for more than 10 years, then three-fourths would have to agree.

For the death penalty to be adjudged, all court members would have to agree on both the findings of guilt and the sentence. In this case, that means that the court members must have a unanimous vote of guilty on the charge(s) and (its) (their) specification(s) for which death is an authorized sentence, that is, Specification(s) _____ of Charge(s) _____, (a) violation(s) of (premeditated murder) (the Law of Armed Conflict) (_____), in order for the case to remain a capital case during any sentencing phase of the trial.

> ***NOTE: RCM 1004 does include specific factors that would warrant imposition of the death penalty. Currently, the provision is unclear because it provides that death is possible where "death is authorized under the law of war". Supreme Court precedent may or may not require a factual finding in addition to the availability under the LOW. The government should be required to specify the factors, even if not listed in RCM 1004, it believes warrant the death penalty under the LOW. In addition, case law provides additional rights to the accused in a court-martial where death is sought.***

MJ: To impose a death sentence, the court members must: (1) unanimously find, beyond a reasonable doubt, that you are guilty of an offense for which death is an authorized punishment under the law; (2) unanimously find, beyond a reasonable doubt, evidence of (the) (at least one) aggravating factor; (3) unanimously find that any extenuating or mitigating circumstance(s) (is) (are) substantially outweighed by any aggravating circumstance(s), including the aggravating factor(s); and (4) unanimously vote to impose death. If any one of these four votes is not unanimous, then death may not be adjudged.

Do you understand what I have told you so far?

ACC: (Responds.)

MJ: Do you understand the choices that you have?

ACC: (Responds.)

MJ: By what type of court do you wish to be tried?

ACC: (Responds.)

8–1–3. ARRAIGNMENT

MJ: The accused will now be arraigned.

TC: All parties to the trial have been furnished with a copy of the charge(s). Does the accused want (it) (them) read?

NOTE: Article 105, GC III, entitles accused to a copy of documents in language which he understands.

DC: The accused (waives the reading of the charge(s)) (wants the charge(s) read).

MJ: (The reading may be omitted.) (Trial counsel will read the charge(s).)

TC: The charge(s) (is) (are) signed by _____, a person subject to the code as accuser; (is) (are) properly sworn to before a commissioned officer of the armed forces authorized to administer oaths; and (is) (are) properly referred to this court for trial by _____, the Convening Authority.

MJ: Accused and Defense Counsel please rise.

DC/ACC: (Complies.)

MJ: (___) (*state rank of accused, if applicable*) _____, how do you plead? Before receiving your plea, I advise you that any motions to dismiss or to grant other appropriate relief should be made at this time. Your defense counsel will speak for you.

DC: The defense (has (no) (the following) motions) (requests to defer motions at this time).

> ***NOTE: Whenever factual issues are involved in ruling on a motion, the military judge shall state essential findings of fact. If the trial counsel gives notice that the government desires a continuance to file an appeal under Article 62 (see RCM 908), the military judge should note the time on the record so that the 72-hour period may be accurately calculated.***

> ***NOTE: The military judge must ensure that pleas are entered after all motions are litigated.***

DC: The accused, _____, pleads as follows:

NOTE: If the accused enters a plea of guilty to an offense for which death is not an authorized punishment, continue at SECTION II, GUILTY PLEA INQUIRY. In a case which has been referred capital, if the accused attempts to plead guilty to an offense for which death is a possible punishment, you must refuse to accept the plea and enter a plea of Not Guilty on the accused's behalf (Art. 45, UCMJ and R.C.M.910(a)).

IF NOT GUILTY, mark the flyer as an appellate exhibit; ensure each court member packet contains a copy of the flyer, convening orders, note paper, and witness question forms; then GO TO SECTION III, COURT MEMBERS (CONTESTED).

Section II

Guilty Plea Inquiry

8–2–1. GUILTY PLEA INTRODUCTION

MJ: _____, your counsel has entered a plea of guilty for you to (one) (several) charge(s) and specification(s) (_____). Your plea of guilty will not be accepted unless you understand its meaning and effect. I am going to discuss your plea of guilty with you. You may wish to consult with your defense counsel prior to answering any of my questions. If, at any time, you have questions, feel free to ask them.

A plea of guilty is equivalent to a conviction and is the strongest form of proof known to the law. On your plea alone, and without receiving any evidence, this court can find you guilty of the offense(s) to which you have pled guilty. Your plea will not be accepted unless you realize that, by your plea, you admit every act or omission, and element of the offense(s) to which you have pled guilty, and that you are pleading guilty because you actually are, in fact, guilty. If you do not believe that you are guilty, then you should not for any reason plead guilty. Do you understand what I have said so far?

ACC: (Responds.)

MJ: By your plea of guilty, you give up three important rights, but you give up these rights solely with respect to the offenses to which you have pled guilty.

First, the right against self-incrimination; that is, the right to say nothing at all.

Second, the right to a trial of the facts by this court; that is, your right to have this court-martial decide whether or not you are guilty based upon evidence the prosecution would present and on any evidence you may introduce.

Third, the right to be confronted by and to cross-examine any witness called against you.

Do you have any questions about any of these rights?

ACC: (Responds.)

MJ: Do you understand that by pleading guilty you voluntarily give up these rights?

ACC: (Responds.)

MJ: If you continue with your plea of guilty, you will be placed under oath and I will question you to determine whether you are, in fact, guilty. Anything you tell me may be used against you in the sentencing portion of the trial. Do you understand this?

ACC: (Responds.)

MJ: If you tell me anything that is untrue, your statements may be used against you later for charges of perjury or making false statements. Do you understand this?

ACC: (Responds.)

(MJ: Your plea of guilty to a lesser included offense may be used to establish certain elements of the charged offense, if the government decides to proceed on the charged offense. Do you understand this?

ACC: (Responds.))

MJ: Trial Counsel, please place the accused under oath.

TC: _____, please stand and face me.

ACC: (Complies.)

TC: Do you (swear) (affirm) that the statements that you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: (Responds.)

MJ: Is there a stipulation of fact?

TC: (Yes) (No), Your Honor.

NOTE: If no stipulation exists, GO TO INSTRUCTION 8-2-3, GUILTY PLEA FACTUAL BASIS. If a stipulation exists, continue below.

8–2–2. STIPULATION OF FACT INQUIRY

MJ: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure that the accused has a copy.

TC: (Complies.)

MJ: _____ (*state name of accused*), I have before me Prosecution Exhibit ____ for Identification, a stipulation of fact. Did you sign this stipulation?

ACC: (Responds.)

MJ: Did you read this document thoroughly before you signed it?

ACC: (Responds.)

MJ: Do both counsel agree to the stipulation and that your signatures appear on the document?

TC/DC: (Respond.)

MJ: _____, a stipulation of fact is an agreement among the trial counsel, your defense counsel, and you that the contents of the stipulation are true, and, if entered into evidence, are the uncontradicted facts in this case. No one can be forced to enter into a stipulation, so you should enter into it only if you truly want to do so. Do you understand this?

ACC: (Responds.)

MJ: Are you voluntarily entering into this stipulation because you believe it is in your best interest to do so?

ACC: (Responds.)

MJ: If I admit this stipulation into evidence, it will be used in two ways: First, I will use it to determine if you are, in fact, guilty of the offense(s) to which you have pled guilty; and second, the trial counsel may read it to the members of the court and they will have it with them when they decide upon your sentence. Do you understand and agree to these uses of the stipulation?

ACC: (Responds.)

MJ: Do counsel also agree to these uses?

TC/DC: (Respond.)

MJ: _____, a stipulation of fact ordinarily cannot be contradicted. If it should be contradicted after I have accepted your guilty plea, I will reopen this inquiry. You should, therefore, let me know if there is anything whatsoever in this stipulation that you disagree with or feel is untrue. Do you understand that?

ACC: (Responds.)

MJ: At this time, I want you to read your copy of the stipulation silently to yourself as I read it to myself.

> ***NOTE: The military judge should read the stipulation and be alert to resolve inconsistencies between what is stated in the stipulation and what the accused says during the providence inquiry.***

MJ: Have you finished reading it?

ACC: (Responds.)

MJ: _____, is everything in the stipulation true?

ACC: (Responds.)

MJ: Is there anything in the stipulation that you do not wish to admit is true?

ACC: (Responds.)

MJ: Do you agree under oath that the matters contained in the stipulation are true and correct to the best of your knowledge and belief?

ACC: (Responds.)

MJ: Defense Counsel, do you have any objection to Prosecution Exhibit ___ for Identification?

DC: (Responds.)

MJ: Prosecution Exhibit ___ for Identification is admitted into evidence subject to my acceptance of the accused's guilty plea(s).

8–2–3. GUILTY PLEA FACTUAL BASIS

MJ: _____, I am going to explain the elements of the offense(s) to which you have pled guilty. By "elements," I mean those facts which the prosecution would have to prove beyond a reasonable doubt before you could be found guilty, if you had pled not guilty. When I state each element, ask yourself two things: First, is the element true, and, second, whether you wish to

admit that it is true. After I list the elements for you, be prepared to talk to me about the facts regarding the offense(s). Do you have a copy of the charge sheet(s) in front of you?

ACC: (Responds.)

NOTE: For each specification to which the accused pled guilty, proceed as follows:

MJ: Please look at (the) Specification (___) of (the) Charge (___), (in violation of Article _____ of the Uniform Code of Military Justice) (a violation of the Law of Armed Conflict, specifically _____ (*state the article and Convention*)). The elements of the offense of _____ (*state the offense*) are:

NOTE: List elements and explain appropriate definitions using applicable language from Chapter 3.

MJ: Do you understand the elements (and definitions) as I have read them to you?

ACC: (Responds.)

MJ: Do you have any questions about any of them?

ACC: (Responds.)

MJ: Do you understand that your plea of guilty admits that these elements accurately describe what you did?

ACC: (Responds.)

MJ: Do you believe and admit that the elements (and definitions, taken together,) correctly describe what you did?

ACC: (Responds.)

MJ: At this time, I want you to tell me why you believe you are guilty of the offense listed in (the) specification (____) of (the) charge (____). Tell me what happened.

ACC: (Responds.)

NOTE: The military judge must elicit the facts leading to the guilty plea by conducting a direct and personal examination of the accused as to the circumstances of the alleged offense(s). The military judge must do more than elicit legal conclusions. The military judge's questions should be aimed at developing the accused's version of what happened in the accused's own words, and determining if the acts or omissions encompass each and every element of the offense(s) to which the guilty plea relates. The military judge must be alert to the existence of any inconsistencies or possible defenses raised by the stipulation or the accused's testimony and, if they arise, the military judge must discuss them thoroughly with the accused. The military judge must resolve them or declare the plea improvident to the applicable specification(s).

NOTE: After obtaining the factual basis from the accused, the military judge should secure the accused's specific admission as to each element of the offense, e.g., as follows:

MJ: Do you admit that you (killed _____) (_____)?

ACC: (Responds.)

MJ: Do you admit that you (intended to kill _____) (_____)?

ACC: (Responds.)

MJ: Do you admit that you (knew or should have known that _____ was a person protected under the law of armed conflict) (_____)?

ACC: (Responds.)

MJ: And that (the killing took place in the context of and was associated with armed conflict) (_____)?

ACC: (Responds.)

NOTE: After covering all offenses to which the accused pled guilty, the military judge continues as follows:

MJ: Do counsel believe any further inquiry is required?

TC/DC: (Respond.)

8–2–4. MAXIMUM PUNISHMENT INQUIRY

NOTE: Under Article 87, GC III, the accused may not be sentenced to any penalties except those "provided for in respect of members of the armed forces of the said Power who have committed the same acts." See Appendix 12, Maximum Punishment Chart, MCM.

MJ: Trial Counsel, what do you calculate to be the maximum punishment authorized in this case based solely on the accused's plea of guilty?

TC: (Responds.)

NOTE: <u>Mandatory punishment</u>. Under the MCM, the offenses of premeditated murder (Article 118(1), UCMJ) and felony murder (Article 118(4), UCMJ) have a mandatory minimum punishment of life imprisonment with the eligibility for parole, and the offense of spying (Article 106, UCMJ) has a mandatory punishment of death. However, under Article 87, GC III, the court is not bound to apply the mandatory punishment prescribed.

MJ: Defense Counsel, do you agree?

DC: (Responds.)

MJ: _____, the maximum punishment authorized in this case based solely on your guilty plea is _____.

NOTE: <u>Pecuniary punishment</u>. Pecuniary punishment, e.g., fine and/or forfeiture of pay and allowances, appears applicable to EPWs under the provision that EPWs are subject to the same punishment authorized against members of the U.S. armed forces for the same offense. Art. 87, GC III. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding pecuniary punishment and proceed accordingly.

a. Fine. See R.C.M. 1003(b)(3). Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. Special and summary courts-martial, however, may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. Before total forfeitures and a fine can be approved resulting from a guilty plea at a GCM, the accused must be advised that the pecuniary loss could exceed total forfeitures. Moreover, to have any fine approved, the military judge must advise the accused of the possibility of a fine during the providence inquiry.

b. Forfeiture of pay and allowances. See R.C.M. 1003(b)(2); Appendix 12. EPWs only receive a nominal amount of monies during internment such as a monthly advance of pay (Art. 60, GC III) and, if applicable, working pay (Art. 62, GC III). It is unclear whether such monies constitute "pay" and/or "allowances" for purposes of adjudging a forfeiture as punishment. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding forfeiture of pay and allowances and proceed accordingly.

NOTE: Discharge or reduction in rank. EPWs may not be discharged or reduced in rank. Specifically, Article 87, GC III, prohibits the DP from depriving an EPW of his rank. These actions are a matter between an EPW and his state.

MJ: The court may not adjudge a discharge or a reduction in rank as part of your sentence.

MJ: On your plea of guilty alone, this court could sentence you to the maximum punishment which I just stated. Do you understand that?

ACC: (Responds.)

NOTE: <u>Sentencing instruction</u>. The military judge is required by Articles 87 and 100, GC III, to advise the accused as follows:

In determining a legal, appropriate, and adequate punishment, this court will bear in mind that you, not being a national of the United States, are not bound to the United States by any duty of allegiance and that you are in the power of the United States as a result of circumstances independent of your own will. As such, under Article 87 of the Geneva Convention Relative to the Treatment of Prisoners of War, this court is not bound to apply the maximum punishment and is at liberty to arrive at a lesser legal sentence, to include no punishment. Do you understand that?

ACC: (Responds.)

MJ: Do you have any questions as to the sentence that could be imposed as a result of your guilty plea?

ACC: (Responds.)

MJ: Trial Counsel, is there a pretrial agreement in this case?

TC: (Responds.)

NOTE: If a pretrial agreement exists, continue below. If no pretrial agreement exists, proceed to INSTRUCTION 8-2-6, IF NO PRETRIAL AGREEMENT EXISTS.

8–2–5. PRETRIAL AGREEMENT

NOTE: If there is a PTA in a case referred capital, the military judge must determine if it has a provision providing for a non-capital referral by operation of the PTA. If so, the military judge should follow the procedural guide for a PTA with members at INSTRUCTION 2-2-7, Pretrial Agreement (Members), but not review the quantum portion of the PTA. The military judge should make the following inquiry:

MJ: Paragraph ___ of the pretrial agreement states that, if you comply with the provisions of the pretrial agreement, the Convening Authority will refer the case as a non-capital case. This means that the death penalty could not be adjudged. Do you understand that?

ACC: (Responds.)

MJ: Counsel, do you agree that, although under the Code the court may not accept a guilty plea to an offense for which the death penalty may be adjudged, that, in this case and under this agreement, the court may accept the accused's guilty plea to the capital offense?

TC/DC: (Respond.)

MJ: The court is aware of Article 45 of the Code and the appellate history of guilty pleas to capital offenses. However, under the circumstances which I am about to list, the court does not believe that Article 45 prohibits acceptance of a guilty plea. These circumstances are:

An offense was referred to trial as a capital offense.

In pretrial negotiations, both the Convening Authority and the accused agreed that, if the accused successfully pled guilty to the capital offense(s) (and also did _____), the case would be tried as a non-capital case.

The military judge has conducted a thorough providence inquiry and has found the accused's plea of guilty to the capital offense(s) to be provident.

The military judge has conducted a thorough inquiry concerning the pretrial agreement and has found that both sides agree with the military judge's interpretation and has found that the agreement was voluntary.

The military judge is prepared to accept the plea of the accused and enter findings thereon.

The military judge will enforce the agreement by not allowing the case to go forward, after entry of findings, as a capital case.

The public policy behind Article 45 and the appellate concern for entry of guilty pleas in capital cases are not violated by accepting the plea of guilty.

Do both sides agree that those circumstances exist in this case?

TC/DC: (Respond.)

MJ: Do both sides further agree that, upon entry of findings in this case, and based on the pretrial agreement and the circumstances I have just explained, the case is referred for trial only as a non-capital case?

TC/DC: (Respond.)

> ***NOTE: After the case is referred non-capital by operation of the pretrial agreement, the military judge must advise the accused of his forum rights as he would for any case which was not referred capital. After the accused makes his selection, the military judge should follow the procedural guide for a non-capital case at CHAPTER 2, TRIAL PROCEDURE AND INSTRUCTIONS. [NOTE: If the accused still selects trial by court members, then the military judge may review the quantum portion of the PTA outside the presence of the members and conduct the discussion with the accused as provided at INSTRUCTION 2–2–7, PRETRIAL AGREEMENT (MEMBERS).]***

8–2–6. IF NO PRETRIAL AGREEMENT EXISTS

MJ: Counsel, even though there is no formal pretrial agreement, are there any unwritten agreements or understandings in this case?

TC/DC: (Respond.)

MJ: _____, has anyone made any agreements with you or promises to you to get you to plead guilty?

ACC: (Responds.)

8–2–7. ACCEPTANCE OF GUILTY PLEA

MJ: Defense Counsel, have you had enough time and opportunity to discuss this case with _____?

DC: (Responds.)

MJ: _____, have you had enough time and opportunity to discuss this case with your defense counsel?

ACC: (Responds.)

MJ: _____, have you, in fact, consulted fully with your defense counsel and received the full benefit of (his/her) (their) advice?

ACC: (Responds.)

MJ: Are you satisfied that your defense counsel's advice is in your best interest?

ACC: (Responds.)

MJ: Are you satisfied with your defense counsel?

ACC: (Responds.)

MJ: Are you pleading guilty voluntarily and of your own free will?

ACC: (Responds.)

MJ: Has anyone made any threat or tried in any way to force you to plead guilty?

ACC: (Responds.)

MJ: Do you have any questions as to the meaning and effect of a plea of guilty?

ACC: (Responds.)

MJ: Do you fully understand the meaning and effect of your plea of guilty?

ACC: (Responds.)

MJ: Do you understand that, even though you believe you are guilty, you have the legal and moral right to plead not guilty and to place upon the government the burden of proving your guilt beyond a reasonable doubt?

ACC: (Responds.)

MJ: Take a moment now and consult again with your defense counsel, and then tell me whether you still want to plead guilty.

(Pause.) **MJ: Do you still want to plead guilty?**

ACC: (Responds.)

MJ: _____, I find that your plea of guilty is made voluntarily and with full knowledge of its meaning and effect. I further find that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against you. Accordingly, your plea of guilty is provident and is accepted. However, I advise you that you may request to withdraw your guilty plea at any time before the sentence is announced and, if you have a good reason for your request, I will grant it.

NOTE: If the accused has pled guilty to only some of the charges and specifications, or, has pled guilty to lesser included offenses (LIO), ask the trial counsel if the government is going forward on the offenses to which the accused has pled not guilty. If the government is going forward on any offense, do not enter findings, except to those offenses to which the accused pled guilty as charged in a members' trial (i.e., if the plea was to a LIO or by exceptions and substitutions, and the government is going forward as charged, do not enter findings).

