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## Terrorists and Fair Trial: The Right to a Fair Trial for Alleged Terrorists Detained in Guantánamo Bay

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### 1. Introduction

Alleged terrorists are being held by the US in Guantánamo Bay, at the Bagram Airbase in Afghanistan and in other unknown ‘black sites’.<sup>1</sup> There have been trials against 30 persons so far.<sup>2</sup> The first sentence was imposed in 2008.<sup>3</sup> Do these persons enjoy the right to a fair trial? Does this right belong to the general principles of transnational criminal law?

Our hypothesis is that general principles are those rules that cannot be suspended even in extraordinary situations. Thus, if the right to a fair trial even applies to the extraordinary prosecution and trials of alleged terrorists, it must also apply, *a fortiori*, to those of ordinary criminals thereby amounting to a general principle. To test our argument, we focus on alleged terrorists detained at Guantánamo Bay.

In practical terms one may be inclined to say, following Geoffrey Robertson, that a trial can never be fair if the accused is labelled a ‘terrorist’ before it actually starts.<sup>4</sup> Yet, we will demonstrate in this paper that, at least from a normative perspective, this statement is not true. We start with an explanation of the content of the right to a fair trial and its legal sources and will then give some examples of restrictions on this right during Guantánamo Bay proceedings. In our main part, we will then challenge these restrictions using inductive-comparative as well as teleological-deductive approaches. We will also discuss the relevant case law of the US Supreme Court and international courts and compare different human rights regimes and their rationale, especially international human rights law (IHRL) and international humanitarian law (IHL).

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1 F. de Londras, *Detention in the ‘War on Terror’*, 2011, p. 45. Since its opening in January 2002, 779 men have been detained in Guantánamo; as of January 2013, 166 of them are still imprisoned (American Civil Liberties Union, ‘Guantánamo by the Numbers’, <<http://www.aclu.org/national-security/guantanamo-numbers>> [last visited 28 August 2013]). As to the detention conditions in Guantánamo see D. Gartenstein-Ross, ‘The Future of Preventive Detention Under International Law’, in S. Muller et al. (eds.), *The Law of the Future and the Future of Law: Volume II*, 2012, pp. 259-266.

2 Office of Military Commissions, ‘Military Commissions Cases’, <<http://www.mc.mil/CASES/MilitaryCommissions.aspx>> (last visited 28 August 2013).

3 M. Englerth, ‘Quo Vadis Guantanamo? Reflections on the U.S. Supreme Court’s Boumediene Decision’, 2008 *European Journal of Crime, Criminal Law and Criminal Justice* 16, no. 4, p. 407.

4 G. Robertson, ‘Fair Trials for Terrorists?’, in R.A. Wilson (ed.), *Human Rights in the ‘War on Terror’*, 2005, p. 169.

## 2. The right to a fair trial

### 2.1. Sources

The right to a fair trial which is applicable to the detention and the subsequent prosecution of alleged terrorists can be inferred from different sources. First, on the international level, it is guaranteed in the Geneva Conventions (GC), especially in their Common Article 3, in Articles 84-108 Third Geneva Convention (GC III) and Articles 64-78 Fourth Geneva Convention (GC IV). Second, human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights<sup>5</sup> (ACHR) and the American Declaration of the Rights and Duties of Man<sup>6</sup> (ADRDM) or – here *ratione loci* not applicable – the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>7</sup> (ECHR), the Arab Charter on Human Rights<sup>8</sup> (AChHR) and the African Charter on Human and Peoples' Rights<sup>9</sup> (AChHPR) all make provision for fair trial guarantees. Third, the right to a fair trial is granted in national constitutions such as the United States Constitution (in particular the Fifth and Fourteenth Amendment).

### 2.2. Content

The right to a fair trial is an umbrella right encompassing several sub-rights of any person who is subjected to criminal proceedings,<sup>10</sup> such as:

- the right to equality of arms before a court, which has to be competent, independent, impartial and established by law;<sup>11</sup>
- the right to a public hearing and a public pronouncement of the judgment;<sup>12</sup>
- the right to be presumed innocent until guilt is proven according to the law<sup>13</sup> and the right not to be compelled to testify against oneself;<sup>14</sup>
- the right to be informed of the charge and to have adequate time and facilities to prepare one's defence including the right to have access to the proceedings and to the relevant documents supporting the charges, to choose a lawyer (if necessary, free of charge) and to communicate with him confidentially;<sup>15</sup>
- the right to be tried without undue delay within a reasonable time;<sup>16</sup>
- the right to be assisted by an interpreter if necessary;<sup>17</sup>
- the right to have a convicting judgment reviewed by a higher court<sup>18</sup> and to demand compensation for miscarriages of justice;<sup>19</sup>
- the right not to be tried twice for the same offence and the prohibition of retrospective legislation.<sup>20</sup>

Closely related is the right to protection against arbitrary imprisonment and to challenge the lawfulness of one's detention as well as the right to be brought promptly before a judge.<sup>21</sup>

5 For the text see <<http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>> (last visited 28 August 2013).

6 For the text see <<http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm>> (last visited 28 August 2013).

7 For the text see <<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>> (last visited 28 August 2013).

8 For the text see <<http://www1.umn.edu/humanrts/instree/arabcharter.html>> (last visited 28 August 2013).

9 For the text see <<http://www1.umn.edu/humanrts/instree/z1afchar.htm>> (last visited 28 August 2013).

10 Cf. HRC, General Comment No. 32 (23 August 2007), UN Doc. CCPR/C/GC/32. There is a vast amount of literature on the meaning of the fair trial principle, see for example R. Smith, *Textbook on International Human Rights*, 2012, pp. 265-282; W. Kälin & J. Künzli, *The Law of International Human Rights Protection*, 2009, pp. 440-465; L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, 2011, pp. 251-372; J.H. Israel & W.R. LaFave, *Criminal procedure: constitutional limitations in a nutshell*, 2006, pp. 457-513; very detailed E. Hoven, *Rechtsstaatliche Anforderungen an völkerstrafrechtliche Verfahren*, 2012, pp. 184-504.

11 Cf. Art. 14(1) ICCPR, Art. 8(1) ACHR, Art. 6(1) ECHR, Art. XXVI ADRDM, 6<sup>th</sup> Amendm. US Constitution, Art. 84(2) GC III, Common Art. 3(1)(d) GC.

