Legal Safeguards of the Right to a Fair Trial

*Is there a right to a fair trial for the detainees held at Guantanamo Bay?*

Master Thesis

by

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PREFACE

With this thesis I finally finish my study International Public Law at Tilburg University. It took me more than 5 years before graduating, but I can say that my time as a student was worth it. Especially the opportunity that I received from the University to go two times abroad, have truly enriched my life and even though it therefore took me longer to graduate, I do not regret it, because it was certainly worth it.

During the writing of the thesis I encountered some setbacks and therefore I really wish to thank some people for making it possible to graduate. I would like to thank my supervisor Zahra Albarazi for assisting me during the writing of the thesis and for making me able to critically analyze my own text. I would also like to thank my lovely family, friends and colleagues for supporting me during my studies and especially for the last months. It has not been easy to finish the thesis and without their support and encouragement I am sure that it would not have finished it.

Tilburg, January 2011
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1. INTRODUCTION

During my studies human rights law and criminal law were always the two fields of law that I found the most intriguing. Especially the position of detainees received my particular attention. Finding the right balance between their human rights and the interests of the society is an interesting topic. That is why I have chosen to write my master thesis about the controversial detainment facility, Guantanamo Bay.

Guantanamo Bay is a naval base of the United States, located in Cuba. Within this naval base there exists a detainment facility used by the Bush administration after the attacks of September 11, 2001. In this detention camp there are held detainees who have been accused of having a connection with the 9/11 attacks. The fact that the detention camp is located on the territory of Cuba was for many years an issue of dispute. However, since the U.S. leases this area from Cuba, based on the Cuban-American Treaty from 1903, and has complete jurisdiction and control over the territory, the detention camp is regarded to fall within the legal jurisdiction of the U.S.

There are a number of concerns about the circumstances in which the detainees are held. The prisoners are held in detention without an indictment, without a trial, without access to justice and without any guarantees against torture and abuse. In Guantanamo Bay there thus exists a denial of the most elementary procedural rights of the detainees, which constitutes a gross violation of human rights. Since the U.S. is contesting the applicability of international humanitarian law to these detainees, I decided to put the focus on human rights law and then especially the right to a fair trial. This right is of crucial importance for finding the right balance between human rights and a fair conviction for detainees. The right to a fair trial is regarded to be “one of the most important human rights since it ensures that all people are guaranteed the protection of their human rights and that the procedural means of the rule of law are safeguarded.”

As the number of detainees at Guantanamo Bay decreases, the issue of what to do with the remaining detainees is gaining importance. In March 2011 the White House issued an Executive Order relating to its Guantanamo Bay policies. This Executive Order introduced the Periodic Review Boards, especially set up to determine the legality of the indefinite detention of the detainees. This development shows that the current administration is working towards trying the detainees. It is however still questionable whether the detainees will be held indefinitely in detention. If this will be the outcome of the Periodic Review, to prosecute them before military commissions or to trial them in U.S. federal courts.

In order to facilitate the closure of Guantanamo Bay, as promised by president Obama at his presidential campaign, the remaining detainees first of all must be given a fair trial. With this thesis I want to examine if the Guantanamo detainees do have a right to a fair trial. In order to answer this question I will start in chapter two with discussing the different approaches to combat terrorism and how these approaches affect the positions of detainees. Next to this an overview will be provided of the detainees currently held at Guantanamo Bay and how their

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position, indefinite detention and the practice of administrative detention, touches upon their human rights. The efforts made by the Obama administration to close Guantanamo Bay, including the therefore established Periodic Review System, will be discussed in this chapter as well.

In the third chapter the right to a fair trial, which is needed to facilitate the actual closure of Guantanamo Bay, will be examined as well as the different safeguards related to this right. By using the relevant international human rights documents and case law it will become clear what exactly constitutes a right to a fair trial. Since the detainees are often not well informed of their charges, by reasons of 'national security', I will also examine if and how the right to a fair trial can be limited and how national security and human rights need to be balanced. The complaint procedures in relation to the right to a fair trial will also be discussed in this Chapter.

Chapter four will be devoted to the military commissions that were established by the Bush administration in order to trial the Guantanamo Bay detainees. The main focus of this chapter will concern the question if the procedures used by military commissions and how they handle cases indeed provide the detainees with a fair trial. Since the commissions are criticized for, amongst others, a lack of independence, which is a major concern regarding a right to a fair trial, I will also examine whether these critics are true or not.

Due to all the criticisms regarding trials by military commissions, there is a need for a more suitable way for trying the detainees and therefore the fifth chapter concerns the U.S. Courts, which previously handled most of the terrorism cases. In this chapter it will be set out how these courts handled those trials and the detention standard, which they developed over the years, will be discussed. Attention will also be paid to the standards set by the courts regarding detainees’ ability to request for evidence.

I will end this thesis with a conclusion of the abovementioned intentions of the U.S. to provide the detainees with a trial and if these intentions indeed give the detainees a fair trial.
2. GUANTANAMO BAY

The peculiar legal status of Guantanamo Bay was a factor in the choice of the Bush administration in using Guantanamo Bay as a detention centre. As the sovereignty of Guantanamo in the end rested on Cuba, this enabled the U.S. that persons detained at Guantanamo Bay were legally outside the territory of the U.S. and that is why these prisoners could not claim the same constitutional rights, which they would have had when they were detained on the territory of the U.S.

2.1 Approaches to Combat Terrorism

Terrorism can be regarded as one of the most dramatic challenges that international law is facing today. Even though the phenomenon of terrorism already exists for many years, the new kinds of terrorism that we are witnessing these days are highly more destructive and therefore pose a real threat to the ordinary rules of warfare. One of the most spectacular terroristic attacks happened on September 11, 2001, when the U.S. was attacked by al Qaeda.

According to Stephen C. Neff there are two different approaches to combat terrorism. On the one hand there is the legal strategy of the sovereign-right approach, while, on the other hand, the belligerency approach is available. In the sovereign-right approach, also known as the criminal law strategy, the government uses its normal powers as a sovereign, which is based on domestic criminal law. The belligerency approach, on the contrary, can be regarded as a military mode of operation. Within this approach governments act as a participant in an armed conflict against another state, which is regulated by the laws of war, international humanitarian law.

Both of these approaches are, in their own way, bound by some important legal restrictions. When the sovereign-right approach is taken, the jurisdiction is limited to persons who are personally guilty for wrongdoing and find themselves in the territorial jurisdiction of the state. When a state wishes to reach persons abroad, they need to use an extradition proceeding. In Neff’s opinion, “further important restrictions can be found in international human rights law”, since, “this body of law imposes a huge amount of limitations on the treatment of detainees, which can be labelled under the heading of due process of law.” When the belligerent-right approach is taken, a contrast on all of these fronts is visible. Here, the state can use force against persons solely based on their enemy status, without proving personal guilt. According to Neff, “membership of the opposing belligerent force, as such, is not a wrongful act and therefore no trials are required.” The captured persons are held as a non-punitive form of detention with the aim to separate them from their force for the duration of the conflict. One of the privileges of this so-called ‘prisoner-of-war’-status is that these persons have to be released when the armed conflict has ended. Legal safeguards for these ‘prisoners of war’ can be found in the Geneva Conventions of 1949 and their Additional Protocols. However, these safeguards are only given to persons who meet the definition ‘prisoners of war’ as set out in the Convention.

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4 Dr. Stephen C. Neff, an expert in the history of International Law and Warfare, is a Reader in Public International Law at the University of Edinburgh.
7 Idem, p. 384.
Regarding the detainees held at Guantanamo Bay it can be concluded the U.S. choose the belligerency approach, though, it soon became apparent that these detainees were not given the ‘prisoners of war’ status. According to the U.S. they did not qualify as lawful belligerents because they failed to meet the criteria for lawful combatants. It is clear that the Guantanamo detainees are thus held in a legal black hole. Since giving the detainees the status of ‘unlawful combatants’ has as a consequence “that they are denied the privileges provided for by the Geneva Conventions and also they are held outside the protective ambit of international human rights law, as they are not held as ordinary criminals.”

Obviously, these practices of the U.S. received a lot of critics. According to Robert Cryer, “one of the major challenges of dealing with terrorism is to strike a balance between the protection of the community from acts of terrorism, on the one hand, and the maintenance of the rights of all citizens, including suspected terrorists, on the other hand.” Cryer continues by stating that, “in the U.S. there has been for a long time a discrepancy about whether to detain suspected terrorists indefinitely as enemy combatants in the ‘war against terrorism’ or to prosecute them.” However, with the gradual closing of Guantanamo Bay, the criminal law model is gaining importance.

2.2 Guantanamo Bay Detention Centre

According to Amnesty International, the U.S. responded to the terrorist attacks 9/11 by stating that they had no higher priority than to bring those who were responsible for the attacks to justice. It is clear that the U.S. has a well and fully functioning criminal justice system, with independent courts that are competent and experienced in conducting complex trials, including terrorism cases. However, the Guantanamo detainees seem to be in a different position, since most of them were held in detention without a trial and without access to the U.S. courts. The Obama administration seemed to be aware of this fact and therefore promised at his presidential campaign to close Guantanamo Bay and to bring the detainees to justice.

There are a lot of concerns about using Guantanamo Bay as a detention centre. According to an article of Amnesty International, most of the detainees have not been able to challenge the lawfulness of their detention, while Amnesty also found indications that the detainees have been tortured or that other practices of cruel, inhuman or degrading treatment was used against them. The circumstances, in which most of the detainees are held, indefinitely

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9 Article 4 of the Third Geneva Convention sets out the criteria for ‘prisoners of war’, meaning persons who qualify as ‘lawful combatants’. According to Article 4(2) the following conditions have to be met: “a) that of being commanded by a person responsible for his subordinates; b) that of having a fixed distinctive sign recognizable at a distance; c) that of carrying arms openly; d) that of conducting their operations in accordance with the laws and customs of war.”
11 Professor Robert Cryer is a Professor of International and Criminal Law at the University of Birmingham.
13 Idem, p. 348-349.
in detention, constitute cruel, inhuman and degrading treatment. Therefore, Amnesty concludes that Guantanamo Bay violates international human rights law.\(^{15}\)

### 2.2.1 Detainees held at Guantanamo Bay

In 2006 a Report was released\(^{16}\) in which an effort was made to provide a picture of who the Guantanamo detainees are. It is interesting for this thesis to see who are actually detained at Guantanamo Bay, since according to the U.S. government only ‘the worst of the worst’ were to be detained at Guantanamo.

The data in the Report shows that the government “divides a detainee’s enemy combatant status into six categories that describe the terrorist organization with whom the detainee is affiliated:”\(^{17}\) 1) Al Qaeda (32%), 2) Al Qaeda and Taliban (28%), 3) Taliban (22%), 4) Al Qaeda or Taliban (7%), 5) Unidentified Affiliation/None alleged (10%) and 6) Other (1%). A conclusion that can be drawn from this categorisation is that the six distinct categories are far from clear. While another conclusion of the Report is that fifty-five percent of the detainees are not determined to have committed any hostile act against the U.S.

Following the Report, the government has also described each detainee’s relation to the respective organization. There have been established three degrees of connection between the detainee and the organization with which he is connected:\(^{18}\) 1) ‘Fighters for’ (8%), 2) ‘Members of’ (30%), 3) ‘Associated with’ (60%) and 4) None alleged (2%). This data shows that most of detainees are only determined to be ‘associated with’ one group or another. The used terms ‘members of’ and ‘associated with’ are again far from clear and, according to the Report, “the definition on which the government is relying is so overly broad that anyone who the government believed ever spoke to an al Qaeda member could be regarded to be a member as well.”\(^{19}\)

Another interesting fact that derives from the Report is that the U.S. forces only captured 5% of the detainees, while 86% of the detainees were arrested by other forces and turned over to U.S. custody at a time in which the U.S. offered large sums of money for the capture of suspected enemies.\(^{20}\) This has as a consequence that the evidence based on which the detainees are held is mostly not that convincing.