NOTE: The military judge should not inform the court members of plea and findings of guilty prior to presentation of the evidence on another specification to which the accused pled not guilty, unless the accused requests it or the guilty plea was to a LIO and the prosecution intends to prove the greater offense. Unless one of these two exceptions exists, the flyer should not have any specifications/charges which reflect provident guilty pleas if other offenses are being contested.

NOTE: If no issues of guilt remain, continue below:

MJ: Accused and counsel, please rise.

DC/ACC: (Comply.)

MJ: _____, in accordance with your plea of guilty, this court finds you _____.

Section III

Court Members (Contested)

8–3. PRELIMINARY INSTRUCTIONS

MJ: Bailiff, call the court members.

NOTE: Whenever the members enter the courtroom, all persons except the military judge and the reporter shall rise. The members are seated alternately to the right and left of the president according to rank.

MJ: You may be seated. The court is called to order.

TC: The court is convened by Court-Martial Convening Order Number _____, Headquarters _____, dated _____, (as amended by Court-Martial Convening Order Number _____, same Headquarters, dated _____,) and referred capital as reflected on the charge sheet, copies of which have been furnished to each member of the court.

The accused and the following persons detailed to this court-martial are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel;) (_____, Defense Counsel) (_____, Assistant Defense Counsel) (_____, Civilian Defense Counsel) (_____ (*state name of selected prisoner comrade*), Defense Assistant) (_____, (*state name of selected advocate*), (Assistant) (Associate) Defense Advocate;) and _____, _____, _____, and _____, court members. (The following person(s) detailed to this court (is) (are) absent: _____.)

NOTE: Security concerns may necessitate an alteration of the usual requirement of announcement in open court of the names of court members and the parties. An appellate exhibit containing their names may be substituted.

NOTE: Members who have been relieved (viced) by orders need not be mentioned.

The prosecution is ready to proceed with trial in the case of the United States v. (*state accused's name and rank, if applicable*).

MJ: The members of the court will now be sworn. All persons in the courtroom, please rise.

TC: Do you (swear) (affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so in the due course of law (so help you God)?

MBRS: (Respond.)

MJ: Please be seated. The court is assembled.

Members of the court, it is appropriate that I give you some preliminary instructions. My duty as military judge is to ensure this trial is conducted in a fair, orderly, and impartial manner according to the law. I preside over open sessions, rule upon objections, and instruct you on the law applicable to this case. You are required to follow my instructions on the law and may not

consult any other source as to the law pertaining to this case unless it is admitted into evidence. This rule applies throughout the trial, including closed sessions and periods of recess and adjournment. Any questions you have of me should be asked in open court.

As court members, it is your duty to hear the evidence and determine whether the accused is guilty or not guilty and, if you find (him)(her) guilty, to adjudge an appropriate sentence.

Under the law, the accused is presumed to be innocent of the offense(s). The government has the burden of proving the accused's guilt by legal and competent evidence beyond a reasonable doubt. A reasonable doubt is an honest, conscientious doubt, suggested by the material evidence, or lack of it, in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt. The fact that charges have been preferred against this accused and referred to this court for trial does not permit any inference of guilt. You must determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court and upon the instructions I will give you. Because you cannot properly make that determination until you have heard all the evidence and received the instructions, it is of vital importance that you keep an open mind until all the evidence has been presented and the instructions have been given. I will instruct you fully before you begin your deliberations. In so doing, I may repeat some of the instructions which I will give now or, possibly, during the trial. Bear in mind that all of these instructions are designed to assist you in performing your duties as court members.

The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you. You have the duty to determine the believability of the witnesses. In

performing this duty, you must consider each witness' intelligence and ability to observe and accurately remember, in addition to the witness' sincerity and conduct in court, friendships, prejudices, and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict. In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth. The believability of each witness' testimony should be your guide in evaluating testimony, rather than the number of witnesses called.

Counsel will soon be given an opportunity to ask you questions and exercise challenges. With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so. Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement.

Some of the grounds for challenge would be if you were the accuser in the case, if you had investigated any offense charged, if you have formed or expressed an opinion as to the guilt or innocence of the accused, or any matter that may affect your impartiality. To determine if any grounds for challenge exist, counsel for both sides are given an opportunity to question you. These questions are not intended to embarrass you. They are not an attack upon your integrity. They are asked merely to determine whether a basis for challenge exists.

It is no adverse reflection upon a court member to be excused from a particular case. You may be questioned either individually or collectively, but, in either event, you should indicate an individual response to the question asked. Unless I indicate otherwise, you are required to answer all questions.

You must keep an open mind throughout the trial. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to whether the accused is guilty or not guilty, or as to an appropriate sentence if the accused is found guilty of (any) (this) offense. With regard to sentencing, should that become necessary, you may not have a preconceived idea or formula as to either the type or the amount of punishment that should be imposed if the accused were to be convicted.

Counsel are given an opportunity to question all witnesses. When counsel have finished, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so (at the close of evidence) (prior to any witness being permanently excused). The way we handle that is to require you to write out the question and sign legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked because your questions, like the questions of counsel, are subject to objection. (There are forms provided to you for your use if you desire to question any witness.) I will conduct any needed examination. There are a couple of things that you need to keep in mind with regard to questioning.

First, you cannot attempt to help either the government or the defense.

Second, counsel have interviewed the witnesses and know more about the case than we do. Very often, they do not ask what may appear to us to be an obvious question because they are aware that this particular witness has no knowledge on the subject.

Rules of evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial, when I sustain an objection, disregard the question and answer. If I overrule an objection, you may consider both the question and answer.

During any recess or adjournment, you may not discuss the case with anyone, not even among yourselves. You must not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in the case. You must hold your discussion of the case until you are all together in your closed session deliberations so that all of the panel members have the benefit of your discussion. Do not purposely visit the scene of any incident alleged in the specification(s) or involved in the trial. You must also avoid contact with witnesses or potential witnesses in this case. If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every break or recess, but keep them in mind throughout the trial.

We will try to estimate the time needed for recesses or hearings out of your presence. Frequently, their duration is extended by consideration of new issues arising in such hearings. Your patience and understanding regarding these matters will contribute greatly to an atmosphere consistent with the fair administration of justice.

While you are in your closed session deliberations, only the members will be present. You must remain together and you may not allow any unauthorized intrusion into your deliberations.

Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. However, in addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations and will speak for the court in announcing the results.

This general order of events can be expected at this court-martial: questioning of court members, challenges and excusals, opening statements by counsel, presentation of evidence, substantive instructions on the law to you, closing argument by counsel, procedural instructions on voting, your deliberations, and announcement of the findings. If the accused is convicted of any offense, there will also be sentencing proceedings.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If it becomes too hot or too cold in the courtroom, or if you need a break because of drowsiness or for comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

Each of you may take notes if you desire and use them to refresh your memory during deliberations, but they may not be read or shown to other members. At the time of any recess or adjournment, you may (take your notes with you for safe keeping until the next session) (leave your notes in the courtroom).

One other administrative matter: if during the course of the trial it is necessary that you make any statement, if you would preface the statement by stating your name, that will make it clear on the record which member is speaking.

Are there any questions?

MBRS: (Respond.)

MJ: (Apparently not.) Please take a moment to read the charge(s) on the flyer provided to you and to ensure that your name is correctly reflected on the convening order. If it is not, please let me know.

(Pause.) MJ: Trial counsel, you may announce the general nature of the charge(s).

TC: The general nature of the charge(s) in this case is _____. The charge(s) (was) (were) preferred by _____; forwarded with recommendation as to disposition by _____(; and investigated by _____).

The records of this case disclose (no grounds for challenge) (grounds for challenge of _____ for the following reason(s): _____).

If any member of the court is aware of any matter which he (or she) believes may be a ground for challenge by either side, such matter should now be stated.

MBRS: (Respond.) or

TC: (Negative response from the court members.) (_____.)

MJ: Members, before I or counsel ask you any questions, it is appropriate that I give you some additional instructions.

NOTE: The instruction immediately below is structured for the usual peace-time death penalty case, i.e., for an accused charged with premeditated and/or felony murder under Article 118(1)or(4), UCMJ, which prescribe the mandatory minimum penalty of confinement for life. The military judge may have a case referred capital for some other offense, where the death penalty is a possible penalty but no mandatory is specified (such as wartime assault on or willful disobedience of a commissioned officer, Article 90; compelling a superior to surrender, Article 100; willfully hazarding a vessel, Article 110; rape, Article 120; or wartime misbehavior before the enemy or by a sentinel, Articles 99 or 113, respectively). In such cases, appropriately tailored instructions concerning other possible sentences should be inserted at this point.

MJ: Members, this is a capital (murder) (_____) case. I want to direct your attention specifically to (the) (those) offense(s), (a) violation(s) of (Article ____, UCMJ) (the Law of Armed Conflict), commonly referred to as (premeditated murder) (_____). If the accused is convicted of (premeditated murder) (_____) by a unanimous vote, then the court may, but is not required to, impose the death penalty. In the sentencing phase of the trial, the death penalty is a permissible punishment only if: (1) the court members unanimously find, beyond a reasonable doubt, that (an) (the) aggravating factor exists; and (2) the court members unanimously find that any and all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, to include any aggravating factor(s). If you unanimously find those two items, then the death penalty will be a possible punishment, but only if you vote unanimously to impose death. You must bear in mind that, even if death is a possible

sentence, the decision whether or not to vote for the death penalty is within the discretion of each member.

If the accused is convicted of (premeditated murder) (_____), but, the vote for conviction was not unanimous, the death penalty may not be adjudged. Under Article 87, GC III, the court also is not bound to apply the mandatory punishment prescribed.

Court members, should it become necessary, I will explain your options in great detail at the appropriate time during the trial.

Remember, court members, as I have previously instructed you, the accused is presumed to be innocent and the burden is on the government to prove (his)(her) guilt beyond a reasonable doubt.

Because one possible punishment is death, it will be necessary to ask you questions regarding your views concerning the death penalty. This inquiry has no relationship at all to whether or not the accused is guilty or not guilty of any offense. As I stated before, the accused is presumed not guilty of (this) (these) offense(s).

8–3–1. VOIR DIRE

MJ: Before counsel ask you any questions, I will ask a few preliminary questions. If any member has an affirmative response to any question, please raise your hand.

NOTE: The military judge should indicate for the record the members' response to the following questions, i.e., [Negative response from (all members) (state name(s) or if the

<u>names are not disclosed in open court, a number assigned to that member</u>).] [Positive response from (all members) (state name of member(s)).]

1. Does anyone know the accused?

2. (If appropriate) Does anyone know any person named in any of the specifications?

3. Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?

4. Does anyone have any prior knowledge of the facts or events in this case?

(5. Members, this case has received attention in the (local) (and) (national) media. Is there any member who has seen or heard any mention of this case in the media?

NOTE: To the members who have seen or heard mention of this case in the media, continue with Questions 6-11; if none, go to Question 12.

6. Is there any member who has participated in a military operation that received press coverage?

7. To those who have been in operations that received press coverage: did any member find that the press coverage was 100 percent accurate and complete?

8. Is there any member who believes that, merely because the press reports something, it is, in fact, the truth?

9. Do all members agree with the proposition that press reports of military affairs or about any kind of event may be incorrect or inaccurate?

10. Is there, then, any member who believes that the reports that he (or she) received from the media about this case are completely accurate and truthful?

11. For any member who has seen mention of this case in the media, will you put aside all the matters which you have heard, read, or seen in the media and decide this case, based solely upon the evidence you receive in this court and the law as I instruct you?)

12. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

13. (If appropriate) Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?

14. If so, will that experience influence the performance of your duties as a court member in this case in any way?

> ***NOTE: If Question 14 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the presence of the other members.***

15. How many of you have previously served as court members?

16. (As to those members) Can each of you put aside anything you may have heard in any previous proceeding and decide this case solely on the basis of the evidence and the instructions as to the applicable law?

17. The accused has pled not guilty to (all charges and specifications) (_____), and is presumed to be innocent until (his)(her) guilt is established by legal and competent evidence beyond a reasonable doubt. Does anyone disagree with this rule of law?

18. Can each of you apply this rule of law and vote for a finding of not guilty unless you are convinced beyond a reasonable doubt that the accused is guilty?

19. You are all basically familiar with the military justice system, and you know that the accused has been charged and (his)(her) charges have been forwarded to the convening authority and referred to trial. None of this warrants any inference of guilt. Can each of you follow this instruction and not infer that the accused is guilty of anything merely because the charges have been referred to trial?

20. On the other hand, can each of you vote for a finding of guilty if you are convinced that, under the law, the accused's guilt has been proved by legal and competent evidence beyond a reasonable doubt?

21. Does each member understand that the burden of proof to establish the accused's guilt rests solely upon the prosecution and the burden never shifts to the defense to establish the accused's innocence?

22. Does each member understand, therefore, that the defense has no obligation to present any evidence or to disprove the elements of the offense(s)?

23. Has anyone had any legal training or experience other than that generally received by soldiers of your rank or position?

24. Has anyone had any specialized law enforcement training or experience, to include duties as a military police officer, off-duty security guard, civilian police officer, corrections officer, or comparable duties, other than the general law enforcement duties common to military personnel of your rank and position?

25. I have previously advised you that it is your duty as court members to weigh the evidence and to resolve controverted questions of fact. If the evidence is in conflict, you will necessarily be required to give more weight to some evidence than to other evidence. The weight, if any, to be given to all of the evidence in this case is solely within your discretion. However, you should use the same standards in weighing and evaluating all of the evidence, and the testimony of each witness, and that you should not give more or less weight to the testimony of a particular witness merely because of that witness' status, position, or station in life. Will each of you use the same standards in weighing and evaluating the testimony of each witness?

26. Is any member of the court in the rating chain, supervisory chain, or chain of command of any other member?

NOTE: If Question 26 is answered in the affirmative, the military judge may want to ask questions 27 and 28 outside the presence of the other members.

27. (To junior member(s):) Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, because another member holds a position of authority over you?

28. (To senior member(s):) Will you be embarrassed or restrained in any way in performing your duties as a court member if a member over whom you hold a position of authority should disagree with you?

29. Has anyone had any dealings with any of the parties to the trial, to include me and counsel, which might affect your performance of duty as a court member in any way?

30. Does anyone know of anything of either a personal or professional nature which would cause you to be unable to give your full attention to these proceedings throughout the trial?

31. It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime(s) for which the accused is to be sentenced if found guilty. What that means, Members, is that you believe that the commission of "Crime X" must always result in "Punishment Y." Does any member, having read the charge(s) and specification(s), believe that you would be compelled to vote for any particular punishment, if the accused is found guilty, solely because of the nature of the charge(s)?

32. Members, as I have told you earlier, if the accused is convicted of (premeditated murder) (a violation of the Law of Armed Conflict) (_____) by a unanimous vote, one of the possible punishments is death. Is there any member, due to his (or her) religious, moral, or ethical beliefs, who would be unable to give meaningful consideration to the imposition of the death penalty?

33. Is there any member who, based on your personal, moral, or ethical values, believes that the death penalty must be adjudged in any case involving (premeditated murder) (a violation of the Law of Armed Conflict) (_____)?

34. If sentencing proceedings are required, you will be instructed in detail before you begin your deliberations. I will instruct you on the full range of punishments from no punishment up to the imposition of the death penalty. You should consider all forms of punishment within that range. Consider does not necessarily mean that you would vote for that particular punishment. Consider means that you think about and choose an appropriate punishment within that range. Each member must keep an open mind and not make a choice, nor foreclose from consideration any possible sentence, until the closed session for deliberations and voting on the sentence. Can each of you follow this instruction?

35. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence, if called upon to do so in this case?

36. Can each of you reach a decision on sentence, if required to do so, on an individual basis in this particular case and not solely upon the nature of the offense(s) of which the accused may be convicted?

37. Is any member aware of any matter which might raise a substantial question concerning your participation in this trial as a court member?

Do counsel desire to question the court members?

TC/DC: (Respond.)

NOTE: Trial counsel and defense counsel will conduct voir dire if desired and individual voir dire will be conducted, if required (see INSTRUCTION 2–5–2, INDIVIDUAL VOIR DIRE).

8–3–2. CHALLENGES

NOTE: Challenges are to be made outside the presence of the court members. This may occur at a side-bar conference or at an Article 39(a) session. What follows is a suggested procedure for an Article 39(a) session.

MJ: Members of the court, there are some matters that we must now take up outside of your presence. Please return to the deliberation room.

MBRS: (Comply.)

MJ: All of the members are absent. All other parties are present. Trial Counsel, do you have any challenges for cause?

TC: (Responds.)

MJ: Defense Counsel, do you have any challenges for cause?

DC: (Responds.)

MJ: Trial Counsel, do you have a peremptory challenge?

TC: (Responds.)

MJ: Defense Counsel, do you have a peremptory challenge?

DC: (Responds.)

NOTE: The military judge will verify that a quorum remains and, if enlisted members are detailed, at least one-third are enlisted. If any member is excused as a result of a challenge, the member will be informed that he or she has been excused, and the remaining members will be rearranged.

MJ: Call the members.

8–3–3. ANNOUNCEMENT OF PLEA

TC: All parties are present as before, to now include the court members (with the exception of _____, who (has) (have) been excused).

NOTE: If the accused has pled not guilty to all charges and specifications, or if the accused has pled guilty to only some specifications and has specifically requested members be advised of those guilty pleas, announce the following:

MJ: Court members, at an earlier session, the accused pled (not guilty to all charges and specifications) (not guilty to Charge ___, Specification ____, but guilty to Charge ____, Specification ____).

NOTE: If the accused has pled guilty to lesser included offenses and the prosecution is going forward on the greater offense, continue below; if not, GO TO INSTRUCTION 8–3–4, TRIAL ON MERITS.

MJ: The accused has pled guilty to the lesser included offense of (_____), which constitutes a judicial admission of some of the elements of the offense charged in _____. These elements have therefore been established by the accused's plea without the necessity of further proof. However, the plea of guilty to this lesser included offense provides no basis for a conviction of the offense alleged as there remains in issue the element(s) of _____.

The court is instructed that no inference of guilt of such remaining element(s) arises from any admission involved in the accused's plea, and to permit a conviction of the alleged offense, the prosecution must successfully meet its burden of establishing such element(s) beyond a reasonable doubt by legal and competent evidence. Consequently, when you close to deliberate, unless you are satisfied beyond a reasonable doubt that the prosecution has satisfied this burden of proof, you must find the accused not guilty of _____, but the plea of guilty to the lesser included offense of _____ will require a finding of guilty of that lesser offense without further proof.

NOTE: If mixed pleas were entered and the accused requests that the members be informed of the accused's guilty pleas, the military judge should continue below; if not, GO TO INSTRUCTION 8–3–4, TRIAL ON MERITS.

MJ: The court is advised that findings by the court members will not be required regarding the charge(s) and specification(s) of which the accused has already been found guilty pursuant to (his)(her) plea. I inquired into the providence of the plea(s) of guilty, found (it)(them) to be provident, accepted (it)(them), and entered findings of guilty. Findings will be required, however, as to the charge(s) and specification(s) to which the accused has pled not guilty.

8–3–4. TRIAL ON MERITS

MJ: I advise you that opening statements are not evidence; rather, they are what counsel expect the evidence will be in the case. Does the government have an opening statement?

TC: (Responds.)

MJ: Does the defense have an opening statement or do you wish to reserve opening statement?

DC: (Responds.)

MJ: Trial Counsel, you may proceed.

NOTE: The trial counsel administers the oath/affirmation to all witnesses.