12 Cf. Art. 14(1) ICCPR, Art. 8(5) ACHR, Art. 6(1) ECHR.

13 Cf. Art. 14(2) ICCPR, Art. 8(2) ACHR, Art. 7(1)(b) AChHPR, Art. 16 AChHR, Art. 6(2) ECHR, Art. XXVI ADRDM.

14 Cf. Art. 14(3)(g) ICCPR, Art. 8(2)(g) ACHR, Art. 16(6) AChHR, 5<sup>th</sup> Amendm. US Constitution, Art. 99(2) GC III.

15 Cf. Art. 14(3)(a), (b), (d), (e) ICCPR, Art. 7(4) and 8(2)(c)-(e) ACHR, Art. 16(1), (3), (4) and Art. 13(2) AChHR, Art. 6(3)(a)-(c) ECHR, 17(1)(c) AChHPR, 6<sup>th</sup> Amendm. US Constitution, Art. 99(3), 105 GC III, Art. 71, 72 GC IV.

16 Cf. Art. 14(3)(c) ICCPR, Art. 8(1) ACHR, Art. 7(1)(c) AChHPR, Art. 6(1) ECHR, 6<sup>th</sup> Amendm. US Constitution.

17 Cf. Art. 14(3)(f) ICCPR, Art. 8(1)(a) ACHR, Art. 16(4) AChHR, Art. 6(3)(e) ECHR, Art. 105(1) GC III.

18 Cf. Art. 14(5) ICCPR, Art. 8(2)(h) ACHR, Art. 16(7) AChHR, Art. 7 Prot. 7 ECHR, Art. 106 GC III, Art. 73 GC IV.

19 Cf. Art. 14(6) ICCPR, Art. 10 ACHR, Art. 19(2) AChHR, Art. 3 Prot 7 ECHR.

20 Cf. Art. 14(7) ICCPR, Art. 8(4) ACHR, Art. 19(1) AChHR, Art. 4 Prot. 7 ECHR, Art. XXVI ADRDM, 5<sup>th</sup> Amendm. US Constitution, Art. 67 GC IV.

21 Cf. Art. 9 ICCPR, Art. 7 ACHR, Art. 14 AChHR, Art. 6 AChHPR, Art. 5 ECHR.

### 3. Restrictions on a fair trial during trials against alleged terrorists

#### 3.1. Military commissions

In contrast to the trials of other persons detained during an armed conflict, the Guantánamo detainees are not tried before courts-martial following the procedure of the Uniform Code of Military Justice (UCMJ) but before military commissions.<sup>22</sup> These military commissions consist of one military judge<sup>23</sup> and at least five military officers.<sup>24</sup> They can be traced back to a military order of President Roosevelt issued during World War II.<sup>25</sup> Their most recent legal basis is the Military Commissions Act (MCA) 2009, enacted under the Obama Administration and replacing the previous MCA 2006. The MCA 2006 itself was amended several times due to a series of critical decisions by the Supreme Court.<sup>26</sup> These laws, however, represent only one aspect of the legal bases regulating the detainees' status.

#### 3.2. Fair trial restrictions

In any case, the venue of the trial – military commissions, courts-martial or civilian US courts – is not the crucial issue; rather it is its potentially negative consequences for fair trial rights.<sup>27</sup> While historically the main difference between courts-martial and military commissions consisted of the latter's exclusive jurisdiction over enemy aliens,<sup>28</sup> today trials before military commissions entail serious rights restrictions.<sup>29</sup> Thus, the Guantánamo detainees have only a restricted right to *representation by counsel* since a civilian (non-military) defence counsel is only allowed if he reaches the classified information level 'Secret' or higher.<sup>30</sup> The detention of the majority of the detainees has never been subjected to a substantive *review*.<sup>31</sup> The commission can change the rules on the *admission of evidence* as applied before general courts-martial. For instance, there is no exclusion of either evidence seized outside the US 'on the grounds that the evidence was not seized pursuant to a search warrant or authorization'<sup>32</sup> or of statements by the accused that are otherwise admissible 'on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r [the exclusion of torture evidence, self-incrimination, involuntary statements] of this title'.<sup>33</sup> Hearsay evidence is also admitted.<sup>34</sup> There is a rebuttable presumption in favour of the genuineness and accuracy of the

22 For an overview cf. H.W. Elliott, 'Military Commissions: An Overview', in D.K. Linnan (ed.), *Enemy Combatants, Terrorism, and Armed Conflict Law*, 2008, pp. 124-126.

23 MCA 2009, §948j(a).

24 MCA 2009, §948m(a)(1).

25 F.D. Roosevelt, 'Order Establishing a Military Commission to Try Eight Captured German Saboteurs', G. Peters & J.T. Woolley, *The American Presidency Project*, <<http://www.presidency.ucsb.edu/ws/index.php?pid=16280>> (last visited 28 August 2013); cf. K. Kögler, *Rechtlos in Guantanamo?*, 2007, p. 16. See for the history of military commissions J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, pp. 226-234.

26 *Rasul v Bush*, 542 US 466 (2004), *Hamdi v Rumsfeld*, 542 US 507 (2004), *Hamdan v Rumsfeld*, 548 US 557 (2006). On the influence of these decisions on the law and for their chronology see L.A. Malone, 'The Legal Dilemma of Guantánamo Detainees from Bush to Obama', 2012 *Criminal Law Forum* 23, no. 4, pp. 347-362.

27 M.C. Bassiouni, *The Institutionalization of Torture by the Bush Administration*, 2010, pp. 257-258.

28 *Hamdan v Rumsfeld*, 548 US 557 (2006), p. 53. On the jurisdiction of the former military tribunals / military commissions see F.D. Roosevelt, 'Proclamation 2561 – Denying Certain Enemies Access to the Courts', G. Peters & J.T. Woolley, *The American Presidency Project*, <<http://www.presidency.ucsb.edu/ws/?pid=16281>> (last visited 28 August 2013): 'all persons who are subjects, citizens, or residents of any Nation at war with the United States or who give obedience to or act under the direction of any such Nation and who during time of war enter or attempt to enter the United States or any territory or possession thereof, (...), and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law or war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions'.

29 For a criminological analysis of the detainees' treatment at Guantanamo see H.E. Müller, 'Staatsführungen als Tätergemeinschaften am Beispiel der Gefangenenmisshandlungen und Folter in Guantanamo und Abu Ghraib', in H.E. Müller et al., *Festschrift für Ulrich Eisenberg zum 70. Geburtstag*, 2009, pp. 83-117.