The organisation Human Rights First (hereafter: HRF) published a Fact Sheet\(^{21}\) in 2011 regarding the detainees held at Guantanamo Bay. This fact sheet reveals that the total number of detainees ever detained at Guantanamo Bay is 779 from which 171 were, on 28 July 2011, still detained. By that date there was only one detainee transferred to the U.S. for prosecution. From the remaining 171 detainees at Guantanamo there were 59 detainees who were approved for release, however, not all of them have been released yet. In total there are, under the

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16 By Professor Mark Denbeaux, one of Seton Hall’s senior faculty members and the Director of the Seton Hall Law School Center, who was also the representative of two Guantanamo detainees.
18 Idem, p. 9.
19 Idem, p. 9.
Obama administration, still 46 detainees who are designated for indefinite detention without a charge and without a trial.

2.2.2 Indefinite Detention

The practice of indefinite detention without a trial was a policy developed by the Bush administration after the attacks of 9/11 as a part of the U.S.’s global war strategy.\(^22\) According to Alfred de Zayas\(^23\), international human rights law prohibits the practice of keeping persons in a legal black hole and even ‘the war on terror’ does not justify practices like indefinite detention. “The deprivation of liberty is subject to certain conditions, and even initially lawful detention can become arbitrary and contrary to law if it is not subject to periodic review”, he continues. The practice of indefinite detention is prohibited in Article 9(1) ICCPR\(^24\) and while a temporary derogation from this provision is allowed under Article 4 ICCPR, persons deprived from their liberty are entitled to a prompt trial. Even though the practice of indefinite detention is explicitly prohibited, in reality, the practice of indefinite detention is often used and governments try to justify these practices on the basis of ‘national security’.\(^25\) While the derogation regime of Article 4 makes it possible that a temporary derogation of Article 9(1) is possible, this is subject to strict conditions as set forth in the underlying Article. The United Nations Human Rights Committee (hereafter: HRC), the body responsible for monitoring compliance by state parties to the ICCPR, has stated that “measures derogating from provisions of the Covenant must be of an exceptional and temporary nature. (…) A fundamental requirement is that such measures are limited to the extent strictly required by the exigencies of the situation.”\(^26\) It is clear that derogations and also the practice of indefinite detention can in no event be open-ended.

Since initially legal detention may become arbitrary if it is unduly prolonged or not subject to periodic review the HRC has laid down the elements that must be tested in order to determine if preventive detention is justified.\(^27\) An important note that must be made regarding the Guantanamo detainees is that “the application of the Covenant may not be disturbed by transferring a person outside the national borders of the state concerned,”\(^28\) such as Guantanamo Bay, since, “a state party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that state party, even if not situated within the territory of the state party.”\(^29\)

\(^22\) Amnesty International 2011, p. 3.
\(^23\) Alfred de Zayas is a member of the New York Bar and former Secretary of the Human Rights Committee.
\(^24\) Article 9(1) ICCPR states: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance and procedures as are established by law.”
\(^26\) UN HRC, General Comment No. 29, States of Emergency (Article 4), adopted at the 1950th meeting, 24 July 2001, §2-3.
\(^27\) UN HRC, General Comment No. 8, Right to Liberty and Security of Persons (Article 9), sixteenth session, 30 July 1982, in §4 it is stated that: “If so-called preventive detention is used, for reasons of public security, it must be controlled by the same provisions, it must not be arbitrary, and must be based on grounds and procedures established by law (§1), information of the reasons must be given (§2) and control of the detention must be available (§4) as well as compensation in the case of a breach (§5). And if, in addition, criminal charges are brought in such cases, the full protection of Article 9(2) and (3), as well as Article 14 must be granted.”
\(^28\) A. de Zayas 2005, p. 19.
The practice of indefinite detention not only violates Article 9 ICCPR, it has at the same time the potential to violate other provisions of the Covenant, of which Article 14, the right to a fair trial, must be mentioned in this respect, since this Article requires a prompt trial before a competent and impartial tribunal. While Article 4 ICCPR permits temporary derogation from both of these provisions; the decision to derogate must be notified to the Secretary-General of the UN and must satisfy strict requirements. Surprisingly, in the context of the ‘war on terror’ the U.S. has not notified any derogation from the Covenant to the Secretary-General of the UN, and this is particularly worrisome since numerous of Executive Orders show incompatibilities with the underlying Articles of Covenant. Pursuant to a Military Order issued by president Bush, persons suspected of terrorism in the U.S. have been subjected to indefinite detention.

Over the years a number of cases came before the HRC, which found that indefinite detention constitutes a violation of the Covenant. In the case of Mr. Santullo, which is completely comparable to the position in which the Guantanamo detainees are held, the HRC found a violation of Article 9(4) ICCPR, since during his detention he had no access to a lawyer, he was denied any possibility to file a habeas corpus petition and neither was there a decision against him that could be the subject of an appeal.

### 2.2.3 Administrative Detention

Deprivation of liberty for security reasons is an exceptional measure of control that may be taken in an armed conflict. However, according to Jelena Pejic, “the practice of administrative detention of persons, who are believed to pose a threat to state security, is also being more and more widely practised outside of armed conflict situations”, which is also the case regarding the Guantanamo detainees. A major concern regarding these practices is that the persons held in administrative detention are not or only vaguely informed of the reasons for their detention while there is also often no mechanism in place to review the lawfulness of the detention or it lacks independency, if there is one. The purpose of a required periodical review to assess the lawfulness of the detention is, according to Pejic, “to determine whether the detainee continues to pose a real threat to the security of the detaining power and to order release if that is not the case”, which thus requires an effective review by an independent and impartial body. Since the establishment of such a periodic review is left to discretion of the state parties, the Obama administration has currently set up the Period Review System, which will be discussed in the next paragraph.

An important principle that governs the practice of administrative detention is that this form of detention must cease as soon as the person involved ceases to pose a threat to the...
security of the state, which implies that this form of detention can in no way be indefinite. In order to meet this concern Article 9(4) ICCPR provides that anyone deprived of liberty has the right to file a petition for habeas corpus.\textsuperscript{39} Even though, as said, the right to liberty of persons may be derogated from under strict conditions, in the opinion of Pejic, the jurisprudence of international as well as regional human rights bodies has determined that among the non-derogable rights, even though not explicitly listed as such, is the right of a person to challenge the lawfulness of his detention (habeas corpus).\textsuperscript{40}

\subsubsection*{2.3 Efforts to Close Guantanamo Bay}

The Obama administration is constantly restating that it wants to remove the obstacles that there are for the Guantanamo detainees in order to have a right to a fair trial. They emphasize in this respect the importance of determining the lawfulness of their detentions.\textsuperscript{41} Therefore in March 2011, the White House issued an Executive Order\textsuperscript{42} and a Fact Sheet\textsuperscript{43} relating to its Guantanamo Bay detention policies, in which the Periodic Review System was introduced. The aim of this newly introduced system is to determine the legality of the continued detention of the detainees held at Guantanamo Bay. This development shows that the current administration is willing to bring the detainees to trial, however, it is still questionable whether they will trial the detainees in U.S. federal courts, prosecute them in front of military tribunals or hold them in indefinite detention, if this will be the outcome of the Periodic Review.\textsuperscript{44}

In November 2009, the Department of Justice and State announced that “five Guantanamo Bay detainees accused of conspiring to commit the 9/11 attacks on the U.S. would be prosecuted in U.S. federal courts, whereas five other detainees accused of offenses against the laws of war would be tried by military commissions.”\textsuperscript{45} The rationale of using civilian courts next to military commissions was based on the view that every forum possible should be used to try the detainees.

At the end of 2009, the Obama administration announced that it had the intention “to purchase the Thomson Correctional Facility in Illinois, to house detainees transferred from Guantanamo.” The administration stated that the facility would not be used for detainees who would be tried in federal courts or in military commissions, but instead for those who would be detained indefinitely. However, acquiring the prison and moving the detainees to the U.S. for purposes other than prosecution required congressional approval, which was not received.\textsuperscript{46} Moreover, as observed by the organization Human Rights Watch (hereafter: HRW) “it seems that the closing of Guantanamo in reality means just moving the problem of indefinite detention.”\textsuperscript{47}

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\textsuperscript{39} J. Pejic 2005, p. 382-383.
\textsuperscript{40} Idem, p. 379. This argument is also supported by the HRC in its General Comment No. 29, §11.
\textsuperscript{41} Amnesty International 2011, p. 2.
\textsuperscript{42} The White House, Executive Order – Periodic Review of Individuals detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Office of the Press Secretary, 7 March 2011.
\textsuperscript{43} The White House, Fact Sheet: New Actions on Guantanamo and Detainee Policy, Office of the Press Secretary, 7 March 2011.
\textsuperscript{44} Amnesty International 2011, p. 2.
\textsuperscript{45} J.R. Crook, Contemporary Practice of the United States, American Journal of International Law, Volume 104, Number 4, October 2010, p. 112-113.
\textsuperscript{46} Idem, p. 115.
\end{flushleft}
As the number of detainees at Guantanamo Bay decreases, the issue of what to do with the remaining detainees continues an important issue. In the beginning of 2011, President Obama signed a Defense Authorization Act[48] “that prohibits the transfer of detainees to the U.S. for trial, which results in further confusing the future of the detainees currently at the facility.”[49] In a press release HRW “recognized Obama’s commitment in closing the facility, but cited the continued practices of indefinite detention and the use of military commissions instead of federal courts.”[50] The Guantanamo Detainee Review Task Force, set up by the Obama administration with an aim to review the status of each detainee, completed its report in January 2010, and recommended that 48 of the 240 men whose cases it reviewed, would be held indefinitely, without a charge.[51] However, in order to close this detention centre it is first and fare most important to give the remaining detainees a fair trial.

### 2.3.1 Periodic Review System

As noted, the Presidential Order of 7 March 2011 established the Periodic Review System, which contains an executive review process to determine whether the detainees’ continued detention is needed. The Periodic Review Boards (hereafter: PRB) are intended “to review on a periodic basis the executive branch’s continued, discretionary exercise of existing detention authority in individual cases”. [52]

The PRBs are criticized by HRW for falling short in “that they do not offer detainees an opportunity to have a defence and the challenge the government’s position regarding their detention”. [53] Also, according to Stephen Abraham[54], “the Periodic Review of the detainees is illusory in that it creates an unnecessary process that does not address the fundamental question of whether a person held a Guantanamo Bay has been lawfully detained.”[55]

When examined more closely, the new Periodic Review System seems to provide the detainees with a few improvements regarding their indefinite detention status. According to Section 1(a)[56] the review does not interfere in ongoing habeas corpus proceedings and therefore thus seems to give the detainees an additional option to let them review the legality of their detention. Furthermore, Section 2 of the Order states that the purpose of the review is not to examine the legality of the detention, but to determine whether continued detention “is necessary to protect against a significant threat to the security of the U.S.” The important feature of the review thus lays in “the fact that even when a person is lawfully detained, the

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[50] The Guantanamo Detainee Review Task Force, set up by the Obama administration with an aim to review the status of each detainee, completed its report in January 2010, and recommended that 48 of the 240 men whose cases it reviewed, would be held indefinitely, without a charge. However, in order to close this detention centre it is first and fare most important to give the remaining detainees a fair trial.
[51] Stephen Abraham was formerly assigned to the Office for the Administrative Review of the Detention of Enemy Combatants.
[52] Section 1(a) reads: “The periodic review described in section 3 of this order applies only to those detainees held at Guantanamo on the date of this order, whom the interagency review established by Executive Order 13492 has (i) designated for continued law of war detention; or (ii) referred to for prosecution, except for those detainees against whom charges are pending or a judgment or conviction has been entered.”