NOTE: When questioning is finished, the military judge should instruct the witness along the following lines.

MJ: _____, you are excused (temporarily) (permanently). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within _____ minutes) (_____).

TC: The government rests.

NOTE: This is the time that the defense may make motions for a finding of not guilty. (The motions should be made outside the presence of the court members.) The military judge's standard for ruling on the motion is at RCM 917. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. (If the motion is made before the court members and is denied, give INSTRUCTION 2-7-9, MOTION FOR FINDING OF NOT GUILTY.)

8–3–5. TRIAL RESUMES WITH DEFENSE CASE, IF ANY

MJ: Defense Counsel, you may proceed.

NOTE: If the defense reserved opening statement, the military judge shall ask if the defense counsel wishes to make an opening statement at this time.

DC: The defense rests.

8–3–6. REBUTTAL AND SURREBUTTAL, IF ANY

NOTE: If members have not previously been allowed to ask questions, the military judge should ask:

MJ: Does any court member have any questions of any witness?

MBRS: (Respond.)

NOTE: If the members have questions, the trial counsel or bailiff will collect the written questions, have them marked as appellate exhibits, examine them, show them to the defense counsel, and present them to the military judge so that the military judge may ask the witness the questions.

Court members, you have now heard all of the evidence. At this time, we need to have a hearing outside of your presence to discuss the instructions. You are excused until approximately _____.

MBRS: (Comply.)

8–3–7. DISCUSSION OF FINDINGS INSTRUCTIONS

MJ: All parties are present with the exception of the court members. Counsel, which exhibits go to the court members?

TC/DC: (Respond.)

MJ: Counsel, do you see any lesser included offenses that are in issue in this case?

TC/DC: (Respond.)

(IF THE ACCUSED ELECTED NOT TO TESTIFY:) MJ: Defense, do you wish for me to instruct on the fact that the accused did not testify?

DC: (Responds.)

MJ: I intend to give the following instructions: _____. Does either side have any objection to those instructions?

TC/DC: (Respond.)

MJ: What other instructions do the parties request?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Findings Worksheet as Appellate Exhibit ___, show it to the defense, and present it to me.

TC: (Complies.)

MJ: Defense Counsel, do you have any objections to the Findings Worksheet?

DC: (Responds.)

MJ: Is there anything else that needs to be taken up before the members are called?

TC/DC: (Respond.)

MJ: Call the court members.

8–3–8. PREFATORY INSTRUCTIONS ON FINDINGS

MJ: The court is called to order. All parties are again present as before to include the court members.

> ***NOTE: RCM 920(b) provides that instructions on findings shall be given before or after arguments by counsel or at both times. What follows is the giving of preliminary instructions prior to argument with procedural instructions given after argument.***

MJ: Members of the court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions that I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused. The law presumes the accused to be innocent of the charge(s) against (him)(her).

You will hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you.

During the trial, some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for the record of trial.

I will advise you of the elements of each offense alleged. In (the) Specification (____) of (the) Charge (____), the accused is charged with the offense of (*specify the offense*). To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

NOTE: List the elements of the offense(s) using Chapter 3 of the Benchbook.

NOTE: If lesser included offenses are in issue, continue below; if no lesser-included offenses are in issue, GO TO INSTRUCTION 8–3–10, OTHER APPROPRIATE INSTRUCTIONS.

8–3–9. LESSER INCLUDED OFFENSE(S)

NOTE: After instructions on the elements of an offense alleged, the members of the court must be advised of all lesser included offenses raised by the evidence and within the scope of the pleadings. The members should be advised, in order of diminishing severity, of the elements of each lesser included offense, and its differences from the principal offense and other lesser offenses, if any. The members will not be instructed on lesser offenses that are barred by the statute of limitations unless the accused waives the bar. These instructions may be stated substantially as follows:

8-3-9a. LIO Introduction

MJ: The offense(s) of _____ (is) (are) (a) lesser included offense(s) of the offense set forth in (the) Specification (____) (of) (the) Charge (____). When you vote, if you

find the accused not guilty of the offense charged, that is _____, then you should next consider the lesser included offense of _____, in violation of (Article _____, UCMJ) (the Law of Armed Conflict). To find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

NOTE: List the elements of the LIO using Chapter 3 of the Benchbook.

8-3-9b. LIO Differences

MJ: The offense charged, _____, and the lesser included offense of _____ differ primarily (in that the offense charged requires, as (an) essential element(s), that you be convinced beyond a reasonable doubt that (*state the element(s) applicable only to the greater offense*), whereas the lesser offense of _____ does not include such (an) element(s) (but it does require that you be satisfied beyond a reasonable doubt that (*state any different element(s) applicable only to the lesser offense*).

8-3-9c. Other LIOs Within the Same Specification

MJ: Another lesser included offense of the offense alleged in (the) Specification _____ (of) (the) Charge _____, is the offense of _____ in violation of (Article ____, UCMJ) (the Law of Armed Conflict). To find the accused guilty of this lesser offense, you must be convinced beyond a reasonable doubt of the following elements: (*list the elements*).

This lesser included offense differs from the lesser included offense I discussed with you previously in that this offense does not require, as (an) essential element(s), that the accused (*state the*

***element(s) applicable only to the greater offense*) but it does require that you be satisfied beyond a reasonable doubt that (*state any different element(s) applicable only to the lesser offense*).**

NOTE: Repeat the above as necessary to cover all LIOs and then continue below.

8–3–10. OTHER APPROPRIATE INSTRUCTIONS

NOTE: For other instructions which may be appropriate in a particular case, see Chapter 4, "Confessions and Admissions," Chapter 5, "Special and Other Defenses," Chapter 6, "Mental Responsibility," and Chapter 7, "Evidentiary Instructions." Generally, instructions on credibility of witnesses (see INSTRUCTION 7-7) and circumstantial evidence (see INSTRUCTION 7-3) are typical in most cases and should be given prior to proceeding to the following instructions.

8–3–11. CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS

MJ: You are further advised:

First, that the accused is presumed to be innocent until (his)(her) guilt is established by legal and competent evidence beyond a reasonable doubt;

Second, if there is a reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused and (he)(she) must be acquitted;

Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in favor of the lower degree of guilt to which there is no reasonable doubt; and

Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of (each) (the) offense.

By "reasonable doubt" is not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense(s), although each particular fact advanced by the prosecution, which does not amount to an element, need not be established beyond a reasonable doubt. However, if on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence, you are expected to use your own common sense and your knowledge of human nature and the ways of the world. In light of all of the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind that you may properly believe one witness and disbelieve several other witnesses whose testimony conflicts with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

You must disregard any comment, statement, or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty because you alone have the responsibility to make that determination. Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience.

8–3–12. FINDINGS ARGUMENT

MJ: At this time, you will hear argument by counsel. As the government has the burden of proof, trial counsel may open and close. Trial Counsel, you may proceed.

TC: (Argument.)

MJ: Defense, you may present findings argument.

DC: (Argument.)

MJ: Trial Counsel, rebuttal argument?

TC: (Respond.)

MJ: Counsel have referred to instructions that I gave you and if there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct.

8–3–13. PROCEDURAL INSTRUCTIONS ON FINDINGS

MJ: The following procedural rules will apply to your deliberations and must be observed:

The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should include a full and free discussion of all of the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote.

(The order in which the (several) charges and specifications are to be voted on should be determined by the President subject to objection by a majority of the members.) You vote on the specification(s) under the charge before you vote on the charge.

If you find the accused guilty of any specification under a charge, the finding as to that charge must be guilty. The junior member will collect and count the votes. The count will then be checked by the President, who will immediately announce the result of the ballot to the members.

Table 8–1
Votes Needed for a Finding of Guilty

No. of Members	Two-thirds
5	4
6	4
7	5
8	6
9	6
10	7
11	8
12	8

NOTE: The MJ must be alert to a charge under Article 106, UCMJ (Espionage), and the MJ may need to modify the instruction, e.g., the court may base findings on evidence introduced on issue of guilt, evidence introduced during sentencing proceeding, or all such evidence.

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding of guilty. Because we have ____ members, that means ____ members must concur in any finding of guilty.

If you have at least ____ votes of guilty of any offense, then that will result in a finding of guilty for that offense. If fewer than ____ members vote for a finding of guilty, then your ballot resulted in a finding of not guilty (bearing in mind the instructions I just gave you about voting on the lesser included offense(s)).

Bear in mind, as I just said, that a finding of guilty results if at least two-thirds of the members vote for a finding of guilty (of the offense(s) of (_____)); however, the President of the court must note whether the vote was unanimous concerning the capital offense(s) charged, that is (the) Specification(s) (____) of (the) Charge(s) (____). If the accused is found guilty of a capital offense and if the vote was unanimous, the President will announce such unanimity as part of the announcement of the finding of guilt. If the accused is found guilty of a capital offense but the vote is not unanimous, no announcement as to lack of unanimity should be made. A format for proper announcement of your findings is contained on the Findings Worksheet you will receive, and (it) (they) contain(s) language for each of the three possible findings as to the capital offense(s) charged; that is, not guilty, guilty, or guilty by unanimous vote.

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the President should announce only that reconsideration of a finding has been proposed. Do not state: (1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or (2) which specification (and charge) is involved. I will then give you specific further instructions on the procedure for reconsideration.

NOTE: See INSTRUCTION 2-7-10, RECONSIDERATION INSTRUCTION (FINDINGS).

MJ: As soon as the court has reached its findings and I have examined the Findings Worksheet, the findings will be announced by the President in the presence of all parties. As an aid in putting your findings in proper form and making a proper announcement of the findings, you may use Appellate Exhibit ____, the Findings Worksheet (which the (Trial Counsel) (Bailiff) will now hand to the President).

TC/BAILIFF: (Complies.)

NOTE: The military judge may explain how the Findings Worksheet should be used. Appendix B contains sample Findings Worksheet. A suggested approach follows:

MJ: (COL) (____) _____, as indicated on Appellate Exhibit(s) _____, the first portion will be used if the accused is completely acquitted of (the) (all) charge(s) and specification(s). The second part will be used if the accused is convicted, as charged, of (the) (all) charge(s) and specification(s); (and the third portion will be used if the accused is convicted of some but not all of the offenses).

(The next page of Appellate Exhibit ____ would be used if you find the accused guilty of the lesser included offense of _____ [by exceptions (and substitutions)]. This was (one of) (the) lesser included offense(s) I instructed you on.)

Once you have finished filling in what is applicable, please line out or cross out everything that is not applicable so that, when I check your findings, I can ensure that they are in proper form.

You will note that the Findings Worksheet has been modified to reflect the words that would be deleted (as well as the words that would be substituted therefor) if you found the accused guilty of the lesser included offense(s). (These) (This) modification(s) of the worksheet in no way indicate(s) (an) opinion(s) by me or counsel concerning any degree of guilt of this accused. (They are) (This is) merely included to aid you in understanding what findings might be made in the case and for no other purpose whatsoever. The worksheet is provided only as an aid in finalizing your decision.

Any questions about the Findings Worksheet?

MBRS: (Respond.)

MJ: If, during your deliberations, you have any questions, notify the Bailiff, we will open the court and I will assist you. The Uniform Code of Military Justice prohibits me and everyone else from entering your closed session deliberations. As I mentioned at the beginning of the trial, you must all remain together in the deliberation room during deliberations. While in your closed session deliberations, you may not make communications to or receive communications from anyone outside the deliberation room, by telephone or otherwise. If you have need of a recess, if you have a question, or when you have reached findings, you may notify the Bailiff, who will then notify me that you desire to return to open court to make your desires or findings known. Further, during

your deliberations, you may not consult the Manual for Courts-Martial, the Geneva Convention Relative to the Treatment of Prisoners of War, or any other publication or writing unless it has been admitted into evidence.

Do counsel object to the instructions given or request additional instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions concerning these instructions?

MBRS: (Respond.)

MJ: If it is necessary (and I mention this because there is no latrine immediately adjacent to your deliberation room), your deliberations may be interrupted by a recess. However, before you may leave your closed session deliberations, you must notify us, we must come into the courtroom, formally convene and then recess the court; and, after the recess, we must reconvene the court and formally close again for your deliberations. So, with that in mind, (COL) (____) _____, do you desire to take a brief recess before you begin your deliberations, or would you like to begin immediately?

PRES: (Responds.)

MJ: (Trial Counsel) (Bailiff), please hand to the President of the court Prosecution Exhibit(s) _____ (and Defense Exhibit(s) _____) for use during the court's deliberations.

TC/BAILIFF: (Complies.)

MJ: (COL) (____)_____, please do not mark on any of the exhibits except the Findings Worksheet (and please bring all of the exhibits with you when you return to announce your findings).

The court is closed.

8–3–14. PRESENTENCING SESSION

NOTE: When the members close to deliberate, the military judge may convene an Article 39(a) session to cover pre-sentencing matters, or may wait until after findings.

MJ: This Article 39(a) session is called to order. All parties are present, except the court members.

_____ (*state name of accused*), when the members return from their deliberations, if you are acquitted of all charges and specifications, that will terminate the trial. On the other hand, if you are convicted of any offense, then the court will determine your sentence. During that part of the trial, you (will) have the opportunity to present evidence in extenuation and mitigation of the offense(s) of which you have been found guilty, that is, matters about the offense(s) or yourself which you want the court to consider in deciding your sentence. In addition to the testimony of witnesses and the offering of documentary evidence, you may, yourself, testify under oath as to these matters, or you may remain silent, in which case the court will not draw any adverse inference from your silence. On the other hand, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross examined on it. However, the government may offer evidence to rebut any statement of fact contained in an unsworn statement. The unsworn

statement may be made orally or in writing, or both. It may be made by you or by your counsel on your behalf, or by both you and your counsel. Do you understand these rights that you have?

ACC: (Responds.)

MJ: Counsel, is the personal data on the first page of the charge sheet correct?

TC/DC: (Respond.)

MJ: Defense Counsel, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13, UCMJ?

DC: (Responds.)

> ***NOTE: <u>Illegal pretrial punishment</u>. Article 82, GC III, provides that EPWs are subject to the laws of the DP, and, therefore, Article 13, UCMJ, credit would be equally applicable to EPWs who suffer illegal pretrial punishment. A punishment imposed on an EPW while awaiting trial that exceeds the limitations specified in the GC III may constitute Article 13 punishment. See Arts. 87 and 103, GC III. By analogy, a punishment or penalty imposed on the accused while being held for trial (which are not the result of disciplinary action (i.e., nonjudicial punishment) (see Note 2, infra.)) that exceeds the limitations for "disciplinary sanctions" under Articles 89 and 90, GC III, may also constitute Article 13 punishment. The applicable disciplinary punishments, which may not exceed 30 days, are the following:***
>
> ***(1) Fine: 50 percent of advance pay and working pay;***
>
> ***(2) Discontinuance of privileges granted over and above the treatment provided by the GC III;***
>
> ***(3) Fatigue duty not exceeding two hours daily; and***

(4) Confinement. (Arts. 87, 89-90, and 97-98, GC III).

The accused's time in internment under Article 21, GC III, does not constitute illegal pretrial punishment.

NOTE: Disciplinary sanctions (e.g., nonjudicial punishment) and double jeopardy. Article 86, GC III, provides that "No prisoner of war may be punished more than once for the same act or on the same charge." Disciplinary sanctions imposed IAW Article 89-98, GC III, would bar subsequent punishment for the same act. If evidence of disciplinary sanctions was admitted at trial which reflects that the accused received punishment for the same offense, which the accused was also convicted at the court-martial, the military judge must dismiss the specification or portion of the specification involved.

MJ: (_____), is that correct?

ACC: (Responds.)

NOTE: Pretrial confinement credit. If the accused was confined while awaiting trial, other than internment as a prisoner of war, Article 103, GC III, requires that such time "shall be deducted from any sentence of imprisonment passed upon him." The accused's time in internment under Article 21, GC III, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

MJ: Under the provisions of Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War, any period of time spent by you in confinement while you were awaiting trial

shall be deducted from any sentence of confinement and taken into account by the court when deliberating and fixing your sentence. However, the period during which you were interned as an enemy prisoner of war under Article 21, GC III, will not be considered when deliberating your sentence. Do you understand that?

ACC: (Responds.)

MJ: Counsel, based on the information on the charge sheet, the accused is to be credited with ____ day(s) of pretrial confinement credit. Is that the correct amount?

TC/DC: (Respond.)

MJ: Counsel, do you have any documentary evidence on sentencing which could be marked and offered at this time?

TC/DC: (Comply.)

MJ: Is there anything else by either side?

TC/DC: (Respond.)

MJ: This Article 39(a) session is terminated to await the members' findings.

8–3–15. FINDINGS

MJ: The court is called to order. All parties are again present as before to include the court members. (COL) (____) _____, has the court reached findings?

PRES: (Responds.)

MJ: Are the findings reflected on the Findings Worksheet?

PRES: (Responds.)

MJ: Please fold the worksheet and give it to the (Trial Counsel) (Bailiff) so that I may examine it.

TC/BAILIFF: (Complies.)

> ***NOTE: If a possible error exists on the Findings Worksheet, the military judge must take corrective action. All advice or suggestions to the court from the military judge must occur in open session. In a complex matter, it may be helpful to hold an Article 39(a) session to secure suggestions and agreement on the advice to be given to the court. Occasionally, corrective action by the court involves reconsideration of a finding and, in that situation, instructions on the reconsideration procedure are required (see INSTRUCTION 2-7-10, RECONSIDERATION INSTRUCTION (FINDINGS)).***

MJ: I have reviewed the Findings Worksheet and (the findings appear to be in proper form) (_____). (Bailiff) (Trial counsel), please return the Findings Worksheet to the President.

TC/BAILIFF: (Complies.)

MJ: Defense Counsel and accused please rise.

DC/ACC: (Comply.)

MJ: (COL) (___) _____, please announce the findings of the court.

PRES: (Complies.)

MJ: Counsel and accused may be seated.

DC/ACC: (Comply.)

MJ: (Trial counsel) (Bailiff), please retrieve all exhibits from the President.

TC/BAILIFF: (Complies.)

NOTE: If there are findings of guilty of a capital offense by a unanimous vote, go to the sentencing proceedings. If not, GO TO INSTRUCTION 2-5-17, SENTENCING PROCEEDINGS. If acquitted, continue below.

MJ: Members of the court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations of what happened in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service.

This court-martial is adjourned.

8–3–16. SENTENCING PROCEEDINGS

NOTE: If the military judge has not previously advised the accused of his allocution rights at INSTRUCTION 8-3-14, PRESENTENCING INSTRUCTIONS, the military judge must do so at this time outside the presence of the court members. If there were

findings of guilty of which the members had not previously been informed, they should be advised of such now. An amended flyer containing the other offenses is appropriate.

MJ: Members of the court, at this time, we will enter into the sentencing phase of the trial. (Before doing so, would the members like to take a recess?)

PRES/MBRS: (Respond.)

MJ: Trial Counsel, you may read the personal data concerning the accused as shown on the charge sheet.

TC: The first page of the charge sheet shows the following personal data concerning the accused: (*Reads the data*).

MJ: Members of the court, I have previously admitted into evidence (Prosecution Exhibit(s) _____, which (is) (are) _____) (and) (Defense Exhibit(s) _____, which (is)(are) _____). You will have (this) (these) exhibit(s) available to you during your deliberations.

Trial Counsel, do you have anything to present at this time?

TC: (Responds and presents case on sentencing.)

TC: The government rests.

MJ: Defense Counsel, you may proceed.

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

8–3–17. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Members of the court, you have now heard all of the evidence in this case. At this time, we need to have a hearing outside of your presence to go over the instructions that I will give you. I expect that you will be required to be present again at _____.