30 MCA 2009, § 949c(b)(3)(D); cf. also the former Military Commissions Order (MCO) No. 1 2005, §§ 4(C)(2)-(3).

31 M.C. Bassiouni, *The Institutionalization of Torture by the Bush Administration*, 2010, p. 273 quoting L.B. Wilkerson.

32 MCA 2009, § 949a(b)(3)(A).

33 MCA 2009, § 949a(b)(3)(B); concerning the interrogation methods used see M.C. Bassiouni, *The Institutionalization of Torture by the Bush Administration*, 2010, pp. 51-76 with some case studies.

34 MCA 2009, § 949a(b)(3)(D); cf. J.K. Elsea, 'The Military Commissions Act of 2009: Overview and Legal Issues', *CRS Report for Congress*, 6 April 2010 <<http://www.fas.org/sgp/crs/natsec/R41163.pdf>> (last visited 28 August 2013), p. 27.

Government's evidence.<sup>35</sup> Moreover, *disclosure* rules are restricted: for example, classified information can be excluded from disclosure.<sup>36</sup> Admittedly, however, the same rules apply in civilian federal courts.<sup>37</sup>

The military judge may *exclude the accused* from any part of the proceeding upon a determination that, following a warning from the military judge, the accused persists in conduct that justifies exclusion from the courtroom in order to ensure the physical safety of individuals, or to prevent any disruption of the proceedings by the accused.<sup>38</sup>

There are also doubts concerning the impartiality, independence and competence of the commission members since they are appointed by the Secretary of Defense (or another official designated by him for this purpose) and often lack judicial experience.<sup>39</sup>

Although a good portion of the fair trial restrictions have been remedied in light of the Supreme Court's case law,<sup>40</sup> these remaining restrictions are still significant.<sup>41</sup>

#### 4. Approaches to 'justify' these restrictions

As we have seen above (Section 2) fair trial rights are granted in both armed conflict by IHL and in peacetime by IHRL. In both situations the question arises whether – and if so to what extent – fair trial rights may be restricted. In any case, given that the GC are only applicable in armed conflict,<sup>42</sup> first the legal nature of the 'war on terror' has to be determined. Then one can examine whether the applicable legal regime allows for fair trial restrictions.

##### 4.1. Is the 'war on terror' an (international) armed conflict?

An armed conflict involves armed hostilities between different (non-)state actors.<sup>43</sup> In case of a non-international armed conflict a certain intensity and duration are required.<sup>44</sup> As to the so-called 'war

35 Cf. Deputy Secretary of Defense, 'Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba', *Department of Defense*, 14 July 2006 <<http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf>> (last visited 28 August 2013), p. 6; J.K. Elsea, 'The Military Commissions Act of 2009: Overview and Legal Issues', *CRS Report for Congress*, 6 April 2010 <<http://www.fas.org/sgp/crs/natsec/R41163.pdf>> (last visited 28 August 2013), p. 24.

36 MCA 2009, § 949p-1 et seq.

37 D. Eviatar, 'Obama Legacy: A Parallel Justice System?', *The Washington Independent*, 29 October 2009, <<http://washingtonindependent.com/65579/parallel-justice-system-could-become-obama-legacy>> (last visited 28 August 2013).

38 MCA 2009, § 949d(d); cf. the former rule MCO No. 1 2005, § 6(B)(3) and MCO No. 1 2005, § 5(K).

39 MCA 2009, §§ 948h, 948i(b); Al, 'Guantánamo schließen, die Wahrheit offenlegen', January 2007, <<http://www.konfliktbearbeitung.net/downloads/file705.pdf>> (last visited 28 August 2013), p. 2; J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, p. 215; G. Robertson, 'Fair Trials for Terrorists?', in R.A. Wilson (ed.), *Human Rights in the 'War on Terror'*, 2005, pp. 174-175 (giving the example that some jurors had been in charge of bringing the detainees from Afghanistan to Guantánamo or were senior intelligence officers in Afghanistan); cf. also the former law: Military Commission Instruction No. 3 3.A. (all Military Commission Instructions are available at <<http://biotech.law.lsu.edu/blaw/dodd/corres/mco.htm>> [last visited 28 August 2013]).

40 In a previous regulation all evidence that 'would have probative value to a reasonable person' was admissible including 'testimonial hearsay and evidence obtained through coercion'; live testimony and witnesses' written statements did not need to be sworn. (MCO No. 1 2005, § 6(D)(1), *Hamdan v Rumsfeld*, 548 US 557 (2006), p. 51). Furthermore, the accused's and civilian counsel's access to evidence labelled as 'protected information' (e.g. classified information, 'information protected by law or rule from unauthorized disclosure' and 'information concerning other national security interests') was denied as long as the military commission's presiding officer had concluded that the evidence has 'probative value' and that its admission without the accused's knowledge would not lead to the 'denial of a full and fair trial' (*Hamdan v Rumsfeld*, 548 US 557 (2006), p. 51; MCO No. 1 2005, §§ 6(B)(3), 6(D)(1), 6(D)(5)(a)(v), 6(D)(5)(b)). What is more, the 'sentence should (...) be grounded on a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief (...) and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general' (Military Commission Instruction No. 7 3.A., see note 39, supra). Such importance for national security considerations is usually unknown to ordinary US criminal procedure; it has also been criticized that it may affect the judge's impartiality (J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, p. 217).

41 Cf. J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, pp. 219, 223, 386; G. Robertson, 'Fair Trials for Terrorists?', in R.A. Wilson (ed.), *Human Rights in the 'War on Terror'*, 2005, p. 169, cf. also the latest changes by the 2012 National Defense Authorization Act <<http://www.gpo.gov/fdsys/pkg/BILLS-112s1867es/pdf/BILLS-112s1867es.pdf>> (last visited 28 August 2013); cf. also C. McGreal, 'Military given go-ahead to detain US terrorist suspects without trial', *The Guardian*, 15 December 2011, <<http://www.guardian.co.uk/world/2011/dec/15/americans-face-guantanamo-detention-obama>> (last visited 28 August 2013).

42 Common Art. 2 GC; M.N. Shaw, *International Law*, 2008, pp. 1170-1171.

43 E. Crawford, 'Armed Conflict, International', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, 2012, Para. 1; see also K. Ambos, *Internationales Strafrecht*, 2011, § 7 marginal note 236.