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52 Section 1(b) Executive Order 2011.
54 Stephen Abraham was formerly assigned to the Office for the Administrative Review of the Detention of Enemy Combatants.
55 Section 1(a) reads: “The periodic review described in section 3 of this order applies only to those detainees held at Guantanamo on the date of this order, whom the interagency review established by Executive Order 13492 has (i) designated for continued law of war detention; or (ii) referred to for prosecution, except for those detainees against whom charges are pending or a judgment or conviction has been entered.”
PRBs should refuse to continue the detention if the person does not pose a significant threat to the security.\footnote{R. Chesney, \textit{Key Points from Today’s Executive Order on GTMO Detention Review}, 7 March 2011, available at: <lawfareblog.com/2011/03/key-points-from-todays-executive-order-on-gtmo-detention-review>, §6.}

Section 3(a)(2) further states that the “detainee shall be assisted in proceedings before the Board by a government-provided personal representative who possesses the security clearances necessary for access to the information.” (...) “In addition to this representative, the detainee may be assisted in the proceedings before the PRB by private counsel, at no expense to the government.” This seems to be an improvement, since the presence of a counsel is highly important for accused persons, which will be illustrated in the next chapter.

One of the major changes brought by the establishment of the Periodic Review Systems that the PRBs not only exist of military officers, but will, according to section 9(b), consist of “senior officials (...) appointed by each of the following departments and offices: the Departments of State, Defense Justice, and Homeland Security”. As will be shown in the next chapters, this is a major step forward in complying with the requirements of the right to a fair trial by a competent, independent and impartial tribunal. The Executive Order furthermore explicitly states that there is a continuing obligation for the PRBs to review each detainee’s situation every six months.\footnote{D. Eviatar, \textit{New Administration Procedures import troubling aspects of Afghanistan detention review to GITMO}, 3 August 2011, available at: <humanrightsfirst.org/2011/03/08/new-obama-administration-procedures-import-troubling-aspects-of-afghanistan-detention-review-to-gitmo/>, §3.}

The Organization HRF analyzed the underlying Executive Order and found that “the fact that this is an additional process of review it is certainly a step forward, since it gives prisoners another opportunity to defend themselves.”\footnote{D. Eviatar 2011, §3.} However, at the same time “it represents an unfortunate acceptance by the Obama administration of the entire concept of long-term administrative detention based on some vaguely defined standards of dangerousness.”
3. THE RIGHT TO A FAIR TRIAL

The "right to a fair trial and the right to equality before courts and tribunals are regarded to be key elements of human rights protection, while also safeguarding as a procedural means the rule of law."61 The Australian Human Rights Law Recourse Centre62 (hereafter: HRLRC) also states that, “access to justice is a human right sui generis and a critical element of the promotion, protection and fulfilment of other human rights."63 Especially in the context of Guantanamo Bay, where the purpose of indefinite detention is ‘national security’, a careful balancing of rights and thus a fair trial must take place. However, in terrorism cases there is a major concern regarding the tendency towards limitations on the right to a fair trial.64

3.1 The Right to a Fair Trial under the ICCPR

For the purpose of this thesis I examined the right to a fair trial as contained in Article 14 ICCPR, wheerto the U.S. is a party. I have chosen to put the focus on the ICCPR, since this is one of the most important international human rights treaties, with a huge number of ratifications and parties and it forms part of the International Bill of Human Rights. Article 14 ICCPR is of a particular complex nature since it combines various guarantees with different scopes of application. Therefore the HRC distinguishes different aspects of this right.65 A general comment to start with is that Article 14 contains “certain guarantees that state parties must respect, and while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial is incompatible with the object and purpose of the Covenant.”66

The first guarantee of the right to a fair trial, as contained in Article 14(1), is that “all persons shall be equal before the courts and tribunals”, which guarantee applies to all judicial bodies that are entrusted with a judicial task. It must be understood in that it gives both parties in the proceeding equal access and equality of arms, and aims to ensure that the parties are treated without discrimination.67 This guarantee should also be available for to the detainees held at Guantanamo Bay, since it “must be available to all individuals who may find themselves in the territory or subject to the jurisdiction of the state party.”68 According to the HRC it includes the right of an accused to “prompt and detailed information about the charges, to disclosure of and access to the prosecutor’s evidence, to defence counsel and to examine witnesses against him.”69 When we apply this guarantee to the detainees held at Guantanamo Bay it can be said that this guarantee does not seem to be available for them, since most of the detainees were held for years without a trial and without access to justice. It will also be demonstrated in the next chapters that the detainees’ access to evidence was not always that obvious.

61 UN HRC, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, Ninetieth Session, 23 August 2007, §2.
62 The HRLRC was given the opportunity to comment on the Draft General Comment No. 32 prepared by the HRC.
64 Idem, §9.3.
65 General Comment No. 32, §3.
66 Idem, §§4-5.
67 This is also mentioned in Article 2(1) ICCPR.
68 General Comment No. 32, §9.
Article 14(1) further contains an important guarantee and states that: “(…), everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of (…) public order or national security (…) but any judgment rendered in a criminal case (…) shall be made public.”

Following the HRC, “the requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception.” The independency requirement, on the one hand, focuses especially on the procedure and qualifications for the appointment of judges and their independence from political interference by either the executive branch or legislature. In order to comply with this requirement states thus have to ensure that judges are protected from any form of political influence in their decision-making.70 As is the case regarding the trials of Guantanamo detainees by military commissions, the functions and competencies of the judiciary and the executive are not clearly distinguishable and therefore are not compatible with the notion of an independent tribunal. Therefore trials by military commissions are often criticized because of the potential of political influence. The impartially requirement, on the other hand, further guarantees that judges must not allow their judgement to be influenced by personal interests or prejudice preconceptions about cases before them.71 However, as will be illustrated in the next chapter, often the detainees of Guantanamo Bay are labelled, even before the trials began, as ‘the worst of the worst’, which is again not compatible with this guarantee.

The guarantees of Article 14(1) also cover trials in military tribunals and while the ICCPR does not prohibit trials of civilians in military tribunals, such trials “should be exceptional and must be limited to cases where the state party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where the regular civilian courts are unable to undertake the trials.”72 It seems, however, that the U.S. is not using the military tribunals as an exceptional measure and it will be demonstrated in the thesis that regular civilian courts are not unable to undertake these trials, instead they even seem to provide a better forum for handling such trials.

Also enshrined in Article 14(1) is the guarantee of a fair and public hearing, which can be regarded as an essential element of the right to a fair trial, since, as is acknowledged by the HRC, “the principle of a public hearing allows a public scrutiny of the judicial proceedings and thus protects against unfairness and arbitrary action by the courts.”73 However, according to Article 14(1) courts do have the power to exclude all or part of the public for certain security reasons, but these exceptional situations need a strict interpretation.74

Another fundamental guarantee of the right to a fair trial is the presumption of innocence as enshrined in Article 14(2), which guarantee “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charges has been proved beyond reasonable doubt and ensures that the accused has the benefit of the doubt.”75 This right also includes that judges must not prejudge a case and that the public authorities are

70 General Comment No. 32, §19.
71 Idem, §21.
72 Idem, §22.
73 Idem, §28.
74 Idem, §29.
75 Idem, §30.
prohibited to make statements expressing guilt or innocence of an accused before the trial.\textsuperscript{76} When we apply this requirement to the position in which the Guantanamo detainees are held, it is obvious that they are not presumed innocent, rather they are presumed to be guilty, since they are labelled as 'the worst of the worst' and are therefore placed in Guantanamo Bay.

Article 14(3)\textsuperscript{77} contains seven distinct guarantees for accused persons in criminal proceedings. Firstly, it contains the guarantee of the notice of the reasons for an arrest, which is also separately provided for in Article 9(2). The right to be informed 'promptly' about the charges requires that this information must be given as soon as a person is formally charged with an offense or when he is publicly named as such.\textsuperscript{78} If this requirement is applied to the Guantanamo detainees, it is clear that they are not 'promptly' informed about their charges. Most of them were held in Guantanamo for years, without a charge.

Secondly, Subparagraph 3(b) provides that "the accused person must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing". The term ‘adequate facilities’ must be interpreted in that it includes access to documents and evidence on which the prosecution plans to rely. The right to communicate with counsel includes that accused persons are granted prompt access to counsel and that the counsel should be able to meet with their clients in private and communicate with them in confidentiality.\textsuperscript{79} However, most of the Guantanamo detainees have not been able to communicate with their counsel of own choosing in private and in confidentiality. It is also shown that the U.S. government over the years has developed policies that made it more difficult for lawyers to access the Guantanamo detainees and to provide them with legal assistance.\textsuperscript{80}

Thirdly, the right of the accused to be tried without undue delay, as provided for in subparagraph 3(c), concerns that fact that accused persons are not held too long in uncertainty and to ensure that the deprivation of liberty does not last longer than necessary.\textsuperscript{81} Since Guantanamo Bay is open for more than ten years now, it is obvious that this requirement is also not met.

The fourth guarantee of Article 14(3) contains three distinct sub-guarantees. Firstly, it requires that accused persons are entitled to be present during their trial, secondly, it gives the

\textsuperscript{76} Parliamentary Assembly Council of Europe, \textit{Guantanamo: Violation of Human Rights and International law?}, Strasbourg: Council of Europe Publishing 2007, p. 16.

\textsuperscript{77} Article (14(3) reads: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

\begin{enumerate}
\item To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
\item To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
\item To be tried without undue delay;
\item To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
\item To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
\item To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
\item Not to be compelled to testify against himself or to confess guilt."
\end{enumerate}


\textsuperscript{79} Idem, §33-34.

\textsuperscript{80} General Comment No. 32, §31.

\textsuperscript{81} General Comment No. 32, §35.
accused the right to defend themselves in person or through legal counsel of their own choosing and, thirdly, it guarantees the right to have legal assistance assigned to the accused whenever the interests of justice so require.\textsuperscript{82} States are under an obligation to provide legal assistance, to guarantee the right to an effective remedy as enshrined in Article 2(3), since, according to the HRC, “the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.”\textsuperscript{83}

The fifth guarantee of Article 14(3) contains the right of accused persons to examine, or have examined, the witnesses against him, which guarantee must be read in conjunction with the guarantee of equality of arms. The determination of the admissibility of evidence and how courts should assess it is left to the domestic law. As will be shown in the following chapters the military commissions as well as the courts have developed rules to determine the admissibility of evidence.

The right to have the free assistance of an interpreter, as the sixth guarantee of Article 14(3), enshrines another aspect of the principles of fairness and equality of arms.\textsuperscript{84} Subparagraph 3(g) guarantees the right not to be compelled to testify against oneself or to confess guilt. Again it is left to the domestic law to make sure that statements or confessions acquired in violation of Article 7 ICCPR must be excluded from the evidence.\textsuperscript{85} In the following chapters it will be demonstrated how military commissions as well as federal courts handle such issues.

Obviously, juveniles need special protection in criminal proceedings, as set out in Article 14(4), and therefore they must be tried as soon as possible and in particular their age and situation must be taken into account.\textsuperscript{86} In the case of Guantanamo Bay this safeguard is again not taken care of, since also juveniles were held at Guantanamo Bay.

Article 14(5) further states that: “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.” This guarantee is of great importance with regard to the Guantanamo detainees, however, there is often no mechanism in place to let them review their conviction.

Article 14(6)\textsuperscript{87} is about compensation in the case of miscarriage of justice. It is again left to domestic law to set up rules regarding compensation. Most detainees that have been released over the years, however, did not receive any compensation from the U.S. government.\textsuperscript{88} Finally, Article 14(7) contains the principle of ne bis in idem, which is of crucial importance in criminal law.

\textsuperscript{82} General Comment No. 32, §36-38.
\textsuperscript{83} Idem, §10.
\textsuperscript{84} Idem, §39-40.
\textsuperscript{85} Idem, §41.
\textsuperscript{86} Idem, §42.
\textsuperscript{87} Article 14(6) reads: “When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new of newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such a conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”
\textsuperscript{88} Facts and number can be found on: <uswarcrimes.com/?p=2575>.

14
3.1.1 Relationship to Other Rights

As demonstrated in the previous chapter, the right to a fair trial is, amongst others, strongly connected with the prohibition of indefinite detention and the practice of administrative detention. Furthermore, Article 14 obviously plays an important role in the implementation of other guarantees of the ICCPR that must be complied with in criminal proceedings. The relationship with the right to an effective remedy, as provided for in Article 2(3), is of great importance as discussed in the previous paragraph.