MBRS: (The members withdraw from the courtroom.)

8–3–18. DISCUSSION OF SENTENCING INSTRUCTIONS

MJ: All parties are present, except the court members who are absent.

Counsel, what do you calculate the maximum sentence to be based upon the findings of the court?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Sentence Worksheet as Appellate Exhibit ____, show it to the defense, and present it to me.

TC: (Complies.)

MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?

DC: (Responds.)

MJ: Counsel, I intend to give the following sentencing instructions: _____.

NOTE: The military judge may require the defense counsel to provide in writing a list of all mitigating factors/circumstances that the defense counsel wants the military judge to instruct upon to the court panel.

MJ: Do counsel have any requests for any special instructions?

TC/DC: (Respond.)

(IF THE ACCUSED ELECTED NOT TO TESTIFY:) MJ: Defense, do you wish for me to instruct on the fact that the accused did not testify?

DC: (Responds.)

NOTE: Unsworn statement instruction within discretion of military judge. See United States v Breese, 11 M.J. 17 (C.M.A. 1981).

MJ: Call the members. (The members are called and reenter the courtroom.)

8–3–19. SENTENCING ARGUMENTS

MJ: The court is called to order.

TC: All parties, to include the members, are present.

MJ: Trial Counsel, you may present argument.

TC: (Complies.)

MJ: Defense Counsel, you may present argument.

DC: (Complies.)

8–3–20. SENTENCING INSTRUCTIONS

MJ: Members of the court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as those in aggravation,) you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he)(she) has been found guilty.

You must not adjudge an excessive sentence in reliance upon possible mitigating action by the Convening or higher Authority. A single sentence shall be adjudged for all offenses of which the accused has been found guilty.

> ***NOTE: Sentencing instruction. The military judge is required by Articles 87 and 100, GC III, to instruct the court substantially as follows:***

In determining a legal, appropriate, and adequate punishment, this court will bear in mind that the accused, not being a national of the United States, is not bound to the United States by any duty of allegiance and that (he)(she) is in the power of the United States as a result of circumstances independent of (his)(her) own will. As such, under Article 87 of the Geneva

Convention Relative to the Treatment of Prisoners of War, this court is not bound to apply the maximum punishment, and it is at liberty to adjudge a lesser legal sentence to include no punishment.

8–3–21. MAXIMUM PUNISHMENT

NOTE: Under Article 87, GC III, the accused may not be sentenced to any penalties except those "provided for in respect of members of the armed forces of the said Power who have committed the same acts." See Appendix 12, Maximum Punishment Chart, MCM.

NOTE: <u>Mandatory punishment</u>. Under the MCM, the offenses of premeditated murder (Article 118(1), UCMJ) and felony murder (Article 118(4), UCMJ) have a mandatory minimum punishment of life imprisonment with the eligibility for parole, and the offense of spies (Article 106, UCMJ) has a mandatory punishment of death. However, under Article 87, GC III, the court is not bound to apply the mandatory punishment prescribed.

Note: <u>Confinement for Life without Eligibility for Parole</u>. Section 856a of The Defense Authorization Act of 1998 adds Article 56a, which provides for a sentence to life without eligibility for parole. The act applies to offenses occurring after 19 November 1997. When an accused is eligible to be sentenced to death for an offense occurring after 19 November 1997, the military judge must instruct that confinement for life without eligibility for parole is also a permissible sentence.

MJ: The maximum permissible punishment that may be adjudged in this case is (confinement for life) (confinement for life without eligibility for parole) (to be put to death). The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence, of which I will instruct you later.

In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are a few matters which each member should consider in determining an appropriate sentence. First, bear in mind that there are several principal reasons for the sentence of those who violate the law. These reasons include: punishment of the wrongdoer, protection of society from the wrongdoer, and deterrence of the wrongdoer and those who know of (his)(her) crime(s) and (his)(her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion. Next, you should be aware of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general.

NOTE: Lack of rehabilitative potential is not a proper consideration.

The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

8–3–22. TYPES OF PUNISHMENT

MJ: I will now instruct you on the various kinds of punishments to which you can sentence the accused:

8–3–23. DISCHARGE

NOTE: Discharge. EPWs may not be discharged. This action is a matter between an EPW and his state.

8–3–27. FINE AND/OR FORFEITURES OF PAY

NOTE: Pecuniary punishment. Pecuniary punishment, e.g., fine and/or forfeiture of pay and allowances, appears applicable to EPWs under the provision that EPWs are subject to the same punishment authorized against members of the U.S. armed forces for the same offense. Art. 87, GC III. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding pecuniary punishment and proceed accordingly.

a. Fine. See R.C.M. 1003(b)(3). Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. Special and summary courts-martial, however, may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. Before total forfeitures and a fine can be approved resulting from a guilty plea at a GCM, the accused must be advised that the pecuniary loss could exceed total forfeitures. Moreover, to have any fine approved, the military judge must advise the accused of the possibility of a fine during the providence inquiry.

b. Forfeiture of pay and allowances. See R.C.M. 1003(b)(2); Appendix 12. EPWs only receive a nominal amount of monies during internment such as a

monthly advance of pay (Art. 60, GC III) and, if applicable, working pay (Art. 62, GC III). It is unclear whether such monies constitute "pay" and/or "allowances" for purposes of adjudging a forfeiture as punishment. The military judge should be mindful of any specific guidance that DoD or DoS may issue regarding forfeiture of pay and allowances and proceed accordingly.

8–3–29. PRETRIAL CONFINEMENT CREDIT (IF APPLICABLE)

NOTE: <u>Pretrial confinement credit</u>. If the accused was confined while awaiting trial, Article 103, GC III, requires that such time "shall be deducted from any sentence of imprisonment passed upon him." The accused's time in internment under Article 21, GC III, does not constitute pretrial confinement. The military judge should give the following instruction if the accused is to be credited with pretrial confinement credit.

MJ: Under the provisions of Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War, any period of time spent by the accused in confinement while (he)(she) was awaiting trial shall be taken into account by the court when deliberating and fixing the sentence. However, the period during which the accused was interned as an enemy prisoner of war under Article 21, GC III, will not be considered when deliberating (his)(her) sentence.

In determining an appropriate sentence in this case, you should consider the fact that the accused has spent _____ day(s) in pretrial confinement. If you adjudge confinement as part of your sentence, the day(s) the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional

facility where the accused is sent to serve (his)(her) confinement, and will be given on a day-for-day basis.

8–3–30. CONFINEMENT

MJ: As I have already indicated, this court may sentence the accused to confinement for ((life without eligibility for parole) (life) (a maximum of _____ (years) (months)). (Unless confinement for life without eligibility for parole or confinement for life is adjudged,) (A) sentence to confinement should be adjudged in either full days (or) full months (or full years); fractions (such as one-half or one-third) should not be employed. (So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.)

NOTE: If confinement for life without eligibility for parole is an available punishment, instruct further as follows:

(A sentence to "confinement for life without eligibility for parole" means that the accused will be confined for the remainder of (his)(her) life and will not be eligible for parole by any official, but it does not preclude clemency action which might convert the sentence to one which allows parole. A sentence to "confinement for life" or any lesser confinement term, by comparison, means that the accused will have the possibility of earning parole from such confinement under such circumstances as are or may be provided by law or regulations for enemy prisoners of war. "Parole" is a form of conditional release of a prisoner from actual incarceration, before (his)(her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility

of return to incarceration to complete (his)(her) sentence of confinement if the conditions of parole are violated. In determining whether to adjudge, if either, "confinement for life without eligibility for parole" or "confinement for life" in the sentence, bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole action by the Convening Authority or any other appropriate authority.)

8–3–31. REDUCTION

NOTE: <u>Reduction in rank</u>. EPWs may not be reduced in rank. Specifically, Article 87, GC III, prohibits the DP from depriving an EPW of his rank. This action is a matter between an EPW and his state.

8–3–33. DEATH

MJ: The court may sentence the accused to be put to death.

8–3–34. CLEMENCY (RECOMMENDATION FOR SUSPENSION)

MJ: Although you have no authority to suspend either a portion of or the entire sentence that you adjudge, you may recommend such suspension. However, you must keep in mind during deliberation that such a recommendation is not binding on the Convening or higher Authority. Therefore, in arriving at a sentence, you must be satisfied that it is appropriate for the offense(s) of which the accused has been convicted, even if the Convening or higher Authority refuses to adopt your recommendation for suspension.

If fewer than all members of the court wish to recommend suspension of a portion of or the entire sentence, then the names of those making such a recommendation, or not joining in such a recommendation, whichever is less, should be listed at the bottom of the Sentence Worksheet.

Where such a recommendation is made, then the President, after announcing the sentence, may announce the recommendation and the number of members joining that recommendation. Whether to make any recommendation for suspension of a portion of or the entire sentence is solely a matter within the discretion of the court.

However, you should keep in mind that your responsibility is to adjudge a sentence which you regard as fair and just at the time it is imposed, and not a sentence which will become fair and just only if your recommendation is adopted by the Convening or higher Authority.

8–3–34a. NO PUNISHMENT

MJ: Finally, if you wish, this court may sentence the accused to no punishment.

8–3–35. PLEA OF GUILTY

(MJ: A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.)

8–3–36. ACCUSED'S NOT TESTIFYING

(MJ: The court will not draw any adverse inference from the fact that the accused elected not to testify.)

8–3–37. ACCUSED'S NOT TESTIFYING UNDER OATH

(MJ: The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by the court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut any statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement was not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.)

> ***NOTE: Scope of Accused's Unsworn Statement. The scope of an accused's unsworn statement is broad. If the accused addresses the treatment or sentence of others, command options, or other matters that would be inadmissible but for their being presented in an unsworn statement, the instruction below may be appropriate. In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused's unsworn statement.***

(MJ: The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (_____). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted.)

(For example, it is not your duty (to determine relative blame worthiness of) (and whether appropriate disciplinary action has been taken against) others who might have committed an offense, (whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused's chain of command or other authorities) (_____).)

(Your duty is to adjudge an appropriate sentence for this accused that you regard as fair and just when it is imposed and not one whose fairness depends upon actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases).)

8–3–38. MENDACITY

(MJ: The evidence presented (and the sentencing argument of Trial Counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints.

First, this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did testify falsely under oath to this court.

Second, such false testimony must have been, in your view, willful and material, meaning important, before it may be considered in your deliberations.

Finally, you may consider this factor only insofar as you conclude that it, along with all other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.)

8–3–39. ARGUMENT FOR A SPECIFIC SENTENCE

(MJ: During argument (Trial Counsel) (and) (Defense Counsel) recommended that you consider a specific sentence in this case. The arguments of counsel and their recommendations are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.)

> ***NOTE: The military judge must instruct the court members on the two tests which must be met before a death sentence may be adjudged. First, the court members must determine unanimously and beyond a reasonable doubt that one or more of the aggravating factors specified by the trial counsel under the provisions of RCM 1004(c) have been proven. If so, then the court members must find that the aggravating circumstances substantially outweigh any extenuating or mitigating circumstances before a sentence of death may be adjudged. Even if aggravating circumstances are found, the court members must propose sentences and vote on them, beginning with the lightest, as in non-capital cases.***

MJ: Members of the court, because death may become a possible sentence in this case, your deliberations require the following procedures.

8–3–40. CONCLUDING SENTENCING INSTRUCTIONS

MJ: When you close to deliberate and vote, only the members will be present. Your deliberation should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of the members in the exercise of their judgment.

You may adjudge a sentence of death only under certain circumstances.

First, a death sentence may not be adjudged unless all of the court members find, beyond a reasonable doubt, that (an) (one or more) aggravating factor(s) existed. The alleged aggravating factor(s) (is) (are) as follows: (*read the aggravating factor(s) specified by the trial counsel upon which some evidence has been introduced*). (This) (These) alleged aggravating factor(s) (is) (are) also set out on Appellate Exhibit ____, the Sentence Worksheet, which I will discuss in a moment.

All of the members of the court must agree, beyond a reasonable doubt, that (this) (one or more of the) aggravating factor(s) existed at the time of the offense(s) or resulted from the offense(s).

> ***NOTE: If more than one aggravating factor is involved, the following instruction should be given.***

(MJ: It is not sufficient that some members find that one aggravating factor existed, while the remaining members find that a different aggravating factor existed; rather, all of you must find, beyond a reasonable doubt, that the same aggravating factor or factors existed before a sentence of death may be adjudged.)

In this regard, you are again advised that the term "reasonable doubt" is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving caused by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty although not necessarily to an absolute or mathematical certainty.

> ***NOTE: The military judge should also give additional definitional or explanatory instructions relevant to the specified aggravating factors, such as "national security" (RCM 1004(c)), proof of intent or knowledge by circumstantial evidence (INSTRUCTION 7-3), "persons in execution of office" (INSTRUCTIONS 3-15-1, 3-15-3, or 3-104-1), or the elements of any substantive offense relevant to the aggravating factor(s).***

MJ: Members, in making the determination of whether or not (the) (an) aggravating factor(s) existed, you may consider all of the evidence in the case, including the evidence presented prior to the findings of guilty, as well as any evidence presented during the sentencing hearing. Your deliberations on the aggravating factor(s) should properly include a full and free discussion on all of the evidence that has been presented.

After you have completed your discussion, then voting on (the) (each) aggravating factor must be accomplished (separately) by secret written ballot, and all members are required to vote. The junior member will collect and count the ballots. The count will be checked by the President, who will immediately announce the results of the ballot to the other members of the court.

If you fail to find unanimously that (at least one of) the aggravating factor(s) existed, then you may not adjudge a sentence of death.

If, however, you do find by unanimous vote that (at least one of) (the) aggravating factor(s) existed, then proceed to the next step. In this next step, you may not adjudge a sentence of death unless you unanimously find that any and all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including (such) (the) factor(s) as you have found existed in the first step of this procedure. Thus, in addition to the aggravating factor(s) that you have found by unanimous vote, you may consider the following aggravating circumstances:

(Previous convictions),

(Prosecution exhibits, stipulations, etc.),

(Rebuttal testimony of _____),

(Nature of weapon used in the commission of the offense),

(Nature and extent of injuries suffered by the victim),

(Nature of the harm done to national security), and/or

(Other_____).

NOTE: After consulting with the defense counsel, the military judge should instruct on applicable extenuating and mitigating circumstances, including, but not limited to, the following:

MJ: You must also consider all evidence in extenuation and mitigation and balance them against the aggravating circumstances using the test I previously instructed you upon.

You are also instructed to consider in extenuation and mitigation any other aspect of the accused's character, background, and any other aspect of the offense(s) you find appropriate. In other words, that list of extenuating and mitigating circumstances I just gave you is not exclusive.

You may consider any matter in extenuation and mitigation, whether it was presented before or after findings and whether it was presented by the prosecution or the defense. Each member is at liberty to consider any matter which he (or she) believes to be a matter in extenuation and mitigation, regardless of whether the panel as a whole believes that it is a matter in extenuation and mitigation.

Once again, Members, your deliberations should begin with a full and free discussion on the aggravating circumstances and the extenuating and mitigating circumstances. After you have completed your discussions, then you will vote on whether or not the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances. The vote will be by secret written ballot and all members of the court are required to vote.

The junior member will collect and count the ballots. The count will then be checked by the President, who will immediately announce the results of the ballot to the other members of the court.

If the court does not determine unanimously that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, then a sentence of death will not be a possible punishment.

If you unanimously find (the) (one or more) aggravating factor(s) and even if you unanimously determine that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, you still have the absolute discretion to decline to impose the death sentence.

Members, at this point, you will know, because you have gone through the aforementioned steps, whether or not death is among the punishments that may be proposed.

However, no proposed sentence may include both (1) confinement for the period of (his)(her) natural life or confinement for life without eligibility for parole and (2) death. Those two are inconsistent.

A sentence of death may be adjudged only upon the unanimous vote of all of the members. A sentence of death includes confinement which is a necessary incident of a sentence of death but not a part of it. If you adjudge the death sentence, the accused will be confined until the death sentence is carried out. Thus, if you adjudge death, you need not announce confinement as part of your sentence.

The imposition of any other lawful punishment is totally within your discretion. In determining a legal, appropriate, and adequate punishment, this court will bear in mind that the accused, not being a national of the United States, is not bound to the United States by any duty of allegiance and that (he)(she) is in the power of the United States as a result of circumstances independent of (his)(her) own will. As such, under Article 87 of the Geneva Convention Relative to the Treatment of Prisoners of War, you are not bound to apply the maximum punishment, and you are at liberty to arrive at a lesser legal sentence to include no punishment.

Members, even if you have found, in accordance with the instructions I have given you, that (an) (the) aggravating factor(s) exist(s) and that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, each member still has the absolute discretion to not vote for a death sentence. Even if death is a possible sentence, the decision to vote for death is each member's individual decision.

Members, the (only) offense(s) that (is) (are) punishable by a death sentence is Specification(s) _____ of Charge(s) _____, i.e., (a violation of Article _____ of the Uniform Code of Military Justice) (a violation of the Law of Armed Conflict, specifically _____ (*state the article and Convention*)).

Again, your deliberations on an appropriate sentence should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner in an attempt to control the independence of the members in the exercise of their judgment.

When you have completed your discussions, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. The junior member collects the proposed sentences and submits them to the President, who will arrange them in order of their severity.

The court will then vote by secret written ballot on each proposed sentence in its entirety, beginning with the least severe and continuing with the next least severe, until a sentence is adopted by the required concurrence. You are reminded that the most severe punishment is the death penalty. To adopt a sentence that does not include the death penalty, the required concurrence is three-fourths. That is _____ of the _____ members present.

The junior member will collect and count the votes. The count will then be checked by the President, who shall immediately announce the result of the ballot to the other members of the court.

If you vote on all of the proposed sentences without reaching the required concurrence, repeat the process of discussion, proposal, and voting.

Once a sentence has been reached, any member of the court may propose that it be reconsidered prior to its being announced in open court. If, after you determine your sentence, any member suggests that you reconsider the sentence, open the court and the President should announce that reconsideration has been proposed, without reference to whether the proposed reballot concerns increasing or decreasing the sentence. I will then give you detailed instructions in open court on how to reconsider it.

NOTE: See INSTRUCTION 2-7-14, RECONSIDERATION INSTRUCTION (SENTENCE).

MJ: As an aid in putting the sentence in proper form, you will have the use of the Sentence Worksheet, Appellate Exhibit _____, which the (Trial Counsel) (Bailiff) will now hand to the President.

TC/BAILIFF: (Complies.)

MJ: As a reminder, you must first vote on (the) (each) aggravating factor which (is) (are) listed on the worksheet in Part A, and then reflect the court's vote on (the) (each) aggravating factor in the space provided. (Then strike out any factor not unanimously found by the members.) If (this) (these) vote(s) result in a unanimous finding that (the) (one or more) factor(s) (has) (have) been proven, then the court members should go to Part B of Appellate Exhibit _____. On the other hand, if the court does not find unanimously that (the) (any) aggravating factor has been proven, you should then line out Part A (Aggravating Factor(s)) and Part B (Balancing of Aggravating Circumstances and Extenuating and Mitigating Circumstances) by marking a large "X" across them and the President should not read any of the language from Parts A and B because a death sentence cannot be considered.

If the court members unanimously find (the) (any) aggravating factor(s) in accordance with the instructions I have previously given you, then you should next direct your attention to Part B (Balancing Aggravating Circumstances, including the aggravating factor(s), against Extenuating and Mitigating Circumstances).

The members must then vote on whether the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, including the aggravating factor(s) specifically found as indicated in Part A.