44 *Prosecutor v Tadić*, Opinion and Judgment, Case No. IT-94-1-T, T.Ch., 7 May 1997, Para. 562; Th. Marauhn & Z.F. Ntoubandi, 'Armed Conflict, Non-International', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, 2012, Para. 3; K. Schöberl, 'Konfliktpartei und Krisengebiet in bewaffneten Auseinandersetzungen – zur Debatte um den Anwendungsbereich des Rechts internationaler und nicht-internationaler bewaffneter Konflikt', 2012 *Journal of International Law of Peace and Armed Conflict*, no. 3, p. 136; H. McCoubrey,

on terror' the official US position is that it is fighting in a global armed conflict against al Qaeda.<sup>45</sup> As has been shown elsewhere<sup>46</sup> this is not a convincing assumption given that al Qaeda does not fulfil the requirements of an 'organised armed group' within the meaning of IHL and that the US is not at war with the states which allegedly host al Qaeda members. In any case, it is beyond dispute that the US, shortly after 11 September 2001, had been in an international armed conflict with Afghanistan which was, at that time, still governed by the Taliban.<sup>47</sup> This armed conflict was, however, not initiated by the attacks of 11 September 2001 since the al Qaeda pilots acted as individual (terrorist) perpetrators.<sup>48</sup> Instead, the Afghan conflict can be divided into three phases:<sup>49</sup>

- With the US intervention in October 2001, the ongoing non-international conflict between the Taliban and dissident Afghan forces was turned into an international conflict with the US-led coalition fighting against the de facto Government of Afghanistan.<sup>50</sup>
- After the fall of the Taliban, the armed conflict turned into a non-international one.<sup>51</sup>
- This characterisation did not change with the support of the Karzai Government against the Taliban by the US-led ISAF mission in its fight against the Taliban since they acted on behalf of the Afghan Government.<sup>52</sup>

## 4.2. Applicable law

### 4.2.1. IHL in general

For persons detained during, or in relation to, the armed conflict against the Taliban and/or in Afghanistan IHL is applicable:<sup>53</sup> specifically, the GC and their Additional Protocols (AP), although only the former

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*International Humanitarian Law*, 1998, p. 254; G.D. Solis, *The Law of Armed Conflict*, 2010, p. 153; A. Bianchi & Y. Naqvi, *International Humanitarian Law and Terrorism*, 2011, p. 132; see also K. Ambos, *Internationales Strafrecht*, 2011, § 7 marginal note 235.

45 Cf. recently E. Holder, 'Speech at Northwestern University School of Law', *US Department of Justice*, 5 March 2012, <<http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>> (last visited 28 August 2013): 'We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks – fortunately, unsuccessful – against us from countries other than Afghanistan.'

46 K. Ambos & J. Alkatout, 'Has "Justice Been Done"? The Legality of Bin Laden's Killing Under International Law', 2012 *Israel Law Review* 45, no. 2, pp. 346-347 (on an armed conflict), 347-350 (Al Qaeda as an organised armed group?), 350-353 (on a possible spillover effect) with further references and a discussion of those views who share the official US position of a 'war' against al Qaeda.

47 Y. Arai-Takahashi, 'Disentangling legal quagmires: the legal characterisation of the armed conflicts in Afghanistan since 6/7 October 2001 and the question of prisoner of war status', 2002 *Yearbook of International Humanitarian Law* 5, p. 64; G.H. Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants', 2002 *American Journal of International Law* 96, no. 4, p. 893; J. Toman, 'The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions', 2002 *Israel Yearbook on Human Rights* 32, p. 272. For a chronology see M.C. Bassiouni, *The Institutionalization of Torture by the Bush Administration*, 2010, pp. xxxiii-l.

48 J. Toman, 'The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions', 2002 *Israel Yearbook on Human Rights* 32, p. 273; J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, pp. 139, 365; J. Fitzpatrick, 'Jurisdiction of military commissions and the ambiguous war on terrorism', 2002 *American Journal of International Law* 96, no. 2, p. 348; R. Wolfrum & C.E. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', 2002 *Max Planck Yearbook of United Nations Law* 6, p. 588; cf. A. Walen & I. Venzke, 'Unconstitutional Detention of Nonresident Aliens: Revisiting the Supreme Court's Treatment of the Law of War in Hamdi v. Rumsfeld', 2007 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67, p. 853.

49 J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, pp. 364-366; Y. Arai-Takahashi, 'Disentangling legal quagmires: the legal characterisation of the armed conflicts in Afghanistan since 6/7 October 2001 and the question of prisoner of war status', 2002 *Yearbook of International Humanitarian Law* 5, p. 64 subdivides into five different stages but does not come to a different conclusion.

50 J. Elsea, 'Treatment of "Battlefield Detainees" in the War on Terrorism', *CRS Report for Congress*, 15 November 2005, <<http://fpc.state.gov/documents/organization/58279.pdf>> (last visited 28 August 2013), p. 14; J. Toman, 'The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions', 2002 *Israel Yearbook on Human Rights* 32, p. 272; J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, p. 364-366; K. Schöberl, 'Konfliktpartei und Krisengebiet in bewaffneten Auseinandersetzungen – zur Debatte um den Anwendungsbereich des Rechts internationaler und nicht-internationaler bewaffneter Konflikt', 2012 *Journal of International Law of Peace and Armed Conflict*, no. 3, p. 131, underlining, however, that the definition of a de facto government is so far unclear; see also K. Ambos, *Internationales Strafrecht*, 2011, § 7 marginal note 241.

51 J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, p. 366.

52 M. Milanovic, 'What Exactly Internationalizes an Internal Armed Conflict?', *EJIL:Talk!*, 7 May 2010, <<http://www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/>> (last visited 28 August 2013); K. Schöberl, 'Konfliktpartei und Krisengebiet in bewaffneten Auseinandersetzungen – zur Debatte um den Anwendungsbereich des Rechts internationaler und nicht-internationaler bewaffneter Konflikt', 2012 *Journal of International Law of Peace and Armed Conflict*, no. 3, p. 135; G.D. Solis, *The Law of Armed Conflict*, 2010, p. 154; cf. M.N. Schmitt et al., *International Institute of Humanitarian Law, The Manual on the Law of Non-International Armed Conflict*, <<http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf>> (last visited 28 August 2013), p. 2: 'Non-international armed conflicts are armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government.' (emphasis added); see also K. Ambos, 'Afghanistan-Einsatz der Bundeswehr und Völker( straf) recht', 2010 *Neue Juristische Wochenschrift*, no. 24, p. 1726.