Article 7 of the Covenant is also worth mentioning with respect to the right to a fair trial. According to the HRC, “to ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both article 7, which prohibits torture and inhuman, cruel or degrading treatment and article 14(3)(g), which prohibits compulsion to testify against oneself or confess guilt.”89 The case of David Hicks, a former Guantanamo detainee, discussed in the next chapter, provides a good illustration of these practices.

When an accused person, detained on the basis of Article 9, is charged with an offence but not brought to trial, the prohibitions of unduly delaying trials as enshrined in Article 9(3) and Article 14(3)(c) may be violated at the same time.90 Further, it is clear that the way in which criminal proceedings are handled might affect the enjoyment of rights and guarantees of the Covenant not especially connected to Article 14. For example, delays of criminal proceedings for many years may violate the right of a person to leave a country as guaranteed in article 12(2).91 If this is applied apply to the situation in which the detainees are held at Guantanamo Bay it can be concluded that indeed all these provisions are violated.

3.2 Derogations to the Right to a Fair Trial

There are minimum fair trial rights that have to be provided to every accused, so even in the so-called ‘war on terror’ states have to abide by these rules. However, the current practices in the ‘war on terror’ do not seem to recognize that a minimum level of fair trial must be provided to all accused.

Article 14 ICCPR as such is not listed among the non-derogable rights in Article 4(2). However, this does not imply that states facing an emergency can depart from the right to a fair trial. Therefore it is important to examine which aspects of Article 14 can and should be non-derogable.92 Since the HRC acknowledges that human rights law continues to apply in both in times of war and peace, the derogation regime of the ICCPR is of great importance in this respect. The system of the derogation clause (provided for in Article 4 ICCPR93) was especially

89 General Comment No. 32, §60.
90 Idem, §61.
91 Idem, §63.
93 Article 4(1) provides: “In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination.”
set up to deal with extraordinary challenges and safeguard the right of national governments to deal with such public emergency and therefore thus also should cover the ‘war on terror’.

The right of a person to challenge the lawfulness of his detention is regarded to be a key component of the right to liberty of person under human rights law. According to Pejic, “even though the right to liberty may be derogated from in situations of emergency, human rights soft law and jurisprudence have established that the right to challenge the lawfulness of one’s detention before a judicial body is non-derogable.”

Some rights are, explicitly non-derogable and according to the HRC, “certain procedural rights become non-derogable in circumstances where derogation would impinge on effective protection of non-derogable rights.” For example since, Article 7 as such is non-derogable, no statement, confession or evidence obtained in violation of this Article may be used as evidence in criminal proceedings, neither during a state of emergency. Moreover, deviating from very fundamental principles of a fair trial, such as the presumption of innocence, is prohibited all times.

It is important to determine whether the right to a fair trial was violated in any particular case as a consequence of measures taken by states after 9/11. Especially, after the 9/11 attacks the HRC has studied reports of different states while constantly recalling that measures countering terrorism have to be in conformity with the Covenant. However, the question is still “as to whether, and to what extent, states may derogate from the fair trial guarantees in such circumstances.” It must be borne in mind that even when it might be possible to derogate from Article 14, a trial may never be ‘unfair’, since not the right itself may be derogated from, but only some aspects of the full exercise of the right to a fair trial. Certain measures may be necessary in order to combat terrorism, which can weaken the right of the accused, but do not necessarily make the trial unfair. There is a need for a procedural balance, “which implies a certain harmony in order to guarantee and protect both collective security and individual human rights.” Also underlined by the Inter-American Court, “the judicial remedies that must be considered to be essential are those that ordinarily will effectively guarantee the full exercise of the rights and freedoms protected.” In this respect there is an important task for independent and impartial judges to determine some exceptions to normally applicable trial procedures, to ensure in these cases that the procedural balance has been preserved, and to determine whether or not the trial can be qualified as fair. Therefore it is obvious that the principle of judicial independence and impartiality is fundamental and this is one of the main concerns regarding military commissions, which will be discussed in the next chapter.

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95 Idem, p. 386.
96 General Comment No. 32, §15.
97 General Comment No. 29, §7, §11 and §15.
100 Idem, p. 417.
101 Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations (Articles 27(2) and 7(6) of the American Convention on Human Rights, Advisory Opinion OC-8/87, January 30, 1987, §29.
102 C. Olivier 2004, p. 419.
3.2.1 Inter-American Commission on Human Rights and Terrorism

In its Report on Terrorism and Human Rights\textsuperscript{103} the Inter-American Commission on Human Rights (hereafter: IACHR) acknowledged “where an emergency situation is involved, which threatens the independence or security of a state, the fundamental components of the right to a fair trial must nevertheless be respected.”\textsuperscript{104} While Article 8 of the ACHR, concerning the right to a fair trial, is not mentioned as such in Article 27(2) ACHR, states are prohibited to derogate from the fundamental fair trials protections provided for in this Article and other comparable provisions of international instruments,\textsuperscript{105} including the corresponding Article 14 ICCPR.

The IACHR first notes in this respect that “due process rights form an integral part of the judicial guarantees essential for the protection of non-derogable rights and may therefore be considered non-derogable.”\textsuperscript{106} Therefore, the basic components of the right to a fair trial cannot be derogated from. The Commission acknowledges, that there are indeed some aspects of the right to a fair trial from which derogation might, in exceptional circumstances, be permissible. However, such a suspension must be in compliance with the principles of necessity, proportionality as well as non-discrimination, and must be subjected to supervision by a supervisory organ established under international law.\textsuperscript{107} According to the IACHR, the guarantees of the right to a fair trial that might be subject to derogation include, first of all, the right to a public trial, if such a limitation on public access is demonstrated to be strictly necessary in the interests of justice. Any such a restriction must, however, be strictly justified on a case-by-case basis and be subject to on-going judicial supervision.\textsuperscript{108} The right of a detainee to examine or have examined witnesses against him can, secondly, also be derogated from in some instances. The right to a hearing within a reasonable time constitutes a third aspect of the right to a fair trial from which derogation might be possible in some circumstances. However, as with other permissible derogations, such delays may “only be as long as the exigencies of the situation strictly require, can in no case be indefinite, and must remain subject to judicial supervision.”\textsuperscript{109} Thus, according to the Commission, some guarantees of the right to a fair trial might be restricted, however, this must be subject to strict judicial supervision, which is not the case for the Guantanamo detainees.

It is thus clear that most fundamental fair trial requirements cannot justifiably be suspended under human rights law. For the purpose of this thesis and the position of the Guantanamo detainees, it is important to examine which rights can in no event be suspended. The rights that need to be respected, since they are regarded to be fundamental principles of criminal law, include the ne bis in idem principle, the nullum crime sine lege and nulla poena sine lege principles, the presumption of innocence, and the right not to be convicted of an offense except on the basis of individual criminal responsibility.\textsuperscript{110} The IACHR further notes that the right to be tried by a competent, independent and impartial tribunal needs to be in conformity

\textsuperscript{104} Inter-American Commission on Human Rights 2002, §245.
\textsuperscript{105} Idem, §245.
\textsuperscript{106} Idem, §246.
\textsuperscript{107} Idem, §249.
\textsuperscript{108} Idem, §250.
\textsuperscript{109} Idem, §253.
\textsuperscript{110} Idem, §260 sub a.
with the applicable international standards. In respect of the prosecution of civilians, this requires a trial by regular courts and the Commission prohibits the general use of military tribunals to try civilians. Military courts are, according to the Commission, only allowed to try privileged and unprivileged combatants, provided that the minimum requirements of due process are guaranteed.\textsuperscript{111} Based on this it can be concluded that the Commissions allows trying Guantanamo detainees before military commissions, but only if the minimum guarantees of the right to a fair trial are observed. Therefore the next chapter will examine if the trials before military tribunals do comply with these minimum requirements.

### 3.3 Complaint Procedures

As is demonstrated, the circumstances in which the Guantanamo detainees were held for many years violate their right to a fair trial. For victims of human rights violations international human rights treaties have established two kinds of complaint procedures in order to vindicate their rights. On the one hand there are procedures open for state parties (the so-called inter-state complaint procedures), while on the other hand individual complaint procedures are available for persons who are victims of violation of their human rights.\textsuperscript{112}

#### 3.3.1 Individual Complaint Procedure

Individual complaint procedures, according to Christian Tomuschat\textsuperscript{113}, “constitute an important remedy which permits victims of human rights violations to vindicate their rights independently and therefore make human right truly effective.”\textsuperscript{114} Regarding the ICCPR the individual complaint procedure cannot be found in the Covenant itself, but in its Optional Protocol\textsuperscript{115}. States are thus not automatically bound by this individual complaint procedure, but have to become a party to the Protocol in order for individuals to rely on this complaint procedure. Since the U.S. did not recognize this complaint procedure, this procedure is not available for the (former) detainees at Guantanamo Bay.\textsuperscript{116} Also in the ACHR provision\textsuperscript{117} is made for individual complaint procedures, however, again, the state concerned has to have declared to accept the competence of the Committee\textsuperscript{118} and the U.S. unfortunately has not done so. It is thus clear that the Guantanamo detainees do not have the opportunity to rely on an individual complaint procedure.

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{111}] Inter-American Commission on Human Rights 2002, §260 sub b.
\item[\textsuperscript{112}] C. Tomuschat 2008, p. 193.
\item[\textsuperscript{113}] Christian Tomuschat is a Professor in Public International Law at the Humboldt University in Berlin and is a former member of the UN HRC and the UN's International Law Commission.
\item[\textsuperscript{114}] C. Tomuschat 2008, p. 194.
\item[\textsuperscript{115}] Article 1 Optional Protocol ICCPR states: "A state party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that state party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a state party to the Covenant which is not a party to the present Protocol."
\item[\textsuperscript{116}] A. de Zayas 2005, p. 31.
\item[\textsuperscript{117}] Article 44 ACHR reads: “Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”
\item[\textsuperscript{118}] This can be seen from the wording of Article 45(1) ACHR, which reads: "Any State Party may (…) declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of human rights set forth in this Convention.”
\end{enumerate}
\end{footnotesize}
Besides the quasi-judicial petitions procedure of the HRC, there also exist non-binding redress mechanisms such as, according to de Zayas, “the intercession of the United Nations Working Group on Arbitrary Detention, which, for instance, in its report to the 59th sessions of the United Nations Commission on Human Rights in 2003 condemned the indefinite detention of Afghan and other persons in Guantanamo Bay.\textsuperscript{119}

### 3.3.2 Inter-State Complaint Procedure

Inter-state complaint procedures are provided for in most of the human rights treaties that are established within the framework of the UN. According to Tomuschat, “inter-state complaints generally presuppose a special declaration to be made by the two state, the applicant as well as the respondent state.” In practice, however it seems that states prefer, when they are in disagreement, to use informal diplomatic methods, instead of resorting to formal procedures.\textsuperscript{120}

In fact, none of the inter-state complaint procedures within the framework of the UN treaties have ever been used yet. However, this is not to underestimate the importance of these procedures, since they indeed provide a remedy of last resort, when the diplomatic methods do not reach the wanted effect.