If the court members do not unanimously find that the extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances, including the aggravating factor(s) specifically found as indicated in Part A, then you may not adjudge a sentence of death and Parts A and B of Appellate Exhibit _____ should be lined out by marking a large "X" across them, and the President should not read any of the language from Parts A and B of Appellate Exhibit _____.

Mr. President, as I have previously instructed you, a sentence to (1) death and (2) confinement for life or life without eligibility for parole are inconsistent. You may not return a sentence that contains both of them.

Now, Mr. President, please turn your attention to Part C of the Sentence Worksheet, Appellate Exhibit _____.

If the sentence does not include death, then where it says "signature of President," only you as the President will sign there because all of the members are not required to sign. If the sentence does include death, all of the court members will then sign at the appropriate place as indicated on the Sentence Worksheet, Appellate Exhibit _____, at the end of Part C.

Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing

matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial, the Geneva Convention Relative to the Treatment of Prisoners of War, or any other publication or writing not properly admitted or received during this trial.

These instructions must not be interpreted as indicating any opinion as to the sentence which should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of adherence to the laws and customs of war in general, punishment of the accused, and the protection of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. When the court returns, I will examine the Sentence Worksheet and the President will then announce the sentence.

Do counsel object to the instructions as given or request additional instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions?

MBRS: (Respond.)

MJ: (COL) (____) _____, if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?

PRES: (Responds.)

MJ: (Trial counsel) (Bailiff), please give the President Prosecution Exhibit(s) _____ (and Defense Exhibit(s) _____).

TC/BAILIFF: (Complies.)

MJ: (COL) (___)_____, please do not mark on any of the exhibits, except the Sentence Worksheet, and please bring all of the exhibits with you when you return to announce the sentence.

The court is closed.

8–3–41. ANNOUNCEMENT OF SENTENCE

MJ: The court is called to order.

TC: All parties to include the court members are present as before.

MJ: (President), have you reached a sentence?

PRES: (Responds.)

> ***NOTE: If the President indicates that the members are unable to agree on a sentence, the military judge should give INSTRUCTION 2-7-13, "HUNG JURY" INSTRUCTION.***

MJ: (President), is the sentence reflected on the Sentence Worksheet?

PRES: (Responds.)

MJ: (President), please fold the Sentence Worksheet and give it to the (Trial Counsel) (Bailiff) so that I can examine it.

PRES/TC/BAILIFF: (Comply.)

MJ: I have examined the Sentence Worksheet and it appears (to be in proper form) (_____). (Trial Counsel) (Bailiff), you may return it to the President.

TC/BAILIFF/PRES: (Complies.)

MJ: Defense Counsel and accused, please rise.

DC/ACC: (Comply.)

MJ: (President), please announce the sentence of the court.

PRES: (Complies.)

> ***NOTE: Article 107, GC III, requires the Detaining Power to immediately notify the Protecting Power and the prisoners' representative of the accused's judgment, sentence, and appellate rights. The Detaining Power must provide a "detailed communication containing: (1) the precise wording of the finding and sentence; (2) a summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and the defense; (3) notification, where applicable, of the establishment where the sentence will be served."***

MJ: Please be seated.

DC/ACC: (Comply.)

MJ: (Trial counsel) (Bailiff), please retrieve the exhibit(s) from the President.

TC/BAILIFF: (Complies.)

MJ: Members of the court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, the oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations of what happened in the courtroom and how the process of a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused. Counsel and the accused will remain.

MBRS: (Withdraw.)

MJ: The members have withdrawn from the courtroom. All other parties are present.

8–3–42. PRETRIAL CONFINEMENT CREDIT

MJ: The accused will be credited with _____ day(s) of pretrial confinement against the accused's term of confinement.

8–3–43. POST-TRIAL and APPELLATE RIGHTS ADVICE

NOTE: <u>Right of appeal</u>. Article 106, GC III, provides: "Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully

informed of his right to appeal or petition and of the time limit within which he may do so." This appears to require an inquiry on the record that the accused is "fully informed" of his appellate rights. This appears to require an inquiry on the record that the accused is "fully informed" of his appellate rights.

MJ: _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights, you have the right to the advice and assistance of counsel.

After the record of trial is prepared, it will be forwarded to the Convening Authority for action. The Convening Authority may approve the findings and the sentence (within the limits of the pretrial agreement, if any), or he or she may disapprove the findings or the sentence in whole or in part. The Convening Authority may reduce the sentence adjudged by the court-martial, but he or she cannot increase it. The Convening Authority can disapprove a finding of guilty, but cannot change a finding of not guilty. Although the Convening Authority is not required to review the case for legal errors, he or she may take action to correct legal errors.

[(IF GCM OR SPCM ADJUDGED CONFINEMENT OF ONE YEAR OR MORE:) In addition, the Staff Judge Advocate will prepare a post-trial recommendation. That recommendation will be served on you or your defense counsel before the Convening Authority takes action on your case.]

Before the Convening Authority takes action, you have the right to submit any matters you wish him or her to consider in deciding whether to approve all, part, or any of the findings and sentence in your case (including a response to the Staff Judge Advocate's post-trial recommendation, if any). Such matters must be submitted within 10 days after a copy of the authenticated record of trial (and the recommendation of the Staff Judge Advocate) (is) (are) served on you or your

counsel. You may request up to an additional 20 days and, for good cause, the Convening Authority may approve the request.

[(IF APPROVED SENTENCE IS DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the Convening Authority approves (death) (confinement for one year or more), your case will be reviewed by the Army Court of Criminal Appeals (ACCA). You are entitled to be represented by counsel before that court. If you request, military counsel will be appointed to represent you at no expense to you. Also, if you choose, you may retain a civilian counsel to represent you at no cost to the United States by notifying the Clerk of Court.

> ***NOTE: The GC III does not cover the type or costs of appellate counsel. The Note on costs of representation, supra, equally applies in this situation.***

After ACCA completes its review, you may request the Court of Appeals for the Armed Forces (CAAF) to review your case. If CAAF grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA.

After CAAF completes its review, you may request review by the Supreme Court of the United States. If that court grants your request, it will review your case and you will have the same rights to counsel as you have before ACCA and CAAF.]

[(IF APPROVED SENTENCE DOES NOT INCLUDE DEATH OR CONFINEMENT FOR ONE YEAR OR MORE, AND APPELLATE REVIEW NOT WAIVED:) If the Convening Authority approves a sentence that does not include death or confinement for one year or more, your case

will be examined in the Office of the Judge Advocate General for legal sufficiency and to determine if the sentence is appropriate. The Judge Advocate General may take corrective action as appropriate. This mandatory review under Article 69(a), UCMJ, will constitute the final action in your case unless The Judge Advocate General refers your case to ACCA for further review.]

[(IF APPROVED SENTENCE IN GCM DOES NOT INCLUDE DEATH OR IN SPCM INCLUDES CONFINEMENT FOR ONE YEAR OR MORE:) You also have the right to waive or withdraw review at any time before completion of the review. If you waive or withdraw review, your decision is final and you cannot change your mind. A judge advocate will review your case and send it to the Convening Authority for final action. Within two years after final action is taken on your case, you may apply to The Judge Advocate General to take corrective action. The Judge Advocate General may modify the findings or sentence on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over you or the offense(s), error prejudicial to your substantial rights, or the appropriateness of the sentence.]

Do you understand your post-trial and appellate rights?

ACC: (Responds.)

Do you have any questions?

ACC: (Responds.)

8–3–44. IF MORE THAN ONE DEFENSE COUNSEL

MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the Staff Judge Advocate's post-trial recommendation to be served?

DC: (Responds.)

MJ: Are there any other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

Appendix A

References

Section I
Required Publications

Manual for Courts–Martial, United States, 2002

Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949). (Available at http://www.unhchr.ch/html/menu3/b/91.htm)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949). (Available at http://www.unhchr.ch/html/menu3/b/92.htm)

Section II
Related Publications

FM 27-10, The Law of Land Warfare

Section III
Prescribed Forms

This section contains no entries.

Section IV
Referenced Forms

This section contains no entries.

Appendix B

Findings Worksheets

1. Sample findings worksheets for each of the various situations which may arise are located at B-1 through B-4. An alternative findings worksheet is located at B-5.

2. The Findings Worksheet must be carefully reviewed by the military judge after the conclusion of the evidence in the case. It must be tailored for each case to ensure that the worksheet allows the court members to reach findings on all theories of the case which have been raised by the evidence. The worksheet should be made as simple as possible.

3. In cases in which the evidence requires that the court members reach findings by exceptions and/or substitutions, the military judge should attempt to have both sides agree on amendments to the specification in question. This will substantially reduce the problems involved with exceptions and substitutions. Use of the instruction on variance will also ensure that the panel members focus on the guilt or innocence factors, rather than the specific day or amount or nomenclature.

4. Counsel for both sides should consent to the Findings Worksheet on the record before it is given to the court members. This is especially important in cases involving lesser-included offenses.
5. The military judge should keep a copy of the worksheet in order to review it with the President prior to the court closing.

6. When the court members return from deliberations, the military judge must review the Findings Worksheet to insure that the findings are lawful and in proper form. The judge must have the President correct any mistake or omissions prior to announcement of the findings.

Appendix B-1

Findings Worksheet—No Lesser Included Offenses

Table B–1
Sample Findings Worksheet—No Lesser Included Offenses

UNITED STATES	)	
	)	
v.	)	
	)	FINDINGS WORKSHEET
SPC James D. Jones	)	
123-45-6789	)	
A Co 1/504 PIR	)	
82d Airborne Division	)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (the) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge I: (Not Guilty) (Guilty)
Of Specification 2 of Charge I: (Not Guilty) (Guilty)
Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge II: (Not Guilty) (Guilty)
Of Specification 2 of Charge II: (Not Guilty) (Guilty)
Of Charge II: Guilty

_____
(Signature of President)

Appendix B-2

Findings Worksheet—Lesser Included Offenses

Table B–2
Sample Findings Worksheet—Lesser Included Offenses

UNITED STATES	)	
	)	
v.	)	
	)	FINDINGS WORKSHEET
SPC James D. Jones	)	
123-45-6789	)	
A Co 1/504 PIR	)	
82d Airborne Division	)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (the) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge I: (Not Guilty) (Guilty)
(Not Guilty of (state greater offense alleged) but Guilty of (state lesser include offense alleged). As to Specification 1 of Charge I, Not Guilty of a Violation of Article (____), but Guilty of a Violation of Article (____).
Of Specification 2 of Charge I: (Not Guilty) (Guilty)
Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge II: (Not Guilty) (Guilty)
Of Specification 2 of Charge II: (Not Guilty) (Guilty)
(Not Guilty of (state greater offense alleged), but Guilty of (state lesser included offense alleged).
Of Charge II: Guilty

_____
(Signature of President)

Appendix B-3

Findings Worksheet—Capital Cases

Table B–3
Sample Findings Worksheet—Capital Cases

UNITED STATES	)	
	)	
v.	)	
	)	FINDINGS WORKSHEET
SPC James D. Jones	)	
123-45-6789	)	
A Co 1/504 PIR	)	
82d Airborne Division	)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal
Of (the) (all) Charge(s) and (its) (their) Specification(s):
Not Guilty

II. Mixed Findings

Of the Specification of Charge I:

a. Not Guilty
b. By unanimous vote of all members, Guilty

_____
President

_____
COL James Member

_____
LTC Joyce Member

_____
CSM Brenda Member

_____
1SG Sally Member

_____
SFC Steven Member

c. Guilty
d. Not Guilty of (premeditated murder), but Guilty of (unpremeditated murder)

Of Charge I: (Not Guilty) (Guilty)

Of Charge II and its Specification: (Not Guilty) (Guilty)

Of The Specification of the Additional Charge:

a. Not Guilty

b. By unanimous vote of all members, Guilty

_____
President

_____
COL James Member

_____
LTC Joyce Member

_____
CSM Brenda Member

_____
1SG Sally Member

_____
SFC Steven Member

c. Guilty

d. Not Guilty of (felony murder), but Guilty of (unpremeditated murder).

Of The Additional Charge: (Not Guilty) (Guilty)

_____
(Signature of President)

Appendix B-4

Findings Worksheet—Exceptions and Substitutions

Table B–4
Sample Findings Worksheet—Exceptions and Substitutions

UNITED STATES	)	
	)	
v.	)	
	)	FINDINGS WORKSHEET
SPC James D. Jones	)	
123-45-6789	)	
A Co 1/504 PIR	)	
82d Airborne Division	)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (the) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge I: (Not Guilty) (Guilty)
(Guilty, Except the [words] [figures] [words and figures]:
_____
_____
Of the excepted [words] [figures] [words and figures]:
Not Guilty)
Of Specification 2 of Charge I: (Not Guilty) (Guilty)
Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge II: (Not Guilty) (Guilty)
(Guilty, Except the [words] [figures] [words and figures]:
_____
_____
Substituting therefor the [words] [figures] [words and figures]:
_____
_____

Of the excepted [words] [figures] [words and figures]:

Not Guilty

Of the substituted [words] [figures] [words and figures]:

Guilty)

Of Specification 2 of Charge II: (Not Guilty) (Guilty)

Of Charge II: Guilty

_____

(Signature of President)

Appendix B-5

Alternative Findings Worksheet

Table B–5
Sample Alternative Findings Worksheet

UNITED STATES	)	
	)	
v.	)	
	)	FINDINGS WORKSHEET
SPC James D. Jones	)	
123-45-6789	)	
A Co 1/504 PIR	)	
82d Airborne Division	)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (the) (all) Charge(s) and (its) (their) Specification(s):
[a] Not Guilty
[b] Guilty

II. Mixed Findings

Charge I (state offense alleged)

Of Charge I and its Specification:
[a] Not Guilty
[b] Guilty

Charge II (state offense alleged)

Of Specification 1 of Charge II:
[a] Not Guilty
[b] Guilty
[c] Not Guilty, but Guilty of (state lesser included offense alleged), in violation of Article (____)
[d] Not Guilty, but Guilty of (state lesser included offense alleged), in violation of Article (____)
[e] Not Guilty, but Guilty of (state lesser included offense alleged) in violation of Article (____)
[f] Guilty, except the (words) (figures) (words and figures)

_____
_____
(and substituting therefor the (words) (figures) (words and figures)
_____
_____

of the excepted (words) (figures) (words and figures), Not Guilty, of the substituted (words) (figures) (words and figures), Guilty.

Of Specification 2 of Charge II:

[a] Not Guilty
[b] Guilty
[c] Not Guilty, but Guilty of (state lesser included offense alleged) in violation of Article (____)
[d] Not Guilty, but Guilty of (state lesser included offense alleged) in violation of Article (____)
[e] Guilty, except the (words) (figures) (words and figures)

_____
_____
(and substituting therefor the (words) (figures) (words and figures)
_____
_____
of the excepted (words) (figures) (words and figures), Not Guilty, of the substituted (words) (figures) (words and figures), Guilty.

Of Charge II

[a] Not Guilty
[b] Guilty

Charge III (state offense alleged)

Of the specification of Charge III:

[a] Not Guilty, and of Charge III, not Guilty
[b] Guilty, and of Charge III, Guilty
[c] Not Guilty, but Guilty of (state lesser included offense alleged) in violation of Article (____)
[d] Not Guilty, but Guilty of (state lesser included offense alleged), in violation of Article (____)
[e] Not Guilty, but Guilty of (state lesser included offense alleged), in violation of Article (____)
[f] Not Guilty, but Guilty of (state lesser included offense alleged), in violation of Article (____)

_____
(Signature of President)

Appendix C

Sentence Worksheets

1. Sample sentence worksheets for the various types of courts-martial are located at C-1 through C-4.

2. The sentence worksheet must be carefully reviewed by the military judge before it is given to the court members. The samples should be modified to insure that the court is not given the opportunity to adjudge an unlawful sentence or one that is inappropriate. Examples include:

a. Fines. The fine heading and sentence element should be removed unless there is an unjust enrichment or some other colorable basis for imposing a fine. The trial counsel may announce that the government does not intend to argue for imposition of a fine, in which case the military judge may elect to delete that punishment from the worksheet. The contingent confinement language is rarely appropriate.

b. Mandatory Sentences. In cases in which there is a mandatory sentence for certain elements, that sentence element should be the only one placed on the sentence worksheet. For example, in a case in which the accused has been convicted of Article 118(1) or (4), Murder, the confinement element should read: To be confined for the length of your natural life. In such cases, the restriction and hard labor without confinement elements should be removed.

3. Counsel for both sides should consent to the sentence worksheet on the record prior to it being given to the court members. In a capital case, the court must ensure that the aggravating factors listed on the sentence worksheet are the same factors of which the accused was given notice.

4. When the court members return from deliberations, the military judge must review the sentence worksheet to ensure that the sentence is lawful and in proper form. The judge must have the President correct any mistakes or omissions prior to announcement of the sentence.

Appendix C-1

Sentence Worksheet—General Court-Martial (Non-Capital)

Table C–1
Sample Sentence Worksheet—General Court-Martial (Non-Capital)

UNITED STATES	)	
	)	
v.	)	
	)	SENTENCE WORKSHEET
SPC James D. Jones	)	
123-45-6789	)	
A Co 1/504 PIR	)	
82d Airborne Division	)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial sentences you:

1. To no punishment.

FINE AND FORFEITURES

2. To pay the United States a fine of $_____ (and to serve (additional) confinement of _____ (days) (months) if the fine is not paid).

3. To forfeit $_____ pay per month for _____ (months).

4. To forfeit all pay and allowances.

RESTRAINT AND HARD LABOR

5. To be restricted for _____ (days) (months) to the limits of:

_____

_____

6. To perform hard labor without confinement for _____ (days) (months).

7. To be confined for _____ (days) (month(s)) (year(s)) (the length of your natural life with eligibility for parole) (the length of your natural life without eligibility for parole).

_____
(Signature of President)

Appendix C-2

Sentence Worksheet—General Court-Martial (Capital Case)

Table C–2
Sample Sentence Worksheet—General Court-Martial (Capital Case)

UNITED STATES	)	
	)	
v.	)	
	)	SENTENCE WORKSHEET
SPC James D. Jones	)	
123-45-6789	)	
A Co 1/504 PIR	)	
82d Airborne Division	)	

[NOTE: If the court-martial adjudges a death sentence, the court shall indicate below which aggravating factor(s) have been proven. The factor(s) which are not proven shall be lined out. If the sentence does not include death, the aggravating factor(s) portion of this worksheet and the extenuating and mitigating circumstances portion of this worksheet shall be nullified by marking a large 'X' across them. The President will not read the language in bold print.]

AGGRAVATING FACTORS

Specialist James D. Jones, this court-martial unanimously finds that the following aggravating factor(s) (has) (have) been proven beyond a reasonable doubt:

	Proven	Not Proven	
1.	(_____)	(_____)	That you committed the offense of (state the offense alleged).
2.	(_____)	(_____)	That you committed the offense of (state the offense alleged).
3.	(_____)	(_____)	That you committed the offense of (state the offense alleged).

_____
(Signature of President)

[NOTE: If the sentence includes death, all members must sign the sentence worksheet below.]

_____
President

_____
COL James Member

_____
LTC Joyce Member

_____
CSM Brenda Member

_____
1SG Sally Member

_____
SFC Steven Member

EXTENUATING AND MITIGATING CIRCUMSTANCES

Specialist James D. Jones, this court-martial unanimously finds that any extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances, including the aggravating factors specifically found by the court and listed above.

_____
(Signature of President)

[NOTE: If the sentence includes death, all members must sign the sentence worksheet below.]