53 J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, p. 139. Concerning the territorial

have been ratified by both the US and Afghanistan<sup>54</sup> and only they are considered, beyond controversy, as customary international law.<sup>55</sup> However, the GC, in particular GC III and IV, only apply, except their Common Article 3, to an international armed conflict, i.e., in this particular case until the fall of the Taliban. Afterwards, only Common Article 3 GC I-IV applies guaranteeing at least some minimal judicial guarantees.

#### 4.2.2. 'Prisoner of war' status for alleged terrorists (GC III) or protection as civilians (GC IV)?

Article 4A GC III grants rights – as prisoners of war – to the following persons:

- '[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces';
- under certain conditions '[m]embers of other militias and members of other volunteer corps, (...) belonging to a Party to the conflict';
- '[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power';
- '[p]ersons who accompany the armed forces without actually being members thereof, (...) provided that they have received authorization, from the armed forces which they accompany, (...)'; as well as
- '[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war'.

Do the Guantánamo detainees belong to one of these categories? In order to answer this question it is helpful to distinguish between al Qaeda and *Taliban*<sup>56</sup> detainees. As to the latter the Bush Administration originally took the position that they were not entitled to a prisoner of war status pursuant to GC III, since Afghanistan was a failed state and the Taliban could not be seen as a government but rather as a 'militant, terrorist-like group'.<sup>57</sup> From Article 4A(3) GC III and Article 43(1) AP I ('not recognized') it follows, however, that the prisoner of war status does not depend on the recognition of the adverse party but on the reasonable interpretation of these regulations.<sup>58</sup> If one considers the Taliban as the armed forces of the then de facto Afghan Government,<sup>59</sup> they clearly fall under Article 4A GC III, either as 'members of the armed forces of a Party to the conflict' (Paragraph 1) or 'members of regular armed forces (...) not recognized by the Detaining Power' (Paragraph 3), or under the more comprehensive provision of Article 43(1) AP I (albeit not ratified by the US).<sup>60</sup> The prisoner of war status is granted irrespective of

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application of IHL in international and non-international armed conflicts see in detail K. Schöberl, 'Konfliktpartei und Krisengebiet in bewaffneten Auseinandersetzungen – zur Debatte um den Anwendungsbereich des Rechts internationaler und nicht-internationaler bewaffneter Konflikte', 2012 *Journal of International Law of Peace and Armed Conflict*, no. 3, pp. 132-138.

54 <<http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>> (last visited 28 August 2013). The Obama Administration stresses that their military practice already complies with AP II and Art. 75 AP I anyway (The White House, 'Fact Sheet: New Actions on Guantanamo and Detainee Policy', 7 March 2011 <[http://www.whitehouse.gov/sites/default/files/Fact\\_Sheet\\_-\\_Guantanamo\\_and\\_Detainee\\_Policy.pdf](http://www.whitehouse.gov/sites/default/files/Fact_Sheet_-_Guantanamo_and_Detainee_Policy.pdf)> [last visited 28 August 2013], p. 3; cf. C.J. Dunlap, 'Do We Need New Regulations in International Humanitarian Law? One American's perspective', 2012 *Journal of International Law of Peace and Armed Conflict*, no. 3, pp. 123, 124-125).

55 G.C. Kamens, 'International Legal Limits on the Government's Power to Detain "Enemy Combatants"', in D.K. Linnan (ed.), *Enemy Combatants, Terrorism, and Armed Conflict Law*, 2008, p. 108; *Hamdan v Rumsfeld*, 548 US 557 (2006), pp. 64-65.

56 The word Taliban comes from '*talib*' meaning 'one who is seeking something for himself' and refers to students studying in religious institutions (K. Matinuddin, *The Taliban phenomenon*, 2001, p. 12). The Taliban rose from villages in Qandahar and refugee camps in Pakistan in 1994 (N. Nojumi, *The rise of the Taliban in Afghanistan*, 2002, p. xi). After the withdrawal of the Soviets, they seized several Afghan cities, including Kabul, in September 1996, gaining control over 80-90 % of the country (ibid.; C.E. Philipp, 'Taliban', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, 2012, Para. 3) and winning the struggle for supremacy in Afghanistan.

57 A.R. Gonzales, 'Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban', *US Department of Justice*, 25 January 2002, <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>> (last visited 28 August 2013), p. 1.

58 Cf. International Committee of the Red Cross [ICRC], *Commentary III Geneva Convention*, 1960, pp. 61-65.

59 J. Toman, 'The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions', 2002 *Israel Yearbook on Human Rights* 32, p. 284; R. Otto, *Targeted Killings and International Law*, 2012, pp. 223-224; Y. Arai-Takahashi, 'Disentangling legal quagmires: the legal characterisation of the armed conflicts in Afghanistan since 6/7 October 2001 and the question of prisoner of war status', 2002 *Yearbook of International Humanitarian Law* 5, pp. 95-97; J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, p. 315; C.E. Philipp, 'Taliban', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, 2012, Paras. 9-11.

60 R. Otto, *Targeted Killings and International Law*, 2012, pp. 22-26; L. Azubuike, 'Status of Taliban and al Qaeda Soldiers: Another Viewpoint', 2003-2004 *Connecticut Journal of International Law* 19, p. 147 (both applying Para. 1 of Article 4A GC III); R. Wolfrum & C.E. Philipp,

nationality.<sup>61</sup> In fact, the Bush Administration changed its original position and recognized the Taliban's prisoner of war status at the beginning of 2002.<sup>62</sup>

As far as *al Qaeda* is concerned, one should first recall that it is an internationally organized terror organisation<sup>63</sup> which was founded in the late 1980s; its name meaning 'the base'.<sup>64</sup> It developed out of the 'mujahedeen' movement against the Soviets in Afghanistan<sup>65</sup> and its members became travelling warriors in conflicts involving Muslim combatants such as Somalia or Bosnia.<sup>66</sup> They also supported the Taliban's rise to power in the mid-1990s.<sup>67</sup> Their members are connected via a transnational network, which allows transnational communication, information exchange or money transfers.<sup>68</sup> After US interventions during the Gulf War in 1990 and Somalia in 1992, they attacked several American institutions such as the World Trade Center in 1993, US embassies in East Africa and the USS Cole in a port in Yemen, the attacks of September 11, 2001 being a kind of peak in this escalation of violence.<sup>69</sup>