In Article 41 ICCPR\textsuperscript{121} the inter-state complaint procedure is provided for. When a State Party to the Covenant has declared to recognize the competence of the HRC to investigate a possible violation of the Covenant, it may bring a case against another state that has also recognized the Committee’s competence. Since the U.S. has made such a declaration, any other state that has done so as well can, according to de Zayas “theoretically submit an inter-state complaint to the Committee regarding the treatment of the detainees at Guantanamo Bay.”\textsuperscript{122} Also in the ACHR provision is made for inter-state complaint procedures, however, the wording of Article 45 ACHR makes it clear that a special declaration thereto has to be made. Since this complaint procedure is never been used, yet, the most important remedy for the detainees at Guantanamo Bay seems to be that when their detention is declared to be unlawful, they have to be released immediately. However, the American Convention\textsuperscript{123} does not contain a provision to compensate arbitrary detention.\textsuperscript{124}

An important note in this respect is made by de Zayas, when he stated that, “when we consider the fact that human rights treaties create erga omnes obligations, any state may, if certain admissibility criteria are satisfied, potentially bring a case before an international tribunal or expert committee.” Indefinite detention, in his view can qualify as “a legitimate subject for an inter-state complaint, since every gross violation of human rights is a matter of concern to every state and to the international community as a whole.”\textsuperscript{125} Article 36(2) of the Statute of the ICJ states: “the states parties to the present Statute may at any time declare that they recognize as

\textsuperscript{119} A. de Zayas 2005, p. 32.
\textsuperscript{120} C. Tomuschat 2008, p. 193-194.
\textsuperscript{121} Article 41(1) ICCPR states: “A state party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under the present Covenant. Communications under this Article may be received and considered only if submitted by a state party which has made a declaration recognizing in regard to itself the competence of the Committee.”
\textsuperscript{122} A. de Zayas 2005, p. 33-34.
\textsuperscript{123} Article 10 ACHR only states: “Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.”
\textsuperscript{124} A. de Zayas 2005, p. 34-35.
\textsuperscript{125} Idem, p. 33.
compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (c) the existence of any fact, which, if established, would constitute a breach of international law”. Some states, however, do not accept this compulsory ipso facto jurisdiction of the ICJ, including the U.S. ¹²⁶

¹²⁶ A. de Zayas 2005, p. 33.
4. MILITARY COMMISSIONS

In order to facilitate the closing of the Guantanamo Bay the U.S. will, according to the Fact Sheet of 7 March 2011, continue to use military commissions to trial the detainees. Despite of all the critics that these military tribunals received, the administration has developed new rules in order to establish ‘fair trials’, as required under international law.

4.1 Background of Military Commissions

When after the attacks of 9/11 a lot of suspects of these attacks were captured, the question arose what to do with these suspects. Instead of trying them in ordinary federal courts, like the U.S. had done in previous terrorist cases, the Bush administration decided to try these detainees before military commissions. These military commissions to trial terrorist suspects were first established on November 13, 2001, when president Bush signed a “Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”, to try non U.S.-citizens.

The U.S. Supreme Court ruled in an early case, in Rasul v. Bush\textsuperscript{127}, that detainees from Guantanamo had the right to challenge their detentions. In a response to this ruling, on 30 July 2004, the Defense Department began conducting ‘Combatant Status Review’ hearings for the detainees held at Guantanamo Bay. According to the organization HRF “these hearings failed to satisfy the Supreme Court’s ruling and did not meet the basic fair trial requirements of U.S. and international law.”\textsuperscript{128}

On 29 June 2006, the U.S. Supreme Court, in Hamdan v. Rumsfeld, held that “trying Guantanamo detainees before the Guantanamo military commissions violated U.S. law as well as the Geneva Conventions.”\textsuperscript{129} The Supreme Court stated that “President Bush did not have the authority to set up these tribunals, but had to be authorized by the Congress in order to do so, since the Congress has the power to create new courts.”\textsuperscript{130} In a response to this the Bush administration, instead of bringing the detainees before U.S. federal courts, signed in October 2006, the renewed Military Commissions Act (hereafter: MCA) into law. This Act allowed the President to determine which persons would be given the status of ‘unlawful enemy combatants’, which as a consequence made them subject to military commissions. As stated by the Department of Justice, “the reforms that the Congress adopted to the MCA would ensure that the commissions trials are fair, effective and lawful.”\textsuperscript{131} It is interesting to note in this respect that Morris Davis, who was the Chief Prosecutor for the Office of Military Commissions from September 2005 until October 2007, resigned based upon the realisation that “full, fair and open trials were unlikely.”\textsuperscript{132} According to him, it was “not the Act that led to injustice, but the way the

\textsuperscript{130} Hamdan v. Rumsfeld, p. 27-30.
legislation was subsequently manipulated”¹³³ and “the military commissions could only regain credibility if the main deficiencies were addressed.”¹³⁴

This was confirmed by the U.S. Supreme Court in the case of Boumediene v. Bush, in which it stated that the previous military commission system “fell short of domestic constitutional guarantees,” while the Supreme Court also held “that the prisoners detained at Guantanamo had a right to a review of their detention and that the MCA of 2006 was an unconstitutional suspension of that right.”¹³⁵

President Obama, who promised at his presidential campaign that he would reject the MCA, because, in his view it failed to establish a legitimate legal framework, signed, instead, on 28 October 2009 a new MCA into law, which can be regarded as the third attempt to create a military commissions system. The previous military commissions systems had both been replaced due to their unfairness and lack of conformity with internationally recognised fair trial standards.¹³⁶ Even though the MCA of 2009 includes some improvements compared to its forerunners, it still seems to fail to provide many of the fundamental elements of a fair trial.

4.2 Critics on Military Commissions

Amnesty International is, even with the reforms of the military commissions, constantly expressing its concern about the use of military commissions. One of the major critics regarding military commissions is that they fail to comply with international fair trial standards. They are regarded to be an incapable forum for doing justice, while they are also criticized for a “lack of independence from the political branches of government that they have authorized, condoned, and blocked accountability and remedy for, human rights violations committed against the detainees that appeared before them.” The commissions are, furthermore labelled, by Amnesty, as “creations of political choice, not tribunals of demonstrably legitimate necessity.”¹³⁷ It has indeed been argued by many that military commissions are "used as a tool to prosecute high-profile detainees and that the goal has more political value rather than maintaining the process of justice".¹³⁸

Another important critic on the military commissions is that they clearly are discriminatory.¹³⁹ Detainees from Guantanamo Bay with the U.S. nationality would not be tried by the military commission under the MCA, but would face trial in federal courts. It is clear that these practices run counter to the fundamental principle of human rights, that the same

¹³⁴ According to Davis these were: 1) put the military back into military commissions and take the politics out, 2) ensure the independence of each component in the military commission process, 3) make openness and transparency of the proceedings an imperative, and 4) expressly reject the use of evidence obtained under undue coercion.
¹³⁷ Amnesty International 2011, p. 2.
¹³⁹ This is clear from the wording of the Military Order 2001 of which Section 3(a) reads: “The order covers any individual who does not have United States nationality who i. is or was a member of the organisation known as al Qaeda, ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or iii. has knowingly harboured one or more individuals described in sub-paragraphs i or ii.”
standard of fair trial should be applied to all, regardless of their nationality. Obviously, the use of federal courts to try the detainees would address this concern.

The former military commissions systems were thus both criticized because of the fact that they would be ineffective and next to that also defective. The use of military commissions to trial terrorist suspects is regarded to block one of the most effective tools for trying detainees, namely federal courts. This can be illustrated by the fact that federal courts in the past have convicted over 400 terrorist offences, while the military commissions only did 6 trials.

4.2.1 Trial of David Hicks

The case of David Hicks provides a good overview of the critics that there are concerning the use of military commissions and the right to a fair trial. David Hicks, an Australian, was captured in Afghanistan and transferred to Guantanamo Bay in the beginning of 2002. In June 2004 formal charges were issued against him and eventually on June 28, 2004 his case was brought before a military commission. After two and a half years of imprisonment, in April 2007, Hicks was the first persons to be sentenced by the military commissions.

When the case of David Hicks is studied more closely, it can be said that in fact he was not given a real trial. This can be illustrated by the fact that already before the trial took place a plea agreement was reached as well as an agreement concerning the conditions of his return to Australia. The guilty plea agreement was reached in a private conference between the parties involved. One of the concerns is that such practices lack public scrutiny, which raises serious questions with regard to due process and the transparency of military commission cases. Therefore Article 14(1) ICCPR requires that trials in general should be public.

The first charge against Hicks, conspiracy, was dropped, based on the ground that it did not constitute a war crime. After that the second attempt was to charge him with 'material support for terrorism'. However, again this charge was criticized because it was “regarded to be an invented crime which was not in conformity with international law standards.” This second charge had two counts; first that Hicks was associated with a terrorist organization, and second that he actually provided material support for a terrorist act. Due to lack of evidence the second count of the charge was dropped and thus at end of the proceedings, after calling Hicks the 'worst of the worst', there was no charge that accused him of hurting anyone or supporting terrorism. The crime of 'providing material support for terrorism', with which Hicks was charged, did not constitute a crime under international law and only became criminalized under U.S. law in 2006, five years after Hicks was detained.

As said, already before the trial of Hicks should take place, there was a deal reached with Hicks in which Hicks would plead guilty to the charge of ‘providing material support for terrorism’ and would be transferred to Australia. According to an independent observer for the Law Council of Australia, “David’s plea of guilt was the product of an inherently oppressive and coercive system. The agreement reflects a view on the part of the U.S. authorities that liberty is

140 Military Commission v. David Matthew Hicks, 26-30 March 2007, available at: <haguejusticeportal.net/eCache/DE F/7/424.html>
142 Idem, The Invented Charge, §1-2.
143 Idem, The Invented Charge, §4-6.
144 Idem, Retrospective Criminal Law, §2.
not a right that may only be denied a person in accordance with strict procedure established by law, but rather liberty is a bargaining chip that the state may use to avoid accountability and buy impunity.”

When compared to the standards for a fair trial, as set forth in Article 14 ICCPR, it is obvious that many of the guarantees were absent in the case of David Hicks. According to former Prosecutor Morris Davis, “Guantanamo detainees are caught in an unfair system. Hearings are conducted behind closed doors on the basis of national security. The military commissions could not be considered independent and impartial since the prosecution, defence and convening authority are all part of the one system, and that system was placed within a chain of political command.” This clearly violates the first fundamental guarantees of the right to a fair trial, as enshrined in Article 14(1) ICCPR. Also the presumption of innocence lacked in the case of Hicks, since from the beginning he was assumed to be guilty. Moreover, the government had publicly stated that he was a member of al Qaeda even before he was tried.

Another interesting feature is that three prosecutors of the military commissions resigned while claiming “they had witnessed criminal conduct in the military commission’s prosecution office, that the commissions were rigged to secure convictions and that evidence supporting the detainees’ innocence was destroyed and false evidence was created to implicate them.”

4.3 Military Commissions and the Right to a Fair Trial

In order to determine whether the detainees indeed have a right to a fair trial when tried before military commissions, it is necessary to combine the different elements of Article 14 ICCPR with the newly established rules of the military commissions.

The first fundamental guarantee of the right to a fair trial is the right to a fair and public hearing by a competent, independent and impartial tribunal that must established by law. Since this is a major concern with regard to trials by military commissions, it is necessary for the purpose of this thesis to study this guarantee more closely. According to the HRC, “the independency requirement refers to the procedure and qualifications for the appointment of judges, and the actual independence of the judiciary from political interference by the executive branch and legislature.” It continues by stating that “a situation where the executive is able to control or direct the judiciary is incompatible with the notion of an independent tribunal.” The impartiality requirement concerns the fact that judges must prevent that their judgement is influenced by personal interests and that they are prohibited to prejudice preconceptions about a case before them. The previous MCA gave the executive branch, instead of the judicial branch, discretionary powers to decide who would be prosecuted before military commissions, while also the Secretary of Defense was given the power to decide about the composition of the military commissions. These practices clearly run counter to the first guarantee of the right to a fair trial as provided for in the ICCPR. The HRC also acknowledges, “that military courts

146 According to Lex Lasry QC, as stated in The Justice Campaign, (The Plea Agreement, §2).
149 Idem, 'Riggid to Secure Convictions', §2.
150 General Comment No. 32, §19.
151 Idem, §20.
152 Idem, §21.
153 Parliamentary Assembly Council of Europe 2007, p. 22-23.
which try civilians could present serious problems as far as the equitable, impartial and independent administration of justice is concerned”. Following to the HRC, “trials of civilians by military courts should be exceptional and must be limited to cases where the state party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where the regular civilian courts are unable to undertake the trials”.