_____
President

_____
COL James Member

_____
LTC Joyce Member

_____
CSM Brenda Member

_____
1SG Sally Member

_____
SFC Steven Member

[NOTE: After the court members have reached a sentence, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the sentence by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, it is my duty as president of this court-martial to announce that the court-martial, (all) (three-fourths) of the members concurring, sentences you:

FINE AND FORFEITURES

1. To pay the United States a fine of _____ (and to serve (additional) confinement of ____ (days) (months) (years) if the fine is not paid).

2. To forfeit $_____ pay per month for _____ months.

3. To forfeit all pay and allowances.

CONFINEMENT

4. To be confined for _____ (days) (months) (years) (the length of your natural life with eligibility for parole) (the length of your natural life without eligibility for parole).

DEATH

5. To be put to death.

_____
(Signature of President)

[NOTE: If the sentence includes death, all court members must sign the sentence worksheet below.]

_____
President

_____
COL James Member

_____
LTC Joyce Member

_____
CSM Brenda Member

_____
1SG Sally Member

_____
SFC Steven Member

Appendix D

Rehearings, New or Other Trials and Revision Procedure

NOTE: <u>Scope of this appendix</u>. In new or other trials and in rehearings which require findings on all charges and specifications referred to a court-martial, the procedure in general is the same as in an original trial.

D-1. Sentence.

NOTE 1: <u>Rehearing on sentence only</u>. In a rehearing on sentence only, sound practice dictates that an out-of-court hearing be held as soon as it is lawfully authorized to consider such matters as: (1) motions to dismiss or for other appropriate relief; (b) sufficiency and timeliness of the written notice of rehearing served upon accused; (c) examination of prior appellate decisions, if any, and applicable promulgating orders (in this regard, the trial counsel should be cautioned that when announcing the general nature of the charges, only those charges and specifications on which findings of guilty stand approved or affirmed should be announced); (d) stipulations, portions of the original record of trial, and other evidence and information normally offered in presentence proceedings (in this regard, the trial counsel should be reminded not to disclose improperly any period of post-trial confinement resulting from the sentence of the original trial); (e) examination of Sentence Worksheet; (f) proposed instructions concerning the rules applicable in determining the maximum punishment and other sentence matters. After this out-of-court hearing, the trial should proceed in open session through the normal challenge procedure. Thereafter, the portion of the procedure through and including the findings should be omitted and the court should be instructed:

MJ: The accused stands convicted but unsentenced of (<u>specify the relevant offense(s)</u>). These proceedings are being held so that you may determine an appropriate sentence for the accused for the commission of such offense(s). In this connection, both sides have agreed that I inform you that there has been a prior trial of this case. This is what is called a "rehearing" and more specifically a "sentence rehearing." I bring this to your attention solely to remove confusion and speculation from your mind. There will, undoubtedly, be references to a "prior trial" or a "prior hearing." There will be a time gap concerning some dates on documents. (There will be testimony concerning the accused's conduct at the (_____) since _____.)

The fact the accused was sentenced for these offenses in (<u>state date of prior hearing</u>) is not evidence. What is an appropriate sentence in this case must be decided only on what legal and competent evidence is presented for your consideration. (An error) (Errors) occurred at the first trial. Therefore, you may not consider, for any reason, that earlier trial, unless evidence therefrom is admitted in this trial. To assist you in your determination of an appropriate sentence, I now call

upon the trial counsel to present evidence of facts and circumstances pertinent to such findings of guilty.

> ***NOTE 2: After such evidence has been presented, normally by stipulation or by reading from the record of the original hearing, the presentence procedure will be the same as in any trial after findings are announced until the court determines and announces its sentence. The accused may not withdraw any plea of guilty upon which the findings of guilty now before the court were based. However, if the accused establishes that such a plea was improvident, the hearing will be suspended and the matter referred to the authority directing the rehearing on the sentence, for appropriate action.***

D-2. Combined Rehearing.

> ***NOTE: Rehearing on sentence combined with a trial on the merits. When a rehearing on sentence is combined with a trial on the merits of some of the specifications referred to the court, the trial will first proceed on the merits without reference to the rehearing on sentence. After the court has announced its findings, it will then be advised of the offenses on which the rehearing on sentence is being held, additional voir dire and challenges for cause will be permitted, and the principles set forth in D-1, NOTE 1, above, will apply to those offenses. The court will then continue with its sentencing procedure and will adjudge a single sentence for all offenses under consideration. A suggested guide for informing the court members about the rehearing follows:***

MJ: There has been a prior trial in this case and this is what is known as a "rehearing." I bring this to your attention with the concurrence of both sides and for one reason only.

There has been a considerable time gap between the alleged offenses and today. There inevitably will be references to what was said at "a prior hearing" or "the first trial." Documents may appear to be outdated or old. I bring this to your attention only to remove confusion and speculation from your mind and to allow you to concentrate on what you hear in court during this rehearing.

The fact that the accused was previously tried is not evidence of guilt. It must be totally disregarded by you. The accused sits before you presumed innocent of the charged offenses. (His) (Her) guilt or innocence maybe decided only on what legal and competent evidence is presented for your consideration in this trial. You may only convict the accused if the legal and competent evidence presented to you in this trial convinces you of (his) (her) guilt beyond a reasonable doubt.

D-3. Proceedings in Revision.

> ***NOTE 1: Procedures. A revision proceeding is a method by which a court-martial reconvenes for the purpose of revising its action or correcting its record. The following guide illustrates two typical uses of a revision proceeding:***

MJ: This Article 39(a) session is called to order.
TC: Let the record reflect that all parties present when the court last adjourned are once again present. There have been no changes in the convening orders since the last date of trial, _____.

MJ: I've called this session for the purpose of clarifying the record in this case in accordance with Article 62(b) of the Uniform Code of Military Justice, and RCM 1102 of the Manual for Courts-Martial. We will follow, insofar as applicable, the procedural guide for this type of hearing contained in The Military Judges' Benchbook For Enemy Prisoners of War. These proceedings in revision have been undertaken by the court (on its own motion pursuant to RCM 1102) (pursuant to the following communication: _____ which will be inserted at this point in the record). The purpose is to correct an unintended omission in my discussion with the accused of (the maximum punishment in this case) (the request for trial by military judge alone). I determine that this matter does not involve a substantive error which would preclude such revision, and, in accordance with RCM 1102 of the Manual, I would point out that (in reading the record of trial for authentication, I noted on page(s) _____ (and _____), I did not include in my discussion of the maximum punishment with the accused that it included confinement for six months) (I noted after adjournment that, in discussing the request for trial by military judge alone, I had failed to discuss with the accused the requirement that in a trial with members, a sentence which includes confinement for more than 10 years requires a concurrence of three-fourths of the members). Although, in accordance with RCM 1102, witnesses may not be called or recalled at this type of session, the accused may be questioned as to (his) (her) understanding of the subject matter under inquiry.

> ***NOTE 2: <u>Procedures when error was as to maximum punishment</u>. The military judge may use the following guide when the proceedings in revision involve an error as to the maximum punishment:***

MJ: (<u>State the name of the accused</u>), do you recall our discussion of the maximum punishment at the prior session of your court-martial?
ACC: (Responds.)

MJ: At the prior session of your court-martial, your defense counsel (_____), stated (she) (he) had advised you of the maximum punishment and that (she) (he) advised you that the maximum included, among other things (confinement for six months) (_____). Do you recall (him) (her) making that statement?
ACC: (Responds.)

MJ: So, you recall then, discussing (the maximum punishment) (_____) with _____ prior to submitting your offer to plead guilty?
ACC: (Responds.)

MJ: And do you recall that (she) (he) told you (the maximum punishment in your case would include confinement for six months) (_____)?
ACC: (Responds.)

MJ: And did you understand that at the time (she) (he) discussed that with you?
ACC: (Responds.)

MJ: And did you understand at the time you entered your plea of guilty at the prior session that the maximum punishment for the offenses to which you pleaded guilty included (confinement for six months) (_____)?

ACC: (Responds.)

MJ: And do you understand now that the maximum punishment for the offenses to which you pleaded guilty was: (to be confined for six months; and to forfeit two-thirds of your pay per month for six months) (_____)?

ACC: (Responds.)

MJ: I reaffirm my findings that the accused's plea of guilty was providently made. Now, do counsel for either side perceive any other matters that we should take up at this time?

TC/DC: (Respond.)

MJ: Court is adjourned.

> ***NOTE 3: <u>Procedures when the error was as to forum request</u>. The military judge may use the following guide when the proceedings in revision involve an error in the forum request:***

MJ: (<u>State the name of the accused</u>), do you recall in our discussion earlier with regard to your request for trial by military judge alone, I told you that, in a trial before a court which included members, two-thirds of those members present voting by secret written ballot would have to concur or agree in any findings of guilty against you?

ACC: (Responds.)

MJ: And did you understand that then?
ACC: (Responds.)

MJ: And do you understand it now?
ACC: (Responds.)

MJ: And do you also recall that I advised you that, in a trial with a court consisting of members, two-thirds of the members present voting by secret written ballot would have to agree before there could be any sentence adjudged against you in the event that there was a guilty finding?

ACC: (Responds.)

MJ: I failed to advise you at that time, but I advise you now; (do you understand that, if the findings of such a court, that is, a court with members, were to authorize a sentence of more than 10 years confinement, then three-fourths of the members present, voting by secret written ballot, would have to concur in any sentence which included confinement for more than 10 years) (_____)?

ACC: (Responds.)

MJ: Now, understanding (that requirement of three-fourths concurrence in any sentence which included confinement for more than 10 years, do you wish to renew your request for trial before me as military judge alone) (_____)? In other words, would you still want to be tried (by me judge alone, or would you prefer to be tried by court members) (_____)?

ACC: (Responds.)

MJ: In view of the accused's response, I reaffirm my finding that the accused's request for trial before me as military judge alone was voluntarily made, that it was an informed and knowing request, and I reaffirm my approval of the request for trial by military judge alone. There being no other matters to be taken up, then the court is adjourned.

Appendix E

Contempt Procedure

NOTE 1: <u>Article 48, UCMJ</u>. "A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceeding by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both."

NOTE 2: <u>Procedure prior to instituting contempt proceedings</u>. When a person's conduct borders upon contempt, that person should ordinarily be advised that his or her conduct is improper and that persisting in such conduct may cause the court to hold him or her in contempt. Such warning should be made a part of the record of trial in order to show a proper foundation for contempt proceedings. (In courts-martial with members, any warning to an accused or defense counsel should occur outside the presence of the members.) Contempt proceedings may often be avoided by causing the offender to be removed from the courtroom. Before an accused is removed from the court-martial, the military judge must comply with the requirements of RCM 804 and determine that the accused's continued presence will materially interfere with the conduct of the proceedings. Ordinarily, alternatives exist to removal of a disruptive accused. (See RCM 804 discussion.)

NOTE 3: <u>Types and timing of contempt proceedings</u>. Two types of contempt proceedings exist: (1) summary disposition, and (2) disposition upon notice and hearing. Each type of contempt proceeding is explained in the following two Notes. However, in both proceedings, contempt power resides solely in the military judge, who has discretion as to when the proceedings will occur during the court-martial to avoid unnecessarily disrupting the court-martial or prejudicing an accused. If the accused has elected court-martial by members, the contempt proceeding will occur outside of the presence of the members. A contempt proceeding is part of the court-martial in which it occurs; therefore, it must occur before adjournment of the court-martial. Also, because the contempt proceeding occurs during the court-martial, the accused at the court-martial, even when not an actual participant in the contempt proceeding, should be present unless the accused waives the right to be present under RCM 804(b).

NOTE 4: <u>Summary disposition</u>. Summary disposition of contempt may be used only when the military judge directly witnesses the allegedly contemptuous conduct in the actual presence of the court-martial. Under such circumstances, the military judge must recite the facts for the record, and indicate that the judge directly witnessed them in the actual presence of the court-martial. See R.C.M. 809(c). The following is a suggested guide for a summary disposition of contempt:

MJ: [<u>To Respondent</u>] I am considering whether you should be excluded from the proceedings for (<u>here describe the conduct witnessed by the military judge in the actual presence of the court-martial</u>). I now give you an opportunity to tell me anything about whether you should be removed

and excluded from further proceedings of this court-martial. (Your defense counsel will speak for you.)

RESPONDENT/DC: [Makes a statement or declines.]

[The military judge may close to deliberate, or immediately enter findings:]

MJ: (State the name of the person), I find beyond a reasonable doubt, based upon my directly witnessing your conduct in the actual presence of the court-martial, that you (state the specific conduct which was observed). I conclude beyond a reasonable doubt that your act(s) constituted (menacing (words) (signs) (and) (gestures) in the presence of this court) (a disturbance of the proceedings of this court by (riotous) (disorderly) conduct).

(State name of the person), I find that you were not in contempt of this court.) (Based upon this conduct, I hold you in contempt of court and I sentence you: To pay the United States a fine of $_____; (and to be confined for ___ days).)

> ***NOTE 5: Disposition upon Notice and Hearing. If the military judge did not witness the allegedly contemptuous conduct, the notice and hearing procedures must be used. In such cases, the alleged offender is brought before the military judge presiding at the court-martial and informed orally or in writing of the alleged contempt, and given a reasonable opportunity to present evidence. The alleged offender has the right to be represented by counsel, and shall be so advised. A suggested guide to accomplish the notice and hearing follows:***

MJ: (State the name of the Respondent), I have (heard) (received (a) report(s)) that you (state the conduct allegedly committed by the offender). If true, you (may have used menacing (words) (signs) (and) (gestures) in the presence of this court) (may have disturbed the proceedings of this court by (riotous) (disorderly) conduct). Article 48, Uniform Code of Military Justice, provides that any person who uses any menacing (word) (signs) (or) (gesture) in the presence of a court-martial, or who disturbs its proceedings by a (riot) (disorder) maybe punished for contempt. The maximum punishment is a fine of $100 and confinement for 30 days. I will conduct a hearing in which I will determine if you should be held in contempt of court. At that hearing, you have the right to present evidence, to call witnesses, and to present argument. You are entitled to be represented by counsel at the contempt hearing.

(For military offender) You may be represented by military counsel appointed to represent you at no expense to you, or you may be represented by civilian counsel of your choosing at no expense to the Government. Do you understand these rights?

(For civilian offender) That counsel must be someone you arrange for at no expense to the Government. Do you understand these rights? Do you desire to be represented by counsel?

RESPONDENT: (Responds.)

MJ: You will be present at (state time/place for contempt hearing) with your counsel for the contempt proceeding. Do you have any questions?

[At the subsequent contempt proceeding, proceed as follows:]

MJ: This contempt proceeding is called to order.
TC: The accused at this court-martial, the respondent for this contempt proceedings, and the following persons detailed to this proceeding are present: _____, Military Judge; _____, Trial Counsel for the court-martial (and this contempt proceeding); (Trial Counsel for this contempt proceeding); _____, Defense Counsel for the accused; and _____, Defense Counsel for the respondent. _____, has been detailed reporter for this proceeding and (has been previously sworn) (will now be sworn.) [or] (_____ continues as court reporter for this proceeding.)

(I) (All members of the prosecution for this proceeding) have the same detailing and qualifications as announced at the court-martial of United States v. (insert the name of the case in which the allegedly contemptuous conduct occurred). [or] (I) (All members of the prosecution for this proceeding) have been detailed to this proceeding by _____. (I am) (All members of the prosecution are qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner which might tend to disqualify (me)(us) in this proceeding.

MILITARY DC: (I) (All members of the defense for the respondent) have the same detailing and qualifications as announced at the court-martial of United States v. (insert the name of the case in which the allegedly contemptuous conduct occurred). [or] (I) (All members of the defense for the respondent) have been detailed to this proceeding by _____. (I am) (All members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense for the respondent has) acted in any manner which might tend to disqualify (me) (us) in this proceedings.

CIVILIAN DC: I will represent the respondent in this contempt proceeding. I am an attorney and licensed to practice law in the state(s) of _____. I am a member in good standing of the _____ bar(s). I have not acted in any capacity which might tend to disqualify me in this contempt proceeding.

[If necessary, the military judge should administer the oath to the civilian counsel, for oath see page 10.]

MJ: (State the name of the defense counsel), during this court-martial of United States v. (insert the name of the case in which the allegedly contemptuous conduct occurred), I indicated to your client that I had (heard) (received (a) report(s)) that (he) (she) (may have used menacing (words) (signs) (and) (gestures) in the presence of this court) (may have disturbed the proceedings of this

court by (riotous) (disorderly) conduct). This proceeding is being held to determine if your client should be held in contempt, and if so, what your client's punishment should be.

Trial counsel, do you wish to make an opening statement?
TC: (Responds with opening statement, if desired.)

MJ: Defense counsel, do you desire to make an opening now or wish to reserve?
DC: (Responds with opening statement, waives, or reserves.)

MJ: Trial counsel, you may call your first witness.

> [The hearing proceeds with evidence being presented by the trial counsel, and cross-examination by the defense counsel, if desired. After the trial counsel rests, the defense counsel may present an opening statement (if originally reserved) or proceed to present witnesses/evidence on behalf of the respondent to show why he or she should not be held in contempt. To hold the offender in contempt, the evidence must establish the contempt beyond a reasonable doubt.]

MJ: [To Respondent] After counsel have argued, I will decide whether you should be held in contempt. If I hold you in contempt, I will also adjudge a sentence. I now give you an opportunity to tell me anything about whether you should be held in contempt or what sentence I should adjudge if you are held in contempt. If you wish to say nothing, that fact will not be held against you and I will draw no adverse inference from your silence. Is there anything you wish to say?
RESPONDENT: (Makes a statement or declines.)

MJ: Trial counsel, you may present argument.
TC: (Argument or waiver.)

MJ: Defense counsel, you may present argument.
DC: (Argument or waiver.)

> [The military judge may close to deliberate, or immediately enter findings:]

MJ: The contempt proceeding is called to order. All parties present when the contempt proceeding closed are again present.

((<u>State the name of the person alleged</u>), I find that you were not in contempt of this court.)

((<u>State the name of the person alleged</u>), I find beyond a reasonable doubt that your act(s) constituted (menacing (words) (signs) (and) (gestures) in the presence of this court) (a disturbance of the proceedings of this court by (riotous) (disorderly) conduct). I hold you in contempt of court and I sentence you: You will be excluded for further proceedings.

NOTE 6: <u>Approval by convening authority of sentence</u>. Because RCM 809 indicates that the convening authority shall designate the place of confinement for any person sentenced to confinement for contempt and further states that confinement begins when adjudged unless the convening authority defers, suspends, or disapproves the confinement, the convening authority should be notified immediately of any contempt sentence which includes confinement. This immediate notification will ensure that the offender is properly confined if the convening authority approves the sentence. A fine does not become effective until ordered executed by the convening authority; therefore, if the sentence only includes a fine, there is not the same urgency in notifying the convening authority.

NOTE 7: <u>Record of contempt proceeding</u>. A record of the contempt proceeding will be made and will be included in the regular record of trial. If the person is held in contempt, a separate record of the contempt proceeding will be prepared and forwarded to the convening authority for review. (As stated in Note 6 above, when the sentence includes confinement, the convening authority should be immediately notified; however, the notification need not consist of a complete record of the proceedings.)

NOTE 8: <u>Barring person held in contempt from the courtroom</u>. When a person has been held in contempt, pending the convening authority's review of the record of the contempt proceeding, that person may be removed from the courtroom and his or her return during the subsequent proceedings may be prohibited. The immediate commander of a person held in contempt should be advised of the court's action. In the case of a civilian, the convening authority should be immediately advised. In either case, a sentence to confinement begins to run when it is adjudged unless suspended, deferred, or disapproved by the convening authority. If the offender is a witness, he or she may be permitted to complete testimony before contempt proceedings are initiated. Ordinarily, the trial and defense counsel should be allowed to continue to perform their duties before the court even though held in contempt, unless it appears that they cannot be expected to conduct themselves properly during subsequent proceedings. The military judge may also delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings. See Note 2, above, about removing an accused from the court-martial proceedings.