Against this background it is clear that *al Qaeda* as such cannot be party to the GC since it is not a state ('High Contracting Party').<sup>70</sup> Yet, this does not necessarily mean that its members are not entitled to a prisoner of war status pursuant to GC III<sup>71</sup> since this status is, as we have seen above, not only granted to the members of state armed forces but also to non-state actors (cf. Article 4A GC III). A non-state actor could belong to a party to the conflict for the purpose of GC III if there exists at least a factual link between it and the respective conflict party.<sup>72</sup> However, as regards our case, neither a sufficient link between *al Qaeda* and the Taliban – despite some interdependencies<sup>73</sup> – could be identified,<sup>74</sup> nor did al

'The Status of the Taliban: Their Obligations and Rights under International Law', 2002 *Max Planck Yearbook of United Nations Law* 6, pp. 598-599; J. Toman, 'The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions', 2002 *Israel Yearbook on Human Rights* 32, pp. 285-286 (both applying Para. 3); dissenting Y. Dinstein, 'Unlawful Combatancy', 2002 *Israel Yearbook on Human Rights* 32, p. 267 applying the requirements of Para. 2 to Para. 3 and arguing that the Taliban do not fulfil the requirements of (a) to (d) since they do not wear any uniform at all; cf. also J. Callen, 'Unlawful Combatants and the Geneva Conventions', 2004 *Virginia Journal of International Law* 44, p. 1027. Contra R. Wolfrum & C.E. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', 2002 *Max Planck Yearbook of United Nations Law* 6, p. 599 (stressing that the Taliban were 'distinguishable from the civilian population because they wore black turbans and had scarves indicating to which force they belonged').

61 Art. 16 GC III: 'Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.' (emphasis added).

62 K.E. Dahlstrom, 'The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay', 2003 *Berkeley Journal of International Law* 21, no. 3, p. 662; B. Kemper & N. Bendavid, 'U.S. grants POW status to Taliban, not Al Qaeda', *Chicago Tribune*, 8 February 2002, <[http://articles.chicagotribune.com/2002-02-08/news/0202080309\\_1\\_geneva-convention-human-rights-al-qaeda](http://articles.chicagotribune.com/2002-02-08/news/0202080309_1_geneva-convention-human-rights-al-qaeda)> (last visited 28 August 2013).

63 B. Riedel, *The Search for Al Qaeda*, 2008, p. ix.

64 P. Migaux, 'Al Qaeda', in G. Chaliand & A. Blin (eds.), *The history of terrorism*, 2007, p. 314.

65 P. Margulies, *Al Qaeda*, 2003, p. 10; U. Schneckener, 'Netzwerke des Terrors', *SWP-Studie*, <[http://www.swp-berlin.org/fileadmin/contents/products/studien/S42\\_02\\_gesch\\_tzt.pdf](http://www.swp-berlin.org/fileadmin/contents/products/studien/S42_02_gesch_tzt.pdf)> (last visited 28 August 2013), p. 20.

66 P. Margulies, *Al Qaeda*, 2003, p. 15.

67 U. Schneckener, 'Netzwerke des Terrors', *SWP-Studie*, <[http://www.swp-berlin.org/fileadmin/contents/products/studien/S42\\_02\\_gesch\\_tzt.pdf](http://www.swp-berlin.org/fileadmin/contents/products/studien/S42_02_gesch_tzt.pdf)> (last visited 28 August 2013), p. 20.

68 U. Schneckener, 'Netzwerke des Terrors', *SWP-Studie*, <[http://www.swp-berlin.org/fileadmin/contents/products/studien/S42\\_02\\_gesch\\_tzt.pdf](http://www.swp-berlin.org/fileadmin/contents/products/studien/S42_02_gesch_tzt.pdf)> (last visited 28 August 2013), p. 25.

69 P. Margulies, *Al Qaeda*, 2003, pp. 16-19.

70 See previously K. Ambos & J. Alkatout, 'Has "Justice Been Done"? The Legality of Bin Laden's Killing Under International Law', 2012 *Israel Law Review* 45, no. 2, p. 347.

71 In this sense however J. Yoo & R.J. Delahunty, 'Memorandum: Application of Treaties and Laws to al Qaeda and Taliban Detainees', *US Department of Justice*, 9 January 2002, <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>> (last visited 28 August 2013), p. 1; G.W. Bush, 'Status of Detainees at Guantanamo', *The White House*, <[http://www.aclu.org/files/assets/2002\\_02\\_07\\_Factsheet\\_Status\\_of\\_Detainees\\_at\\_Guantanamo\\_0.pdf](http://www.aclu.org/files/assets/2002_02_07_Factsheet_Status_of_Detainees_at_Guantanamo_0.pdf)> (last visited 28 August 2013); R.A. Porrata-Doria, 'The Geneva Conventions and Their Applicability to the "War on Terror"', 2004-2005 *Temple Political & Civil Rights Law Review* 14, pp. 607-608.

72 International Committee of the Red Cross [ICRC], *Commentary III Geneva Convention*, 1960, p. 57: "'de facto" relationship'.

73 U. Schneckener, 'Netzwerke des Terrors', *SWP-Studie*, <[http://www.swp-berlin.org/fileadmin/contents/products/studien/S42\\_02\\_gesch\\_tzt.pdf](http://www.swp-berlin.org/fileadmin/contents/products/studien/S42_02_gesch_tzt.pdf)> (last visited 28 August 2013), p. 35.

74 J. Toman, 'The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions', 2002 *Israel Yearbook on Human Rights* 32, p. 292; G.H. Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants', 2002 *American Journal of International Law* 96, no. 4, p. 893, p. 893 with footnote 11; M. Sassòli, 'Guantánamo, Detainees', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, 2012, Para. 14; dissenting Y. Dinstein, 'Unlawful Combatancy', 2002 *Israel Yearbook on Human Rights* 32, p. 268; L. Azubuike, 'Status of Taliban and al Qaeda Soldiers: Another Viewpoint', 2003-2004 *Connecticut Journal of International Law* 19, pp. 153-154.