Based on the rules of the previous military commissions systems only detainees who did not have the U.S. nationality could be tried before military commissions. However, based on Article 14(1) ICCPR all persons must be equal before courts and tribunals and therefore the practice of using military commissions to try only non-U.S. detainees constitutes discrimination which runs counter to Article 14(1) as well as Article 2 ICCPR which prohibits discrimination of any kind.

A detainee should, according to the ICCPR, be accorded the right to be presented by a counsel of its own choosing. However, based on the previous MCA, the Chief Prosecutor and the Chief Defense Counsel were the ones who elected the military as well as the defense counsel. A detainee was allowed to choose a civilian lawyer, at his own expense, however, it was possible that this counsel would not have access to some classified documents, since only the military counsel had access to these documents.

Article 14(3)(g) ICCPR provides that anyone accused of a criminal offense is entitled not to be compelled to testify against himself or to confess guilt, which provision must be read in conjunction with Article 7 which prohibits torture and other cruel or degrading treatment. The HRC has noted “that it is left to domestic law to ensure that statements or confessions obtain in violation of Article 7 are excluded from the evidence.” In the previous MCA, however, no explicit prohibition of statements or confessions made due to torture or coercion could be found. Instead, in some instances the previous MCA even allowed these statements. The military commission’s rules of evidence therefore seem to afford less protection than those prevailing in ordinary civilian courts.

Another important concern about military commissions is that they are allowed to inflict the death penalty. This is particularly worrisome since military commissions accept lower standards of evidence than ordinary courts, which will be illustrated in the next paragraph and the next chapter.

4.4 Future of Military Commissions

Due to the critics regarding trials by military commissions, also illustrated by the case of David Hicks, there was obviously a need for a new document that could take away the deficiencies that there are when using trials by military commissions. Therefore on 27 April 2010 the Department of Defense released the Manual for Military Commissions 2010 Edition. The organization HRF analyzed the Manual and according to HRF, it “contains a number of provisions that violate the U.S. Constitution, the laws of war and international human rights standards applicable to detention and trial.” The new Manual seems to contain improvements.

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154 UN HRC General Comment No. 13, Equality before the Courts and the Rights to a Fair and Public Hearing by an Independent Court established by Law (Article 14), twenty-first session, 1984, §4.
155 Idem, §22.
156 Military Order 2001, Section 4(c)3b.
157 General Comment No. 32, §41.
158 Parliamentary Assembly Council of Europe 2007, p. 25.
compared to the previous military commissions rules, however, the Manual does not compensate all the due process deficiencies of the previous MCA.\textsuperscript{159}

A big concern regarding trials by military commissions concerned the use of evidence. The new Manual has addressed this concern in the fact that the provisions regarding hearsay have undergone a major change\textsuperscript{160} and the use of hearsay as evidence has now become limited. The rules regarding exculpatory evidence\textsuperscript{161} are changed as well, which enhance the ability of the detainee to examine evidence on which the commission will rely in his case. In this respect also the rules concerning classified evidence\textsuperscript{162} are changed and are equally fair for both of the parties. The old rules were criticized because they were so overly broad that they would prevent the detainee to see evidence that could prove innocence and clearly restricted the detainee’s ability to defend himself.\textsuperscript{163} Due to these efforts it seems that the new Manual is more in line with the requirement of equality of arms as provided for in Article 14(1) ICCPR.

The Manual of 2010 includes in a whole chapter\textsuperscript{164} about the composition and personnel of military commissions. Within this chapter there can be found, amongst other things, qualifications for judges and other military commissions personnel, as well as some incompatibilities for these persons. Since Article 14(1) ICCPR requires that the status of judges and rules concerning their security have to be laid down in law, this seems to be an improvement compared to the previous system.

Under Rule 806 RMC it is made possible that public access to a trial can be limited and under circumstances the trial can be closed. This provision seems to be in line with the corresponding guarantee in Article 14 ICCPR, since Rule 806(2)(b) gives the exact circumstances under which a closed trial may be commanded.

The new Manual changed the provision about confessions. Under the former MCA evidence that was obtained through coercion, including cruel, inhuman and degrading treatment, was in some circumstances admissible. Under the new rule “no statement, obtained by the use of torture, or by cruel, inhuman, or degrading treatment, (...) shall be admissible in a trial by military commissions.” This amendment can be seen as a major step forward in complying with Article 14(3)(g) as well as Article 7 ICCPR.

The scope of judicial review has undergone a major change as well, while based on its forerunner, it was only possible for the Courts of Military Commissions Review to review only ‘the law’ (not facts) that ‘prejudiced a substantial trial right of the defendant’. The Manual now broadens the review by the Courts of Military Commission Review to the ‘findings and sentence’\textsuperscript{165} and therefore is more in line with the requirement of Article 14(5) ICCPR, since this Article requires that the review must concern the conviction as well as the sentence.

Instead of the Combatant Status Review Tribunal (hereafter: CRST), the military commissions are now itself, under Rule 202 RMC, the competent organ to determine whether a

\textsuperscript{160} Rule 803 MCRE has been amended so that hearsay can only be admitted if notice is given to the adverse party, and the judge finds that a) the statement is relevant, b) the statement is probative, c) direct testimony is not readily available, and d) the goals of the rules of evidence and justice are best served by introduction.
\textsuperscript{161} Which can be found in Rule 701(e) MCRE.
\textsuperscript{162} Which can be found in Rule 505 MCRE and Rule 701 RMC.
\textsuperscript{163} HRF: Analysis of Proposed Rules for Military Commissions Trials, p. 4.
\textsuperscript{164} Chapter 5 RMC concerning ‘Military Commission Composition and Personnel; Convening Military Commissions’.
\textsuperscript{165} Which can be found in Rule 1201 RMC.
The detainee is subject to its jurisdiction. This can be seen as a big improvement, since the CSRTs used a different and broader definition of 'unlawful enemy combatant', which will be discussed in the next chapter.

The Manual of 2010 introduces, instead of the previously used term 'unlawful enemy combatant' the term 'unprivileged enemy belligerent'. If this definition is compared to its forerunner it can be said that the new definition is not a real improvement. The new definition provides three separate grounds in order to determine if a detainee can be qualified as an 'unprivileged enemy belligerent'. Under the new definition only being a member of al Qaeda is enough to be qualified as an 'unprivileged enemy belligerent'. An important difference is that membership of the Taliban and associated forces are now not a part of the definition anymore. The fact that providing support to hostilities is still treated the same as actually taking part in the hostilities makes the new definition again overly broad, which could subject thousands of people. The Manual, like its forerunners, is again only limited to aliens, and thus is again discriminatory.

A shorting coming of the Manual is that it is still possible that persons may be punished for acts that were not illegal when they were committed. Rule 203 RMC states that, "adjudge any punishment not forbidden by that chapter". So, even when an act is not included in the Uniform Code of Military Justice, it is still possible for the military commissions to punish certain acts, given the fact that in only has to be 'not forbidden'. This runs counter to a fundamental principle of criminal law, namely the principle of nullem crime, nulla poena sine lege.

Rule 308 RMC of the Manual states that the accused will be informed of the charges and specifications against the accused as soon as practicable. Article 14(3)(a) states that anyone charged with a criminal offense shall have the right to be informed promptly and in detail the charge against him. It is questionable whether this ‘as soon as practicable’ meets the standard of promptly informing the accused.

Even though the new Manual has made some major improvements compared to the previous rules regarding military commissions, it still seems to fail to meet all the fair trial requirements of Article 14 ICCPR. Its aim is to strengthen the protections for the accused and with these changes the Manual comes closer to the standards for evidence that apply in ordinary courts. However, the Manual still does not address all the concerns that there regarding trials before military commissions. Amnesty International also expressed its concern by stating, "even though it is clear that the current policy under which cases for military commissions are handled, violate international human rights obligations it still seems that the U.S. is not changing its policy."
5. U.S. COURTS

An interesting note to begin with is that U.S. courts were previously, before the 9/11 attacks, allowed to trial terrorist cases. The terrorist suspects, who in 1993 bombed the World Trade Centre, were all tried in U.S. federal courts.\textsuperscript{170} This shows that the U.S. Courts in previous years successfully prosecuted terrorist suspects in ordinary courts.

Considering the fact that the federal courts do guarantee fair trials in conformity with Article 14 ICCPR, it is not my aim to discuss every aspect of the right to a fair trial in relation to U.S. federal courts in this chapter. Instead, the main focus will be on the difficult task that there is for the courts in order to find the right balance between the right to a fair trial of terrorist suspects and the security risks that there are in resolving these cases. Therefore this chapter will examine how the federal courts handle the issues that there are regarding terrorism cases, with the main focus on the detention standards that are used over the years and the detainees’ access to evidence.

5.1 Detainees’ Access to Federal Courts

From a Fact Sheet\textsuperscript{171}, released by HRF, it can be revealed that the U.S. federal courts had over 400 convictions since 9/11 on terrorism-related charges. There was, however, only 1 Guantanamo detainee who was actually prosecuted in a U.S. federal court. Furthermore, the Fact Sheet shows that the federal courts have determined that 38 of the detainees were being held unlawfully. While it is recognized that the federal courts are a more appropriate forum for trying the Guantanamo detainees, HRW argues, that “despite President Obama’s stated preference for federal court trials, only one detainee, Ahmed Ghailani, has yet been transferred to the U.S. for prosecution.”\textsuperscript{172}

The first detainees arrived at Guantanamo Bay in 2002, which were, originally, planned by the Bush administration be held without at trial and without access to justice.\textsuperscript{173} In 2004 the Supreme Court handed down an important decision in \textit{Rasul v. Bush}, the first habeas petition case, in which it rejected the legal black hole in which the detainees at Guantanamo Bay were held and stated that the detainees are entitled to legal representation and to challenge the legality of their detention. The Supreme Court stated that “the petitioners (1) were not nationals of countries at war with the U.S., (2) had never been afforded access to any tribunal, much less charged with and convicted of wrongdoing, and (3) has been imprisoned in territory over which the U.S. exercises exclusive jurisdiction and control.”\textsuperscript{174}

After the attacks of 9/11 the Bush administration passed the Authorization to Use Military Force (AUMF), which authorized president Bush to capture and detainee persons who planned, authorized, committed or aided the terrorist attacks.\textsuperscript{175} In \textit{Hamdi v. Rumsfeld}, the court held that

\begin{itemize}
  \item \textsuperscript{170} The case of \textit{U.S. v. Ramzi Yousef}, (327 F. 3d 56, 2d Cir. 2003) is worth mentioning here, since he was one of the perpetrators of these 1993 attacks and family Khalid Sheikh Mohammed one of the perpetrators of the 9/11 attacks.
  \item \textsuperscript{172} Human Rights Watch 2011, §14.
  \item \textsuperscript{173} According to the Report ‘Habeas Works’, studied in this chapter, a report written by sixteen (former) federal judges in which they express their believe and trust in the ability of federal courts to resolve difficult terrorism cases.
  \item \textsuperscript{174} Rasul v Bush, at 476.
  \item \textsuperscript{175} Section 2(a) Authorization for Use of Military Force Against Terrorists, Public Law 107-40, 115 Stat. 224, enacted 18 September 2001.
\end{itemize}
“as a necessary incident to the AUMF, the president was authorized to detain persons captured while fighting U.S. forces in Afghanistan for the duration of the conflict.”176 Hereafter, the Department of Defense established the CSRTs in order to determine whether or not the detainees held at Guantanamo Bay were ‘enemy combatants’ who could be detained for the duration of the ‘war on terror’.177 On the same day “that Hamdi was decided, the Court issued an opinion in the case of Rasul v. Bush, holding that the federal habeas statute extended statutory habeas jurisdiction with respect to persons held at Guantanamo Bay. Immediately after this decision hundreds of habeas petitions were filled by the detainees.”178