REFERENCES:

(1) Article 48, UCMJ.

(2) RCM 801, 804, 809, and RCM 809 analysis at Appendix A, MCM.

(3) <u>United States v. Burnett</u>, 27 M.J. 99 (C.M.A. 1988).

Appendix F

Reserved

Appendix G

General and Special Findings

G-1. General.

NOTE 1: Essential findings of fact. Under RCM 905(d), "essential findings of fact" must be stated by the military judge on the record when "factual issues are involved" in ruling on motions. Also under the Military Rules of Evidence, when ruling upon certain motions, the military judge must state essential findings of fact on the record. See MRE 304(d)(4), 311(d)(4), and 321(f). This is a *sua sponte* responsibility.

NOTE 2: Requested special findings. Under RCM 918(b), the military judge MUST, upon request, find the facts specially in the event of a general finding of guilty. Counsel may make requests for special findings more than once during the trial of a case but the judge is required to make only one set of special findings and then only if there is a conviction. The request must be made before findings and the judge may ask counsel to submit the request for special findings and actual proposed findings in writing. Proposed special findings submitted by counsel should be marked as appellate exhibits and appended to the record. However, a failure of counsel to submit proposed special findings in writing does not absolve the judge from the requirement to make special findings.

NOTE 3: Discretionary special findings. The military judge may make such special findings as deemed appropriate even if none are requested. In this regard, special findings may be made, if there is a conviction, whenever the judge concludes that the record does not adequately reflect all significant matters considered when "the trial court saw and heard the witnesses" (See Article 66(c), UCMJ).

NOTE 4: Effect of acquittal or conviction of lesser included offense. If an accused is acquitted, the judge is not obliged to make special findings nor need any be made regarding the greater offense when an accused is convicted of a lesser offense.

G-2. Preparing special findings.

NOTE 1: Findings of law. Special findings must reflect application of correct legal principles to the facts of the case. Conceptually, therefore, the judge cannot properly find the critical and relevant facts unless the evidence is fully considered in the light of rules of law governing the theories of the prosecution and defense.

A review of those instructions contained in this Benchbook concerning elements of offenses and the special and the other defenses in issue should be considered a prerequisite to drafting special findings. The judge should, as a general rule, make findings on all matters upon which members would be instructed. In this connection, it is suggested that the judge use the instructions checklist contained in Appendix J, as an aid in guarding against inadvertent omissions of crucial matters.

NOTE 2: Findings of fact. Appropriate special findings are not only findings on elements of offenses, but also on all factual questions placed reasonably in issue prior to findings, as well as controverted issues of fact which are deemed relevant to the sentencing decision. Jurisdictional facts must be found when they are controverted, and conclusions concerning issues of jurisdiction should be set forth.

However, superfluous findings are not required nor are findings on each particular minor matter concerning which there may be conflicting evidence.

In preparing findings of fact, the judge should exercise care to find the facts simply, clearly and with economy of expression. The judge, when stating special findings in the record, should first prepare a draft or detailed outline of the contemplated special findings. Findings should include facts which are admitted as well as those in dispute. Extended recital of testimony or discussion of evidence is not a substitute for simple findings by the judge as to the facts.

Additionally, special findings should include finding of all facts necessary to the disposition of evidentiary motions and motions to dismiss.

NOTE 3: Form of special findings. Special findings of fact may, in the discretion of the judge, be expressed orally in open court, in writing as an appellate exhibit, or in a written opinion or memorandum of decision filed within a reasonable time after trial but prior to authentication, or by a combination of these methods. However, when the need for special findings may be mooted by the findings, such as when the accused is acquitted, a nonverbatim record may result, a danger of inadvertent omission exists, or the judge wishes to analyze conflicting evidence to demonstrate the basis for any of his determinations, the judge should defer the special findings until after the trial and utilize the opinion or memorandum form. Citation of legal authority for factual conclusions and undisputed principles of law should not be utilized. However, if a memorandum or opinion is filed, citations of authority supporting conclusions of law are appropriate, particularly with regard to principles of law which are not universally accepted.

NOTE 4: Modification of special findings. When a military judge expresses the special findings at the time of trial, but later, prior to authentication, concludes that the special findings should be modified in any material respect, the judge should file an opinion or memorandum of decision to accomplish any necessary modification. Such opinion or memorandum should explain any discrepancy between the announced special findings and the later opinion or memorandum. For example, if a special finding of an element was in fact made by the judge, but omitted through inadvertence when stating the special findings at the trial, the judge may state such omitted special finding in a subsequent opinion or memorandum and include the explanation for its original absence from the record. Revision proceedings may also be utilized for this purpose (see Appendix D). A certificate of correction may be made when the finding was made but left out of the record inadvertently.

NOTE 5: Special findings in nonverbatim case. In a trial by general or special court-martial in which no verbatim record of the proceedings is to be made, the judge should write the special findings completely and append the written document to the record as an appellate exhibit.

NOTE 6: Sample special findings. The following examples of special findings are suggested for use by the military judge when the judge feels it advisable in a given case to announce special findings from the bench after making general findings and after having prepared a draft or outline covering the elements, defenses, and other matters in issue.

EXAMPLE A:

MJ: In view of the request (need) for special findings in this case, I shall now announce them. The court finds beyond a reasonable doubt as follows:

a. That, on 3 September 2000, at Fort Blank, Missouri, the accused absented himself from his unit, namely Company B, 20th Signal Battalion, 20th Infantry Division, Fort Blank, Missouri;

b. That such absence was without proper authority from anyone competent to give him leave; and

c. That he remained so absent until 25 September 2000.

EXAMPLE B:

MJ: In view of the request (need) for special findings in this case, I shall now announce them.

a. The court finds beyond a reasonable doubt as follows:

(1) That, on 2 September 2000, at the Service Club, Fort Blank, Missouri, the accused did bodily harm to PFC John Smith by striking him on the head;

(2) That the accused did so with a certain means, namely, a beer bottle;

(3) That the bodily harm was done with unlawful force and violence;

(4) That such means was used in a manner likely to produce grievous bodily harm.

b. With respect to the accused's claim of self-defense, the court finds that, under the circumstances, there were no reasonable grounds for the accused to apprehend that PFC Smith was about to inflict death or grievous bodily harm upon the accused. The evidence clearly demonstrates that the accused, without provocation, used profane and abusive language toward PFC Smith and struck him as Smith attempted to leave the premises in order to avoid an altercation with the accused. While the court finds that before he was struck by the accused, PFC Smith did shove the accused's arm away from him when the accused attempted to block Smith's departure, such an act, under all the circumstances, could not have caused a reasonable, careful person to apprehend death or grievous bodily harm.

Consequently, the court finds beyond a reasonable doubt, that the accused did not act in self-defense and that the force used by the accused was without justification or excuse.

NOTE 7: Written special findings. A suggested format for use by the military judge when the judge decides to include special findings in an opinion or memorandum of decision is set out below.

Table G–1
Sample Letter—Special Findings

UNITED STATES	)	
	)	
v.	)	
	)	FINDINGS WORKSHEET
SSG Richard Simmons	)	
123-45-6789	)	5 April 2000
Company B, 1st Battalion,	)	
329th Infantry,	)	
52d Infantry Division	)	

1. I considered all legal and competent evidence, and the reasonable inferences to be drawn therefrom. I resolved all issues of credibility. I found the accused guilty beyond a reasonable doubt of each and every element of the Charge at its specification, and I make the further findings as reflected *infra*.

2. I find that near Fort Blank, Missouri, in September 1999, the accused placed his hand on Jones' leg while traveling in the accused's automobile (R. 40). I find that approximately a week later, still in September, the accused kissed Jones on the mouth in the restroom of a theater in the town of Blank near Fort Blank (R. 50, 53). The accused put his hand on Jones' leg in the same theater on the same date (R. 54). He continued this conduct although Jones moved his leg (R. 55). Approximately one week later, in October 1999, Jones again accompanied the accused to town (R. 56), where accused kissed Jones on the lips in a pizza parlor bathroom (R. 57). Later the same day the accused kissed Jones on the lips in a theater latrine (R. 1). The accused put his hand on Jones' leg on the way home in accused's car (R. 73). The accused visited Jones at Jones' home in December 1999 (R. 75). and while there, grabbed Jones' penis through Jones' clothing (R. 76). The accused visited Jones at Jones' home in early January 1996 (R. 73-74) where he kissed Jones on the mouth in the basement (R. 79).

3. I find that Thomas Jones was a male person, and was under the age of 16 years (R. 36, 38).

4. I find that the acts of the accused, as portrayed upon the entire record were in fact indecent. In so finding I have consulted my common sense and my knowledge of the ways of the world. I find that these acts were depraved, grossly vulgar, obscene and repugnant to common propriety and that they tended to excite lust and deprave morals with respect to sexual relations.

5. I find upon a reading of the entire record as it pertains to these acts, that the intent of the accused was totally unambiguous. I find his intent clearly was to appeal to and gratify the lust, passions and sexual desires of both the accused and his victim, Thomas Jones.

6. I find that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the service and was of a nature to bring discredit upon the armed forces.

JAMES HASH
COL, JA
Military Judge

NOTE 8: Essential Findings. A suggested format for use when the military judge decides or needs to include findings in an opinion or memorandum of decision is contained below. This format can also be used for oral essential findings.

Table G–2
Sample Letter—Essential Findings of Fact

UNITED STATES	)	
	)	
v.	)	
	)	ESSENTIAL FINDINGS OF FACT
SSG Richard Simmons	)	
123-45-6789	)	5 April 2000
Company B, 1st Battalion,	)	
329th Infantry,	)	
52d Infantry Division	)	

Having had all of the evidence and having resolved issues of credibility, I find as follows:

1. The investigation into the accused's alleged misconduct began in Saudi Arabia on or about 24 January 1999.

2. The accused made various statements concerning his actions while he was in Saudi Arabia.

3. In Saudi Arabia he saw a lawyer, CPT White, on at least two occasions.

4. Apparently, no action was taken to end the matter prior to the accused's departure from Saudi Arabia.

5. On 10 December 1999, he was issued an administrative reprimand. (A. E. XXXI)

6. At that point he believed the investigation was completed and no further adverse action would befall him.

7. Subsequently, the accused was informed thorough the news media that the matter was not closed and that further action might occur.

8. Eventually the CID was directed to investigate the matter.

9. In the course of this investigation CID Agent Brown met with the accused at Kirtland AFB, New Mexico on 24 March 2000.

10. During the course of that meeting the accused agreed to undergo a polygraph examination.

11. Subsequently, the examination was scheduled for 14 April 2000 at a motel in Albuquerque, New Mexico. CID Agent Orange was to be the examiner.

12. Prior to 0850 on 14 April 2000, the accused arrived at the motel with MAJ Blue.

13. Mr. Brown informed MAJ Blue that he could not attend the examination in the motel room but he was welcome to wait in the lobby.

14. The accused and Mr. Brown then went to the hotel suite and MAJ Blue returned to his duties.

15. In the suite, the accused was introduced to Special Agent Orange and the polygraph examination routine began.

16. The pre-test phase began at 0905 and continued until 1055. After a five minute break, the pre-test phase continued until 1155. The parties reconvened at 1215. At 1240 the instrument phase began and lasted until 1320.

17. Agent Orange then informed the accused that he had shown deception.

18. The post test phase continued for several hours. During this phase, Orange threatened to leave.

19. Eventually, the accused made an oral inculpatory statement.

20. Agent Orange then departed, and Agent Brown continued the interrogation.

21. During the Brown interrogation, the accused made statements which were not as inculpatory as those made to Orange.

22. Eventually Brown typed a statement, the accused signed it at 1633 and departed at 1645 (AE VIII).

23. During early 2000, the accused was informed by a radio broadcast that the investigation was to be reopened.

24. During this period there were a number of newspaper articles concerning his case, a Congressman became involved (not on his side), and a rape crisis counselor was also involved.

25. The accused was not on active duty and not training with his regular reserve unit.

26. The accused made many efforts to obtain a lawyer.

27. He approached civilian lawyers, civilian lawyers who were members of the Reserves, and the Army Trial Defense Service.

28. In the United States, prior to 14 April 2000, he never retained nor was furnished a lawyer who could help him with the criminal investigation.

29. On 24 March 2000 and 14 April 2000, he was advised by the CID agents that if he desired a lawyer, one would be furnished to him. He declined to request a lawyer.

30. Prior to 24 March 2000, the accused felt himself to be alone against the United States Government which was pursuing a criminal case against him.

31. As a last resort he asked MAJ Blue to accompany him to the CID interrogations.

32. MAJ Blue attended the 24 March interrogation but as noted was denied entry to the 14 April polygraph examination and interrogation.

33. During the entire polygraph examination/interrogation the accused had two breaks, one of five minutes and one for 20 minutes. He had access to food but only had a coke.

34. He was accompanied by no one.

35. Proper rights warnings were given and waived by the accused.

36. The test I used to determine if the accused's statement of 14 April was voluntary is —Was the confession the product of an essential free and unconstrained choice by its maker?

37. In applying that test, I considered two other rules of law. First, the government had the burden of convincing me by a preponderance of the evidence that the statement was voluntary. If they could not so convince me, the statement would not be admitted. Second, in determining the issue, the totality of the circumstances were to be considered.

38. In making my determination, I considered that the accused believed himself to be alone against the government. Essentially all of his efforts to obtain legal counsel in the United States were fruitless. He was denied the accompaniment of MAJ Blue. It appeared to him that the media had chosen sides and was against him. The CID told him he had lied and gave him another scenario which it offered as the truth. He was not a member of an active duty unit which he could rely on for support and his reserve unit told him to train elsewhere.

39. With all these matters weighing on him and affecting him he cracked and gave up.

40. Although he could physically leave the motel suite, psychologically he could not.

41. Under these conditions he told the CID what it wanted to hear.

42. Under these conditions, his statement was not the product of an essentially free and unconstrained choice.

43. Under these conditions the government did not convince me by a preponderance of the evidence that the statement was voluntary.

JAMES HASH
COL, JA
Military Judge

REFERENCES:

(1) RCM 918, MCM.

(2) United States v. Gerard, 11 M.J. 446 (C.M.A. 1982).

(3) United States v. Orben, 28 M.J. 172 (C.M.A. 1989).

(4) United States v. Martinez, 38 M.J. 82 (C.M.A. 1993).

Appendix H

Rules of Practice Before Army Courts-Martial

The Chief Trial Judge is authorized to promulgate general Rules of Court, and local Rules of Court may be prescribed by Chief Circuit Judges for courts-martial within their circuits. RCM 108; AR 27-10, para. 8-8. Such rules must be consistent with the Constitution, the UCMJ, the Manual for Courts-Martial, Army regulations, and other applicable legal authority. See United States v. Williams, 23 M. J. 382 (C. M. A. 1987). Local rules must be forwarded to the Chief Trial Judge.

Appendix I

Form for Certificate of Correction of Record of Trial

NOTE: Once a record of trial has been authenticated and forwarded to the convening authority, it may be changed only through issuance of a certificate of correction. A certificate of correction may be used only to make the record correspond to that which actually occurred at the trial. A certificate of correction may not be used to correct a defect or error in the trial proceedings. Prior to authentication of the correction, all parties will be given notice of the proposed correction and an opportunity to respond. The certificate will be authenticated in the same manner as the record of trial and the accused will be furnished, and receipt for, a copy of the certificate. RCM 1104(d) and Appendix 14f, MCM.

Table I–1
Sample Letter—Certificate of Correction

UNITED STATES	)	
	)	
v.	)	
	)	
SSG Richard Simmons	)	
123-45-6789	)	Certificate of Correction
Company B, 1st Battalion,	)	
329th Infantry,	)	
52d Infantry Division	)	

The record of trial in the above case, which was tried by the general court-martial convened by Court-Martial Convening Order Number 10, Headquarters, Fort Bragg, dated 4 October 1999, as amended by Court-Martial Order Number 6, Headquarters, Fort Bragg, dated 31 May 2000, at Fort Bragg, North Carolina 28307, on 3-7 and 10 June 2000, is corrected by insertion of photographs as suitable descriptions of Defense Exhibit K, a pair of regular combat boots; Defense Exhibit L, a pair of jungle combat boots; and Defense Exhibit M, a pair of tennis shoes, at their appropriate place in the record. Substitution of photographs was authorized by the military judge on page 365 of the record of trial.

This correction is made because the original exhibits, photographs, or suitable descriptions of these exhibits as required by RCM 1103 are missing from the record of trial.

Substitute authentication by the trial counsel is authorized pursuant to RCM 1104(a)(2)(B) because the military judge has been retired from active duty and is not available.

All parties were given notice of this correction and permitted to examine and respond prior to the authentication of this Certificate of Correction pursuant to RCM 1104(d)(2).

A copy of this Certificate of Correction is being served on the accused by certified mail, return receipt requested, and will be sent for attachment to the record of trial when received.

JOHN Q. SMITH
CPT, JA
Trial Counsel

Appendix J

Instructions Checklists

Instructions checklists for contested cases (mental responsibility not in issue and mental responsibility (sanity) in issue) are located at J-1 and J-2.

Appendix J-1

Instructions Checklist-Mental Responsibility Not In Issue

I. PRIOR TO FINDINGS

(___) Preliminary instructions (2-5)
(___) Joint offenders (7-2)
(___) Elements of offenses (Chap 3)
(___) Vicarious liability (7-1)
(___) Absent accused (2-7-23)
(___) _____
(___) _____

II. DURING TRIAL (As Required)

(___) Stipulation of Fact (7-4-1 and 2-7-24)
(___) Stipulation of Expected Testimony (7-4-2 and 2-7-24)
(___) Expert Testimony (7-9-1)
(___) Prior Inconsistent Statement (7-11-1)
(___) Prior Consistent Statement (7-11-2)
(___) Accused's Failure to Testify (7-12)
(___) Uncharged Misconduct (7-13-1)
(___) Prior Conviction to Impeach (7-13-2)
(___) Have You Heard Questions to Impeach Opinion (7-18)
(___) Comment on Rights to Silence or Counsel (2-7-20)
(___) _____
(___) _____

III. FINDINGS (Mental Responsibility NOT an Issue)

A. (___) Prefatory Instructions (2-5-9 or 8-3-8)

(B. Argument of Counsel. Can be done following Closing Substantive Instructions, at MJ's discretion.)