Qaeda fight on behalf of and subject to the command of the Afghan state or its armed forces wearing a distinctive emblem to that effect.<sup>75</sup> Thus, GC III is, as a rule, not applicable to al Qaeda members.<sup>76</sup>

This does not mean, however, that al Qaeda members or any other person belonging to non-state actors who do not enjoy prisoner of war status are lacking any protection under IHL. Rather, the question arises whether they are to be considered *civilians* and as such protected by GC IV. To start with, Article 4(1) GC IV determines that '[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'. The ICRC Commentary seems to put the term 'in the hands of' on an equal footing with 'in the territory of'.<sup>77</sup> It is for this reason that some authors claim that the persons have to be 'be captured either in occupied territory or in the home territory of [a] belligerent country'.<sup>78</sup> This restriction, however, has no basis in the text of GC IV. The term 'in the hands of' suggests a de facto rather than a legal status. It cannot make any difference if an alien civilian is captured on the detaining party's territory or on the one of the adversary. In particular, in times of conflict, the territorial control can vary and thus a territorial link cannot be decisive.

Article 4(3) GC IV excludes persons protected by GC III from the protection by GC IV. As the paragraph only excludes those persons from the protection of one instrument (GC IV), if they are protected by another (GC III), it implies that there is no gap in protection between GC III and IV.<sup>79</sup> This is confirmed by an inversion of the argument following from Article 5 GC IV. The fact that this provision restricts the rights of individuals engaged in hostile acts against the territorial or occupying power (Paragraphs 1 and 2) implies, in turn, that even these 'hostile' persons are, in principle, protected by the Convention. Indeed, Article 5 GC IV speaks of 'an individual protected person'. In any case, even if this restriction applied to al Qaeda members, their fair trial rights would remain unaffected as explicitly stated by Article 5(3) GC IV ('(...) shall not be deprived of the rights of fair and regular trial prescribed by the present Convention.').

Yet, while nationality is irrelevant for the application of GC III,<sup>80</sup> Article 4(2) GC IV provides for a so-called nationality exception. Accordingly, it excludes from protection, inter alia, civilians who are '[n]ationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, (...) while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.' This nationality exception applies to most Guantánamo detainees since they are nationals of 'neutral states' such as Yemen, Kuwait or Saudi Arabia with which the US have diplomatic relations.<sup>81</sup> It is therefore argued by some scholars that these Al Qaeda members are not protected by GC IV.<sup>82</sup> This is not convincing, though. The rationale of the nationality exception is

75 J. Toman, 'The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions', 2002 *Israel Yearbook on Human Rights* 32, p. 293; cf. Art. 43(1) GC AP I, Art. 1 Regulations concerning the Laws and Customs of War on Land annex to the 1907 Hague Convention IV respecting the Laws and Customs of War on Land; cf. J.-M. Henckaerts, 'Armed Forces', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, 2012.

76 Cf. J. Toman, 'The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions', 2002 *Israel Yearbook on Human Rights* 32, p. 294; R. Otto, *Targeted Killings and International Law*, 2012, pp. 232-233.

77 International Committee of the Red Cross [ICRC], *Commentary IV Geneva Convention*, 1958, p. 51: 'Nevertheless, disregarding points of detail, it will be seen that there are two main classes of protected person: (1) "enemy nationals" within the national territory of each of the Parties to the conflict and (2) "the whole population" of occupied territories (excluding nationals of the Occupying Power).'

78 J. Callen, 'Unlawful Combatants and the Geneva Conventions', 2004 *Virginia Journal of International Law* 44, pp. 1065 and 1032.

79 *Prosecutor v Delalic*, Judgement, Case No. IT-96-21-T, T.Ch., 16 November 1998, Para. 271; K. Dörmann, 'The legal situation of "unlawful/unprivileged combatants"', 2003 *International Review of the Red Cross* 85, no. 849, p. 47; A. Cassese, 'Expert Opinion On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law', <<http://www.stoptorture.org.il/files/cassese.pdf>> (last visited 28 August 2013), p. 14; M. Sassóli, 'Use and Abuse of the Laws of War in the "War on Terrorism"', 2004 *Law and Inequality* 22, no. 2, p. 207; International Committee of the Red Cross [ICRC], *Commentary IV Geneva Convention*, 1958, p. 51: 'In short, all the particular cases we have just been considering confirm a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no "intermediate status"; nobody in enemy hands can be outside the law.'

80 See note 61, supra.

81 Concerning a list of detainees see <<http://www.guardian.co.uk/world/datablog/2011/apr/25/guantanamo-bay-detainees-full-list#data>> (last visited 28 August 2013) and the official list of the Department of Defense <<http://www.defense.gov/news/May2006/d20060515%20List.pdf>> (last visited 28 August 2013). Cf. J. Callen, 'Unlawful Combatants and the Geneva Conventions', 2004 *Virginia Journal of International Law* 44, p. 1070.

82 J. Callen, 'Unlawful Combatants and the Geneva Conventions', 2004 *Virginia Journal of International Law* 44, p. 1070; J.B. Bellinger III & V.M. Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing

explained with the possible protection of the respective nationals of neutral states by treaties concerning the legal status of aliens and the consular support of their home states.<sup>83</sup> This protection does not work effectively, however, if such nationals are detained by another power and the home states do not even know of this detention. Further, the nationality exception cannot reasonably be applied in times of occupation<sup>84</sup> since in this situation the diplomatic representatives are not accredited with the occupying power and therefore consular support cannot be granted.<sup>85</sup> An occupation of Afghan territory by the US-led ISAF forces may at least have taken place in the short period between their intervention and the fall of the Taliban Government.<sup>86</sup> But even if one fully applied the nationality exception to the detriment of the respective al Qaeda members at least the basic judicial rights ‘which are recognized as indispensable by civilized peoples’ (Common Article 3 GC) remain applicable. For if one accepts that these rights are granted in conflicts not covered by the GCs, one must, *a fortiori*, apply them to situations and cases where the Geneva Law is applicable in principle except for internal exceptions.