The Congress responded to Rasul by passing the Detainee Treatment Act of 2005 (hereafter: DTA), which again tried to deny the jurisdiction of the federal courts the decided over habeas petitions filed by Guantanamo detainees by amending the habeas statute. In response to this the Court held in Hamdan v. Rumsfeld, however, that the DTA had no application to habeas petitions filed before the effective date of the Act. Again responding to Hamdan, the Congress adopted the MCA of 2006, which removed all the possibilities for the Guantanamo detainees to file a habeas petition in federal courts, regardless of when it was filed and limited detainees to the review process set up by the DTA.179

The Court held, in Boumediene v. Bush, “that the review process created by the DTA was not an adequate substitute for habeas petitions because it failed to provide the detainee with a meaningful opportunity to challenge its detention, which includes the right to challenge the allegations against him and to gather and present evidence in his favour.” Next to this “it also failed to permit meaningful judicial review of ‘both the cause for detention and (of) the Executive’s power to detain’, and did not permit the judiciary to order release.”180 The Court left it to the “expertise and competence of the District Courts to address how habeas hearings were to be conducted”181 and left to the lower courts the task of refining the substantive detention standard.182 This can be seen as is one of the essentials of the judicial function, since the lower courts have not been invented the law, instead, they have been interpreting and applying a standard for detention.183

In the White House Fact Sheet of 7 March 2011 it is stated that “the federal courts are a more appropriate forum for trying particular individuals than trying them before military commissions.”184 President Obama’s Executive Order of this date “recognises the ‘constitutional privilege’ of habeas corpus granted to the Guantanamo detainees, and emphasizes that nothing in the order is meant to affect the jurisdiction of the federal courts to determine the legality of any Guantanamo detainee’s detention.”185 The right to file a petition for habeas corpus can be regarded, according to Amnesty International, as a bedrock guarantee against arbitrary

178 M.J. Garcia 2008, CRS-2
183 Idem, p. 7.
184 Fact Sheet 2011, §12.
185 Section 1(b) Executive Order 2011.
detention. The essence of habeas proceedings has for many years been that government authorities are required to bring an individual before a court and that the government has to demonstrate that there is a legal basis for the detention. Normally, if the government fails to do so promptly the court has to order that individual must be released.\textsuperscript{186} However, according Amnesty, when a court has ruled that a Guantanamo detainee’s detention is unlawful, the release has neither been prompt nor guaranteed. Moreover, according to the Executive Order of 7 March 2011, president Obama can envisage the possibility of continued detention for months or even years after such a ruling.\textsuperscript{187}

Attorney General Eric Holder announced in November 2009 that the cases of the five men accused of plotting the September 11, 2001 attacks on the U.S. “would be transferred from Guantanamo to U.S. federal court in New York.” However, based on public statements made by local officials who claimed high costs to secure the trial, the administration announced that it would reconsider the location for the trial. To date the Obama administration has still not announced where, or even if, the 9/11 accused will be prosecuted.\textsuperscript{188} After more than two years with no decision on a location for the trial, the Congress also imposed funding restrictions, under the National Defense Authorization Act, that even made it more difficult to transfer Guantanamo detainees to federal court.\textsuperscript{189}

5.2 Detention standards

As demonstrated in the thesis, one of the most problematic issues concerning the Guantanamo detainees are the grounds on which they are detained. As shown, the grounds for detention were previously so broad, that thousands of persons could fall into the category of persons that could be detained in the ‘war on terror’. In order to meet this concern the federal courts have developed and clarified the detention standards based on which the detention of the detainees could be determined.

In Hamdi v. Rumsfeld the Court clarified that the “authority to detain for the duration of a relevant conflict is based on longstanding law-of-war principles.”\textsuperscript{190} However, the court, in the same decision, left “the task to develop the substantive detention standard to the lower courts.”\textsuperscript{191} In Boumediene v. Bush the Court again expressed its faith in the lower courts and left them the task of “refining the substantive standard.”\textsuperscript{192} The first federal court case that addressed the substantive detention standard was Boumediene v. Bush. The court adopted the detention standard as was used by the CSRTs:

“An ‘enemy combatant’ is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”\textsuperscript{193}

\textsuperscript{186} Amnesty International 2011, p. 4.
\textsuperscript{187} Idem, p. 4.
\textsuperscript{188} Human Rights Watch 2011, §15.
\textsuperscript{189} Idem, §16.
\textsuperscript{190} Hamdi v. Rumsfeld, at 521.
\textsuperscript{191} Hamdi v. Rumsfeld, at 522.
\textsuperscript{192} Boumediene v. Bush, at 2229, 2276.
After taking office the Obama administration adopted a new, partly overlapping, detention standard, which reads:

“The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harboured those responsible for the attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al Qaeda forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.”

From this definition it can be seen that the Obama administration limited the detention standard since it now required ‘substantial’ support, instead of support, for the Taliban, al Qaeda, or associated forces. This new detention standard was for the first time used by the court in Gherebi v. Obama, which determined:

“The President has the authority to detain persons who were part of, or substantially supported, the Taliban or al Qaeda forces that are entangled in hostilities against the United States or its coalition partners, provided that the terms ‘substantially supported’ and ‘part of’ are interpreted to encompass only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.”

The Court thus needed to interpret the terms, ‘substantially supported’ and ‘part of’ in order to determine whether Gherebi was a ‘member of the enemy organization’s armed forces’ or not. The judge in Gherebi interpreted these notions in the light of the facts of that case but did not determine the precise nature and degree or characteristics of the notions of ‘substantial support’ or ‘associated forces’. Instead, he left the standard to be refined by the courts on a case-by-case basis.

Often detainees have argued that they were not ‘part of’ the Taliban or al Qaeda at the time of their capture. According to the Habeas Corpus Report, examined in this chapter, “there is a strong consensus that detention is lawful if the government can prove that at the time of capture the detainee was part of or substantially supported al Qaeda or the Taliban.” Therefore the judges have ruled “that the government may not lawfully detain a person whose relationship with al Qaeda or the Taliban ended prior to the detainee’s capture.” In Basardh v. Obama the court determined “that the government may lawfully detain only those individuals who remain a security threat to the U.S. even if the individual was ‘part of’ a terrorist organization at the time of capture.”

In Hamlily v. Obama, the scope of the government’s detention authority was further refined. However, instead of focussing on ‘membership’, like in the case of Gherebi, in Hamlily

194 Which can be found in Hamlily v. Obama, 616 F, D.D.C. 2009.
the focus was put on the question whether Hamlily was ‘part of’ a group hostile to the U.S.\textsuperscript{200} Even though the courts thus used two different formulations, in \textit{Hamlily} it was noted that “in application the differences between \textit{Gherebi} and \textit{Hamlily} should not be great.”\textsuperscript{201} Following the Habeas Report, “the standards used in \textit{Hamlily} and \textit{Gherebi} are functionally the same, since both standards require that the government bears the burden of proof in order to provide that a detainee committed a belligerent act or was a member of (or ‘part of’) an enemy organization’s armed forces.” Thus, under both standards, the courts consider circumstantial evidence of membership.\textsuperscript{202}

Based on this it can be concluded that the courts indeed refined and limited the scope of the detention standard, so that the scope of persons who could be detained in the ‘war on terror’ is more limited when tried before federal courts compared to trials before military commissions.

\subsection*{5.3 Rules of Evidence}

As illustrated previously, it is not easy for the detainees to challenge the lawfulness of their detention, since they often do not know the evidence on which the government is relying. Therefore the federal courts have developed rules of evidence, in order to provide the detainees with a meaningful opportunity to challenge their detention.

After the \textit{Boumediene} decision, the federal courts were given an important role regarding Guantanamo cases. Shortly after this decision, the District court judges expressed the need for a draft Case Management Order (hereafter: CMO) to clarify the procedures regarding the Guantanamo detainees. Judge Hogan of the District Court for the District of Columbia was the one who responded to this request and developed the CMO.\textsuperscript{203} He first of all stated that to provide the detainees in these cases with “prompt habeas corpus review while proceed with the caution necessary in this context and not disregarding the dangers detention is these cases was intended to prevent, the Courts enters this CMO to govern the Guantanamo proceedings.”\textsuperscript{204} This CMO was quickly applied by all judges dealing with Guantanamo cases and has promoted the development and application of a uniform framework from which a predictable set of rules derived. However, as can be seen from the wording of the CMO it can be concluded that courts can apply this order with flexibility on a case-by-case basis.

Under Rule 1(a) of the CMO it is stated that, conform \textit{Hamdi}, “holding detainees seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification.” Therefore, the government has to explain its legal justification for detaining the detainee. “If the government’s justification for detention is the detainees’ status as an enemy combatant, the government has to provide the definition of enemy combatant on which it relies.”\textsuperscript{205} It is thus clear that the CMO urges the government to provide the detainees with the evidence on which it relies, so that the detainee will have an opportunity to challenge his detention.

\textsuperscript{200}HRF: Habeas Works 2010, p. 15.
\textsuperscript{201}\textit{Hamlily v. Obama}, 616 F. D.D.C. 2009, at 76.
\textsuperscript{202}HRF: Habeas Works 2010, p. 16.
\textsuperscript{203}Judge T.F. Hogan, \textit{In re Guantanamo Bay Detainee Litigation}, No. 08-mc-0042, Case Management Order, United States District Court for the District of Columbia.
\textsuperscript{204}CMO (Case Management Order), at preface.
\textsuperscript{205}According to Section 1(b) CMO.
The risk that classified information will be wrongfully released to the public was a major concern with regard to the Guantanamo cases. In order to meet this concern and to provide the Guantanamo detainees with the required equality of arms, the “courts have developed a set of rules that seeks to strike a balance between the protection of classified information and ensuring that detainees have enough information to challenge their detention.” These rules can be divided into two categories. On the one hand there are restrictions put on the counsel, while, on the other hand, there are restrictions on the detainee. Regarding the restrictions on the counsel, no counsel is allowed to travel to Guantanamo, meet with a detainee, or receive and review classified material unless he has received a security clearance. However, even after receiving security clearances, the counsel must agree in writing to comply with a strict Protective Order, which, amongst others, prohibits the counsel from disclosing classified information to his client. Regarding the restrictions on the detainee, the CMO orders the government to disclose to the detainee the not processed copies of documents on which it relies or that are exculpatory, while for other documents the government may provide summaries of the documents. As can be concluded from these rules is that under the CMO lawyers do have a better position with regard to access to evidence and to meet with their clients when compared to the procedures used in trials by military commissions.

The CMO entitles detainees to three categories of evidence: 1) exculpatory evidence; 2) discovery; and 3) additional evidence if the detainee can show good cause. With regard to the first category, the CMO provides that “the government shall disclose to the detainee all reasonably available evidence that tends materially to undermine the information presented to support the government’s justification for detaining the detainee.” As to the second category, “if requested by the detainee the government shall disclose to the detainee: 1) any documents or objects in its possession; 2) all statements, in whatever form, made or adopted by the petitioner; and 3) information about the circumstances in which such statements if the petitioner were made or adopted.” And finally, under Rule 1(F) of the CMO, the third category of evidence that may be requested concerns classified information. According to this provision, “the government shall provide the detainee with adequate substitute and provide the detainees counsel with the classified information, provided that the detainees counsel is cleared to access such information under the Protective Order.” Again when these provisions are compared to the rules that govern proceeding before military commissions, it can be said that the detainees do have a better position when tried before federal courts, since the possibilities to examine the evidence based on which they are detained are much broader.

As decided in Boumediene, “if a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court.” Also in Hamdi it was decided that “a detainee seeking to challenge his classification as an enemy combatant must receive (...) a fair

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207 Idem, p. 17.
209 Idem, p. 18.
210 Section 1(D)(1) CMO.
211 Section 1(E)(1) CMO.
opportunity to rebut the government’s factual assertions before a neutral decisionmaker.”  

Therefore, Section 2(a) of the CMO provides that “the government bears the burden of proving by a preponderance of the evidence that the petitioner’s detention is lawful.” This is a big improvement for the position of the detainees, since now the detention is not presumed to be valid, instead the government bears the burden of proof in these cases.