C. (___) Elements of offenses (Chap 3)
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____

D. (___) Terms having special legal significance.
(___) _____ (___) _____ (___) _____

E. (___) Vicarious Liability (7-1)

F. (___) Joint Offenders (7-2)

G. Special and Other Defenses
(___) Self-Defense (5-2)
(___) Homicide/Aggravated Assault (5-2-1)
(___) Non-Aggravated Assault (5-2-2)
(___) Assault as LIO (5-2-3)
(___) Homicide/Unintended Death (5-2-4)
(___) Use of Force to Deter (5-2-5)
(___) Other Instructions - Self-Defense (5-2-6)
(___) _____
(___) _____
(___) _____
(___)
(___) Defense of Another (5-3)
(___) Homicide/Aggravated Assault (5-3-1)
(___) Assault/Battery (5-3-2)
(___) Homicide/Agg Assault plus LIO (5-3-3)
(___) Accident (5-4)
(___) Duress (Compulsion or Coercion) (5-5)
(___) Entrapment (5-6)
(___) Defense of Property (5-7)
(___) Obedience to Orders (5-8)
(___) Unlawful Order (5-8-1)
(___) Lawful Orders (5-8-2)
(___) Physical Impossibility (5-9-1)
(___) Physical Inability (5-9-2)
(___) Financial and Other Inability (5-10)
(___) Ignorance or Mistake of Fact (5-11)
(___) Specific intent/knowledge (5-11-1)
(___) General intent (5-11-2)
(___) Article 134 Check Offenses (5-11-3)
(___) Drug Offenses (5-11-4)
(___) Voluntary Intoxication (5-12)
(___) Alibi (5-13)
(___) Voluntary Abandonment (5-15)
(___) Parental Discipline (5-16)
(___) Evidence Negating Mens Rea (5-17)
(___) Claim of Right (5-18)
(___) Causation-Lack of (5-19)
(___) Other _____
(___) Other _____
(___) Other _____

H. Pretrial Statements
(___) Pretrial Statements (Chap 4)

I. Vicarious Liability (7-1) (if not given in Part III E)
(___) Aider and Abettor (7-1-1)
(___) Counseling, Commanding, Procuring (7-1-2)
(___) Causing an Act to be Done (7-1-3)
(___) Liability of Coconspirators (7-1-4)

J. Joint Offenders (7-2) (if not given in Part III F)

K. Evidentiary and other instructions
(___) Circumstantial Evidence (7-3)
    (___) Proof of intent
    (___) Proof of knowledge
(___) Stipulation of Fact (7-4-1)
(___) Stipulation of Expected Testimony (7-4-2)
(___) Depositions (7-5)
(___) Judicial Notice (7-6)
(___) Credibility of Witness (7-7-1)
(___) Eyewitness/Interracial Identification (7-7-2)
(___) Character Evidence - Accused (7-8-1)
(___) Character Evidence - Victim (7-8-2)
(___) Character for Untruthfulness (7-8-3)
(___) Expert Testimony (7-9-1)
(___) Polygraph Expert (7-9-2)
(___) Accomplice Testimony (7-10)
(___) Prior Inconsistent Statement (7-11-1)
(___) Prior Consistent Statement (7-11-2)
(___) Accused's Failure to Testify (7-12)
(___) Uncharged Misconduct - Accused (7-13-1)
(___) Prior Conviction to Impeach (7-13-2)
(___) Past Sexual Behavior of Nonconsensual Sex Victim (7-14)
(___) Variance-Findings by Exceptions and Substitutions (7-15)
(___) Variance-Value, Damage or Amount (7-16)
(___) Spill-Over (7-17)
(___) Have you Heard Questions to Impeachment Opinion (7-18)
(___) Witness under Grant of Immunity (7-19)
(___) Chain of Custody (7-20)
(___) Privilege (7-21)
(___) False Exculpatory Statements (7-22)
(___) Closed Trial Sessions (7-23)
(___) Brain Death (7-24)
(___) _____
(___) _____
(___) _____

L. (___) Closing Substantive Instructions on Findings (2-5-12 or 8-3-11)

(M. Argument by Counsel. If not done in Part III B above.)

N. (___) Procedural Instructions on Findings (2-5-14 or 8-3-13)

O. (___) Presentencing Session (2-5-15)

P. (___) NO SENTENCING PROCEEDINGS (If no sentencing proceedings are required, give Excusal Instruction at end of 2-5-16.)

IV. SENTENCING

A. (___) Argument or Request for Punitive Discharge Inquiry (2-7-27)

(B. (___) Argument by Counsel)

C. Sentence Instructions (2-5-21 through 2-5-23)
(___) Offenses considered one for sentencing
(___) Escalator clause
(___) Article 58a
(___) Pretrial confinement credit
(___) Article 58b deferment
(___) 58b clemency powers by CA
(___) Fine
(___) Punitive discharge -- Vested benefits
(___) Summary of evidence in extenuation/mitigation
(___) Accused's failure to testify
(___) Accused's not testifying under oath
(___) Scope of accused's unsworn statement
(___) Effect of guilty plea
(___) Mendacity
(___) Argument for specific sentence
((___) Clemency (2-7-16 and 2-7-17 or 8-3-34))
((___) Relative severity of sentence (2-7-15))
((___) Credit for Article 15 punishment (2-7-21))
(___) _____
(___) _____
(___) _____
(___) Concluding instructions (2-5-24)

V. EXCUSING MEMBERS. Give Excusal Instruction at 2-5-25

Appendix J-2

Instructions Checklist-Mental Responsibility IS In Issue

I. PRIOR TO FINDINGS

(___) Preliminary instructions (2-5)
(___) Joint offenders (7-2)
(___) Elements of offenses (Chap 3)
(___) Vicarious liability (7-1)
(___) Preliminary instruction on insanity (6-3)
(___) _____
(___) _____

II. DURING TRIAL (As Required)

(___) Stipulation of Fact (7-4-1 and 2-7-24)
(___) Stipulation of Expected Testimony (7-4-2 and 2-7-24)
(___) Expert Testimony (7-9-1)
(___) Prior Inconsistent Statement (7-11-1)
(___) Prior Consistent Statement (7-11-2)
(___) Accused's Failure to Testify (7-12)
(___) Uncharged Misconduct (7-13-1)
(___) Prior Conviction to Impeach (7-13-2)
(___) Have You Heard Questions to Impeach Opininon (7-18)
(___) Comment on Rights to Silence or Counsel (2-7-20)
(___) Preliminary instruction on insanity (6-3)
(___) _____
(___) _____

III. FINDINGS (Mental Responsibility IS an Issue)

A. (___) Prefatory Instructions (2-5-9 or 8-3-8)

(B. Argument of Counsel. Can be done following Closing Substantive Instructions, at MJ's discretion.)

C. (___) Elements of offenses (Chap 3)
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____

D. (___) Terms having special legal significance.
(___) _____ (___) _____ (___) _____

E. (___) Vicarious Liability (7-1)

F. Joint Offenders (7-2)

G. Special and Other Defenses
(___) Self-Defense (5-2)
    (___) Homicide/Aggravated Assault (5-2-1)
    (___) Non-Aggravated Assault (5-2-2)
    (___) Assault as LIO (5-2-3)
    (___) Homicide/Unintended Death (5-2-4)
    (___) Use of Force to Deter (5-2-5)
    (___) Other Instructions - Self-Defense (5-2-6)
        (___) _____
        (___) _____
        (___) _____
        (___) _____
(___) Defense of Another (5-3)
    (___) Homicide/Aggravated Assault (5-3-1)
    (___) Assault/Battery (5-3-2)
    (___) Homicide/Agg Assault plus LIO (5-3-3)
(___) Accident (5-4)
(___) Duress (Compulsion or Coercion) (5-5)
(___) Entrapment (5-6)
(___) Defense of Property (5-7)
(___) Obedience to Orders (5-8)
    (___) Unlawful Order (5-8-1)
    (___) Lawful Orders (5-8-2)
(___) Physical Impossibility (5-9-1)
(___) Physical Inability (5-9-2)
(___) Financial and Other Inability (5-10)
(___) Ignorance or Mistake of Fact (5-11)
    (___) Specific intent/knowledge (5-11-1)
    (___) General intent (5-11-2)
    (___) Article 134 Check Offenses (5-11-3)
    (___) Drug Offenses (5-11-4)
(___) Voluntary Intoxication (5-12)
(___) Alibi (5-13)
(___) Voluntary Abandonment (5-15)
(___) Parental Discipline (5-16)
NO!! Evidence Negating Mens Rea (5-17)
(___) Claim of Right (5-18)
(___) Causation-Lack of (5-19)
(___) Other _____
(___) Other _____
(___) Other _____

H. Pretrial Statements (Chap 4)

I. Vicarious Liability (7-1) (if not given in Part III E)
(___) Aider and Abettor (7-1-1)
(___) Counseling, Commanding, Procuring (7-1-2)
(___) Causing an Act to be Done (7-1-3)
(___) Liability of Coconspirators (7-1-4)

J. Joint Offenders (7-2) (if not given in Part III F)

K. Defense of Lack of Mental Responsibility
(___) Mental Responsibility at Time of Offense (6-4)
(___) Partial Mental Responsibility (6-5)
(___) Expert Testimony (7-9-1)
(___) Evaluation of Testimony (6-6)

L. Evidentiary and other instructions
(___) Circumstantial Evidence (7-3)
    (___) Proof of intent
    (___) Proof of knowledge
(___) Stipulation of Fact (7-4-1)
(___) Stipulation of Expected Testimony (7-4-2)
(___) Depositions (7-5)
(___) Judicial Notice (7-6)
(___) Credibility of Witness (7-7-1)
(___) Eyewitness/Interracial Identification (7-7-2)
(___) Character Evidence - Accused (7-8-1)
(___) Character Evidence - Victim (7-8-2)
(___) Character for Untruthfulness (7-8-3)
(___) Expert Testimony (7-9-1)
(___) Polygraph Expert (7-9-2)
(___) Accomplice Testimony (7-10)
(___) Prior Inconsistent Statement (7-11-1)
(___) Prior Consistent Statement (7-11-2)
(___) Accused's Failure to Testify (7-12)
(___) Uncharged Misconduct - Accused (7-13-1)
(___) Prior Conviction to Impeach (7-13-2)
(___) Past Sexual Behavior of Nonconsensual Sex Victim (7-14)
(___) Variance-Findings by Exceptions and Substitutions (7-15)
(___) Variance-Value, Damage or Amount (7-16)
(___) Spill-Over (7-17)
(___) Have you Heard Questions to Impeachment Opinion (7-18)
(___) Witness under Grant of Immunity (7-19)
(___) Chain of Custody (7-20)
(___) Privilege (7-21)
(___) False Exculpatory Statements (7-22)
(___) Closed Trial Sessions (7-23)
(___) Brain Death (7-24)
(___) _____
(___) _____
(___) _____

M. (___) Closing Substantive Instructions on Findings (2-5-12 or 8-3-11)

(N. Argument by Counsel. If not done in Part III B above.)

O. (___) Procedural Instructions on Findings (Mental Responsibility at Issue) (6-7)

P. (___) Presentencing Session (2-5-15)

Q. (___) NO SENTENCING PROCEEDINGS (If no sentencing proceedings are required, give Excusal Instruction at 2-5-16)

IV. SENTENCING

A. (___) Argument or Request for Punitive Discharge Inquiry (2-7-27)

(B. (___) Argument by Counsel)

C. Sentence Instructions (2-5-21 through 2-5-23)
(___) Offenses considered one for sentencing
(___) Escalator clause
(___) Article 58a
(___) Pretrial confinement credit
(___) Article 58b deferment
(___) 58b clemency powers by CA
(___) Fine
(___) Punitive discharge -- Vested benefits
(___) Summary of evidence in extenuation/mitigation
(___) Mental responsibility sentencing factors (6-9)
(___) Accused's failure to testify
(___) Accused's not testifying under oath
(___) Scope of accused's unsworn statement
(___) Effect of guilty plea
(___) Mendacity
(___) Argument for specific sentence
((___) Clemency (2-7-16 and 2-7-17 or 8-3-34))
((___) Relative severity of sentence (2-7-15))
((___) Credit for Article 15 punishment (2-7-21))
(___) _____
(___) _____
(___) _____
(___) Concluding instructions (2-5-24)

V. EXCUSING MEMBERS. Give Excusal Instruction at 2-5-25

Appendix K

DuBay Hearing Procedure

NOTE: Scope of this appendix. When a record of trial is deficient on a particular issue, appellate courts sometimes order limited evidentiary hearings to assist them in performing their appellate duties. These hearings generally require the military judge to make specific findings of fact and conclusions of law on a particular issue, thus eliminating "the unsatisfactory alternative of settling [an] issue on the basis of ex parte affidavits, amidst a barrage of claims and counterclaims." United States v. DuBay, 37 C.M.R. 411, 413 (CMA 1967).

MJ: Please be seated. This limited hearing is called to order.
TC: This limited hearing was ordered by _____ in accordance with United States v. DuBay. Appellate Exhibit I (__) is the order from _____ returning the record of trial to The Judge Advocate General, for remand to a convening authority to order a limited hearing pursuant to United States v. DuBay. Appellate Exhibit II (__) is the memorandum from The Judge Advocate General to the Commander, _____, designating (him)(her) as the convening authority authorized to order this limited hearing. Appellate Exhibit III (__) is the advice from the Staff Judge Advocate to the convening authority and the convening authority's order to conduct this limited hearing. (Appellate Exhibit IV (__) is the docketing order for this hearing, with the written input from both sides attached.) A copy of these Appellate Exhibits, along with the record of trial in this case, have been furnished to the military judge, counsel and the appellant.

NOTE: The military judge should also require any additional documents relating to the hearing be made Appellate Exhibits at this point. The record of trial of the prior trial ordinarily should not be marked as an Appellate Exhibit.

TC: The government is ready to proceed in this limited hearing.

MJ: Defense counsel, do you have any challenges to the jurisdiction of this limited hearing?
DC: (Responds.)
TC: (I) (All members of the prosecution) have been detailed to this limited hearing by (name of detailing authority). (I am) (All members of the prosecution are) qualified and certified under Article 27(b), and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner that might tend to disqualify (me) (us) in this hearing.

TC: The appellant and the following persons detailed to this hearing are present: _____, Military Judge; _____, Trial Counsel; (_____, Assistant Trial Counsel;) (and) _____, Defense Counsel(; (and) _____, Assistant Defense Counsel;) (and _____, Civilian Defense Counsel). No voting members of the court are present or required. The following persons detailed to this court are absent: _____.

NOTE: Oaths for counsel. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the military judge: "Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?"

TC: _____ has been detailed reporter for this court and (has been previously sworn) (will now be sworn).

> ***NOTE: When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of each opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.***

MJ: _____, you have the right to be represented by _____, your detailed military defense counsel. (He) (She) is provided to you at no expense to you.

You also have the right to request a different military lawyer to represent you. If the person you request were reasonably available, he or she would be appointed to represent you free of charge. If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are entitled only to one military lawyer. You may ask (his) (her) superiors to let you keep your detailed counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would have to be provided by you at no expense to the government.

If a civilian lawyer represents you, you can also keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer. Do you understand that?
APP: (Responds.)

MJ: Do you have any questions about your rights to counsel?
APP: (Responds.)

MJ: By whom do you wish to be represented?
APP: (Responds.)

MJ: And by (him) (her) (them) alone?
APP: (Responds.)

> ***NOTE: If the accused elects pro se representation, see applicable inquiry at 2-7-2, PRO SE REPRESENTATION. The military judge must be aware of any possible conflict of interest by counsel and, if a conflict exists, the military judge must obtain a waiver from the accused or order new counsel appointed for the accused. See applicable inquiry at 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.***
>
> ***NOTE: If the original defense counsel from trial is not present, the military judge should inquire or explain as applicable why the attorney-client relationship has ceased***

(Example: Former defense counsel left active duty or appellant is claiming ineffective assistance of counsel against former defense counsel). In any situation where it appears the appellant may have a legal right to the assistance of a former defense counsel, the military judge should obtain from the appellant an affirmative waiver of that former defense counsel's presence.

MJ: _____ is no longer on active duty and cannot be detailed by military authority to represent you at this hearing. However, you could attempt to retain _____ as civilian counsel. Accordingly, _____ has been detailed to represent you at this hearing. Do you wish to proceed with this hearing with out _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this hearing?

MJ: Because you have made allegations after trial that _____ was ineffective in (his) (her) former representation of you, (he) (she) has not been detailed to represent you at this hearing. Accordingly, _____ has been detailed to represent you at this hearing. Do you wish to proceed with this hearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this hearing?

MJ: Defense counsel will announce by whom (he) (she) (they) (was) (were) detailed and (his) (her) (their) qualifications.

DC: (I) (All detailed members of the defense) have been detailed to this hearing by _____. (I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense has) acted in any manner that might tend to disqualify (me) (us) in this proceeding.

(OATH FOR CIVILIAN COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?

MJ: I have been properly certified and sworn, and detailed (myself) (by _____) to this hearing. Counsel for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn.

TC: Your honor, are you aware of any matter that might be a ground for challenge against you?

MJ: (I am not. I was the trial judge for the _____ portion of this case.) (I am not. I was not the trial judge for any prior proceedings in this case, whether pretrial, trial or post-trial.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Responds.)

MJ: Counsel, based on Appellate Exhibit(s) __, the purpose of this limited hearing is _____. Do both counsel agree?

TC/DC: (Respond.)

MJ: _____ has your defense counsel explained the nature of this hearing to you?

APP: (Responds.)

MJ: Defense counsel, does the accused have in front of (him) (her) a copy of Appellate Exhibit I (__), the appellate court's order directing this hearing?

DC: (Responds.)

MJ: _____, look at page (__) of Appellate Exhibit I (__). The appellate court told me to determine _____. Do you see that portion of Appellate Exhibit I (__)? Do you understand that my sole purpose at this hearing is to listen to the matters presented by the parties and then make findings of fact and conclusions of law with respect to the issue(s) that the appellate court specified?

APP: (Responds.)

MJ: I have no authority to change anything that happened at your original trial. I cannot alter any prior ruling, finding or sentence. When I provide my findings and conclusions, the appellate court will decide what happens in your case. Do you understand that?

APP: (Responds.)

MJ: Because the Defense raised the matter at issue in this hearing, I will allow the Defense to go first with opening statement, presentation of the evidence and argument. Does the Defense have an opening statement?

DC: (Responds.)

MJ: Does the Government have an opening statement?

TC: (Responds.)

MJ: Defense counsel, you may present evidence.

NOTE: The TC administers the oath/affirmation to all witnesses. After a witness testifies, the military judge should instruct the witness along the following lines:

MJ: _____, you are excused (temporarily) (permanently). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within ___ minutes).

DC: The Defense has nothing further.

MJ: Government, you may present evidence.
TC: The Government has nothing further.

MJ: Defense, do you wish to present any rebuttal evidence?
DC: (Responds.)

MJ: Defense, you may present closing argument.
DC: (Responds.)

MJ: Government, you may present closing argument.
TC: (Responds.)

MJ: I will prepare findings of fact and conclusions of law, which will be provided to counsel and attached to this record as Appellate Exhibit __ prior to my authentication of the record.

Is there anything further from either party?
TC/DC: (Respond.)

MJ: This hearing is adjourned.

Glossary

Section I
Abbreviations

A.B.R.
Board of Review

A.C.C.A.
Army Court of Criminal Appeals

ACC
Accused

A.C.M.R.
Army Court of Military Review

A.F.B.R.
Air Force Board of Review

A.F.C.C.A.
Air Force Court of Criminal Appeals

A.F.C.M.R.
Air Force Court of Military Review

ADC
Assistant/Associate Defense Counsel

ATC
Assistant Trial Counsel

BCD
Bad Conduct Discharge

CDC
Civilian Defense Counsel

C.G.C.C.A.
Coast Guard Court of Criminal Appeals

C.G.C.M.R.
Coast Guard Court of Military Review

C.M.A.
United States Court of Military Appeals

C.A.A.F.
Court of Appeals for the Armed Forces

DC
Defense Counsel

DD
Dishonorable Discharge

DP
Detaining Power

EPW
Enemy prisoner of war

GCM
General Court-Martial

IMC
Individual Military Defense Counsel

MCM
Manual for Courts-Martial

MJ
Military Judge
M.J.
Military Justice Reporter

MRE
Military Rules of Evidence

N.M.C.M.R.
Navy-Marine Corps Court of Military Review

N.M.C.C.A.
Navy-Marine Corps Court of Criminal Appeals

PP
Protecting Power

RCM
Rules for Courts-Martial

SCM
Summary Court-Martial

SPCM
Special Court-Martial

TC
Trial Counsel

UCMJ
Uniform Code of Military Justice

Section II
Terms
This section contains no entries.

Section III
Special Abbreviations and Terms
This section contains no entries.