In Hamdi it was acknowledged that “hearsay may need to be accepted as the most reliable available evidence” from the government. Based on the CMO “the judge may admit and consider hearsay evidence that is material and relevant to the legality of the detainees detention.” Judges have, based on the CMO, generally admitted hearsay from detainees as well as from the government. Since having accepted hearsay in principle, the judge’s focus on a case-by-case determination about the weight such evidence should be given. While placing the burden of proof on the party that submits the evidence to establish its probative value. In Bostan v Obama the standard for the admissibility of hearsay evidence was clarified and it was held that the government could not rely on a shortage of resources or its own mistakes as justification for the use of hearsay. When compared to the new rules of military commissions, it can be concluded that the both the courts and the military commissions have thus limited the admissibility of hearsay.

For many years, courts have recognized that evidence produced by torture cannot be used to justify a detainee’s detention. Therefore detainees are permitted to contest a particular statement if it was influenced due to unreliable interrogations methods. In a lot of cases detainees have argued that statements used by the government were given due to the use of torture. Again, the federal courts have developed a standard in order to decide when courts can admit allegedly involuntary statements and how much weight those statements must be given. A case-by-case examination allows the courts to consider all the factors with regard to each allegedly involuntary statement to determine the reliability and accuracy of the statement, while trying to maintain a balance between the interests of the government and the detainee. In this respect the government bears the burden of proof to show that the prior coercion did not influence the later statement.

According to the Habeas Works Report, it is clear that the federal courts are developing a coherent and consistent jurisprudence that attempts to balance the liberty interests of the Guantanamo detainees against the security interests of the U.S. Due to all the efforts to provide the detainee the information based on which he is detained the U.S. courts are gaining towards a more equality of arms, as required by Article 14(1) ICCPR. It is also visible that the way in which the U.S. Court are handling those difficult cases are more transparent and open than the way in which military commissions try to resolve these cases.

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213 Hamdi v. Rumsfeld, at 533.
214 Hamdi v. Rumsfeld, at 533-534.
219 Idem, p. 27.
6. CONCLUSION

This thesis examined the right to a fair trial for the detainees held at the controversial detention facility, Guantanamo Bay. Since this detention centre received a lot of international criticism over the years, the Obama administration decided that it wanted to close Guantanamo Bay. However, to pursue the actual closure of the detention camp the U.S. has to decide what to do with the remaining detainees and therefore a trial is of crucial importance. I have chosen to structure the thesis in such a way as the possibilities given by the Obama administration to close Guantanamo. They pointed to the possibilities to the detainees indefinite in detention, if this will be the outcome of the newly established Periodic Review, to try the detainees before military commissions or to give them a trial in federal courts.

After the 9/11 attacks the U.S. shifted to a belligerency approach in order to combat terrorism. When this approach is chosen legal safeguards for captured persons can be found in international humanitarian law. However, these safeguards are only given to persons who meet the definition of ‘prisoners-of-war’, though, it soon became apparent that the Guantanamo detainees were denied these safeguards. In the second Chapter an overview was provided of who were actually detained at Guantanamo Bay, since the U.S. government has stated that only ‘the worst of the worst’ were to be detained at Guantanamo. One of the conclusions of the examined Report that was the definition, used by the government to determine if someone could be detained, was so overly broad that thousands of persons could be detained. Moreover, the Report revealed that the grounds on which a lot of detainees were held were not always that clear and it thus questions the legality of their detention.

Indefinite detention without a trial was a policy developed after the 9/11 attacks by the Bush administration. However, holding persons in detention is subject to certain conditions, and it is demonstrated that even initially lawful detention can become arbitrary and unlawful if it is not subject to periodic review. The HRC has made it clear that the ICCPR applies both in times of peace and in times of armed conflict and therefore also covers ‘the war on terror’. Deprivation of liberty for security reasons, administrative detention, is another measure of control that may be taken in an armed conflict. However, the practice of administrative detention is often used outside armed conflict situations, which is also the case with the Guantanamo detainees. An important concern in this respect is that there is often no mechanism in place to review the lawfulness of the detention. Also important with respect to the Guantanamo detainees is that administrative detention can in no way be indefinite. The establishment of a periodic review to determine the lawfulness of the detention is left to the discretion of the state parties and therefore the Obama administration currently set up the Periodic Review System.

In March 2011, the Obama administration introduced a Periodic Review System with the aim to determine the legality of the continued detention of the Guantanamo detainees. Even though there are some critics on this new Review Board, it seems to provide the detainees with a few improvements regarding their indefinite detention status. The important feature of the review lays in the fact that even when a person is lawfully detained, the PRBs should refuse to continue the detention if the person does not pose a significant threat to the security and thus gives prisoners another opportunity to defend themselves.

In Chapter 3 the importance of the right to a fair trial, as contained in the ICCPR, its distinct guarantees and the interpretation thereof was discussed. Especially in the context of
Guantanamo Bay, where the purpose of indefinite detention is ‘national security’, a balancing of rights and thus a fair trial must take place. As demonstrated, the right to a fair trial is, amongst others, strongly connected to the prohibition of indefinite detention and the practice of administrative detention and is therefore of crucial importance with regard to Guantanamo detainees. There are minimum fair trial rights that have to be provided to every accused, so even in the so-called ‘war on terror’ states have to abide by these rules. Article 14 ICCPR as such is not listed among the categorically non-derogable rights, however, this does not imply that states facing an emergency can depart from the right to a fair trial in total. Therefore, Chapter 3 examined which aspects of Article 14 can and should be non-derogable.

There are some guarantees of the right to a fair trial from which derogation might be permissible under certain circumstances. It is important to note that any such a limitation, which must be subject to supervision, in any event needs to be in compliance with the principles of necessity, proportionality as well as non-discrimination. Among these guarantees is the right to a public hearing, if this is necessary in the interest of justice while also the right of a detainee to examine or have examined witnesses against him can be subject to limitations. The right to be tried within a reasonable time can also be limited in some instances, but any such delay can in no way be indefinite and may only be as long as the situation strictly requires.

It is demonstrated in the thesis that most fundamental fair trial guarantees cannot be limited. The rights that need to be respected at all times, and thus also with regard to the Guantanamo detainees are the right to habeas corpus, the ne bis in idem principle, the nullum crime sine lege and nulla poena sine lege principles, the presumption of innocence, the right not to be convicted of an offense except on the basis of individual responsibility and also the right to be tried by a competent, independent and impartial tribunal cannot be limited. Even though trials by military courts are not prohibited as such, they are only allowed to try privileged and unprivileged combatants.

Important for victims of human rights violations are the two kinds of complaint procedures that are set up under international human rights treaties. The individual complaint procedure of the ICCPR is however not available for the Guantanamo detainees, since the U.S. did not recognize this individual complaint procedure. The option of the inter-state complaint procedure is also provided for under the ICCPR. States, however, generally prefer to make use of informal diplomatic methods and in fact, none of the inter-state complaint procedures within the framework of the UN treaties has ever been used yet. Based on all of this we can concluded that there are almost no possibilities for the detainees to file complaints about the human rights violations that have taken place within Guantanamo Bay.

In order to facilitate the closing of the Guantanamo Bay the U.S. will, according to the Fact Sheet of 7 March 2011, continue to use military commissions to trial the detainees. Despite of all the critics that these military tribunals received, the administration developed new rules in order to establish ‘fair trials’. President Obama signed on 28 October 2009 a new MCA into law, which can be regarded as the third attempt to create a military commissions system. The previous military commissions systems had both been replaced due to their unfairness and lack of conformity with internationally recognised fair trial standards. Even though the MCA of 2009 includes some improvements compared to its forerunners, it still seems to fail to provide many of the fundamental elements of a fair trial.
The case of David Hicks discussed in Chapter four provides a good overview of the critics that there are concerning the use of military commissions and the right to a fair trial. When compared to the standards for a fair trial, as set forth in Article 14 ICCPR, it is clear that many of the guarantees were absent in the case of David Hicks. Since it is obvious from this case and the critics regarding trials before military commissions, there was a need for a new document that could take away the deficiencies that there are when using trials by military commissions. Therefore on 27 April 2010 the Manual 2010 was released which includes new rules governing the military commissions proceedings. The new Manual seems to contain improvements compared to the previous military commissions rules, however, as demonstrated in Chapter four, it does not compensate all the deficiencies of the previous MCA.

One of the major critics regarding trials by military commissions concerns the use of evidence. The Manual 2010 has addressed this concern in the fact that the provisions concerning the use of evidence have undergone major changes that have enhanced the ability of the detainees to see evidence on which the government is relying. Due to these efforts it seems that the new Manual is more in line with the requirement of equality of arms as provided for in Article 14(1) ICCPR. The Manual also includes in a whole chapter about the composition and personnel of military commissions. Since Article 14(1) ICCPR requires that the status of judges and rules concerning their security be laid down in law, this seems to be an improvement compared to the previous system. The provision about confessions made due to torture are changed as well which are more in line with the corresponding Articles 14(3)(g) and 7 ICCPR. The scope of judicial review is also broadened and therefore more in conformity with the requirement of Article 14(5) ICCPR.

The Manual for 2010 introduces the term ‘unprivileged enemy belligerent’, but when this definition is compared to the previously used ‘unlawful enemy combatant’-definition, it can be said that the new definition is not a real improvement, since the definition is again overly broad. Also, the Manual, like its forerunners, is only limited to aliens, and is thus again discriminatory. Another shortcoming of the Manual is that it is still possible that persons may be punished for acts that were not illegal when they were committed. This runs counter to a fundamental principle of criminal law, namely the principle of nullem crimen, nulla poena sine lege.

Chapter 5 examined the trials of Guantanamo detainees in U.S. federal courts. As demonstrated, the U.S. Courts in previous years successfully prosecuted terrorist suspects. However, there is a difficult task for the courts in order to find the right balance between the detainees’ right to a fair trial and the security risks that there are in resolving these cases. In the White House Fact Sheet of 7 March 2011 it was recognized that U.S. federal courts are indeed a more appropriate forum for trying the Guantanamo detainees. President Obama’s Executive Order of 7 March 2011 also acknowledges that the Guantanamo detainees do have a right to habeas corpus. While the Bush administration constantly tried to deny the right of habeas corpus for the Guantanamo detainees, the Obama administration clearly acknowledges that the Guantanamo detainees do have the right to challenge the lawfulness of their detention. The Supreme Court in Boumediene v. Bush, however, left it to the expertise and competence of the lower courts to refine the detention standards.

One of the most problematic issues concerning the detainees at Guantanamo Bay are the grounds on which they are detained. As shown previously, the grounds for detention were often overly broad. In order to meet this concern the federal courts have developed and clarified
the detention standards based on which the detention of the detainees could be determined. As is shown in this thesis, it is not easy for the detainees to challenge their detention, since they often do not know the evidence that is used by the government against them. Therefore it is important to see that the federal courts have developed rules of evidence, in order to provide the detainees with a possibility to challenge their detention. It became clear in this thesis that the rules of evidence used by military courts use are not always in compliance with international rules. These concerns are also addressed in federal courts cases.

Since the Boumediene decision, the federal courts have moved towards a resolution of the Guantanamo cases. Shortly after this decision a CMO was developed in order to guide the Guantanamo case, which promoted the development and application of a uniform framework from which a predictable set of rules derived. Next to the fact that the CMO entitles the detainees to three categories of evidence, it also makes provision for the use of hearsay as evidence as well as for the use of statements made due to torture. Based on all this efforts it is demonstrated that these rules have enhanced the ability for detainees to make their case and to defend themselves. It can be concluded that the federal courts thus have developed a coherent as well as consistent jurisprudence which aims to balance the rights of the detainees and the security interests of the U.S. Based on all this efforts the U.S. courts are gaining towards a more equality of arms, as required by Article 14(1) ICCPR, between the parties involved in the dispute.

Since the practice of indefinite detention is prohibited under the ICCPR and the trials before military commissions do not meet all the fair trial guarantees, it is can be concluded that in order to facilitate the actual closure of Guantanamo Bay and to comply with the international fair trial standards en human rights, the remaining detainees should be tried in U.S. federal courts.
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