In a *non-international* conflict the just quoted Common Article 3 applies and affords a minimum standard of protection, that is, in our case, basic judicial rights ‘which are recognized as indispensable by civilized peoples’. The Bush Administration took the opposite view arguing that Common Article 3 only applies to scenarios resembling civil war and not to (non-international) armed conflicts with international participation since this would broaden the scope of the GC and therefore amount to an amendment of the treaties without the approval of the parties.<sup>87</sup> Thus, ‘neither the Geneva Conventions nor the WCA [War Crimes Act] regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict’.<sup>88</sup>

This view is flawed, however. First of all, as we have already argued above, in times of an *international armed* conflict either GC III (for prisoners of war) or GC IV (for civilians) affords protection. It follows from the rationale of the GC that each person falls into one of these categories; there is no gap in protection.<sup>89</sup> In particular, there can be no third category of unprotected persons during armed conflict, whatever qualifier is given to these persons (we will discuss the ‘unlawful’, ‘illegal’ etc. combatants in a moment). In a *non-international armed conflict* Common Article 3 applies and it is by no means uncontroversial, as suggested by the Bush Administration, that the GC States Parties did not anticipate the situation of a non-international armed conflict with international participation, since in the drafting process reference was made to ‘cases of civil war, colonial conflicts, or wars of religion’ as special (but not conclusive) cases of a non-international armed conflict.<sup>90</sup> Even if the Bush Administration’s suggestion were, *arguendo*, correct one must not overlook the fact that the intention of the drafters only constitutes a supplementary means of interpretation.<sup>91</sup> As a result, this means that both Taliban and al Qaeda members enjoy protection under IHL. The former are entitled to prisoner of war status pursuant to GC III, the latter enjoy the rights of Common Article 3 GC or GC IV.<sup>92</sup>

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Law’, 2011 *American Journal of International Law* 105, no. 2, p. 216.

83 International Committee of the Red Cross [ICRC], *Commentary IV Geneva Convention*, 1958, p. 49.

84 International Committee of the Red Cross [ICRC], *Commentary IV Geneva Convention*, 1958, p. 48.

85 International Committee of the Red Cross [ICRC], *Commentary IV Geneva Convention*, 1958, p. 49.

86 See above Section 4.1. For the assumption of an occupation see M. Sassóli, ‘Use and Abuse of the Laws of War in the “War on Terrorism”’, 2004 *Law and Inequality* 22, no. 2, p. 207; contra J. Callen, ‘Unlawful Combatants and the Geneva Conventions’, 2004 *Virginia Journal of International Law* 44, p. 1069.

87 J. Yoo & R.J. Delahunty, ‘Memorandum: Application of Treaties and Laws to al Qaeda and Taliban Detainees’, *US Department of Justice*, 9 January 2002, <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>> (last visited 28 August 2013), pp. 7-10.

88 J. Yoo & R.J. Delahunty, ‘Memorandum: Application of Treaties and Laws to al Qaeda and Taliban Detainees’, *US Department of Justice*, 9 January 2002, <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>> (last visited 28 August 2013), p. 2.

89 Cf. note 79, *supra*.

90 Art. 2(4) Draft Conventions (XVIIth International Red Cross Conference Stockholm), reported in International Committee of the Red Cross [ICRC], *Commentary III Geneva Convention*, 1960, p. 31. Cf. also J.B. Bellinger III & V.M. Padmanabhan, ‘Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law’, 2011 *American Journal of International Law* 105, no. 2, p. 206.

91 Art. 32 Vienna Convention on the Law of Treaties, cf. K. Schöberl, ‘Konfliktpartei und Krisengebiet in bewaffneten Auseinandersetzungen – zur Debatte um den Anwendungsbereich des Rechts internationaler und nicht-internationaler bewaffneter Konflikt’, 2012 *Journal of International Law of Peace and Armed Conflict*, no. 3, p. 137.

92 *Hamdan v Rumsfeld*, 548 US 557 (2006), pp. 65-69.

#### 4.2.3. Denial of rights by means of a third category: unlawful enemy combatants?

The Bush Administration tried to deprive the detainees in Guantánamo of their IHL rights by treating them as ‘unlawful enemy combatants’ or ‘unprivileged enemy belligerents.’<sup>93</sup> While this concept cannot be found in codified IHL,<sup>94</sup> it can be traced back to the US Supreme Court decision *Ex parte Quirin* in 1942 where the Court defined *unlawful combatants* as those who are, like lawful combatants,

‘subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.’<sup>95</sup>

The MCA 2006 defined an *unlawful enemy combatant* as either ‘a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)’ or ‘a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal [CSRT<sup>96</sup>] or another competent tribunal established under the authority of the President or the Secretary of Defense.’<sup>97</sup> The decisions of the CSRT can be appealed before the District Court of Columbia.<sup>98</sup> Since 2009, the MCA distinguishes between ‘privileged belligerents’ – individuals belonging to one of the eight categories enumerated in Article 4 GC III<sup>99</sup> – and ‘unprivileged enemy belligerents’ – individuals (other than privileged belligerents) who have ‘engaged in hostilities against the United States or its coalition partners, have ‘purposefully and materially supported hostilities against the United States or its coalition partners’ or were ‘a part of al Qaeda at the time of the alleged offense under this chapter.’<sup>100</sup> Unprivileged enemy belligerents may not invoke the Geneva Conventions.<sup>101</sup> Although the MCA 2006 and 2009 employ different terminology – unlawful enemy combatants *versus* unprivileged enemy belligerents – the only notable difference can be seen in the fact that Taliban membership is no longer part of the more recent definition.<sup>102</sup>

Given that the *Quirin* decision was delivered prior to the enactment of the GC and the unlawful combatant concept has not been adopted in the subsequent codifications, it is doubtful whether the concept can be applied in current IHL.<sup>103</sup> In any case, the *Quirin* case does not fit al Qaeda or Taliban cases at all since they are usually not accused of espionage.<sup>104</sup> In essence, the concept sanctions a violation of a combatant’s

93 The term ‘unprivileged enemy belligerent’ was first used in the MCA 2009, the term ‘unlawful enemy combatant’ was used before this (J. Mariner, ‘A First Look at the Military Commissions Act of 2009, Part One’, *Find law*, 4 November 2009, <<http://writ.news.findlaw.com/mariner/20091104.html>> [last visited 28 August 2013]).

94 J. Wiczkorek, *Unrechtmäßige Kombattanten und humanitäres Völkerrecht*, 2005, p. 27; T. Gill & E. van Sliedregt, ‘Guantánamo Bay: A Reflection On The Legal Status And Rights Of “Unlawful Enemy Combatants”’, 2005 *Utrecht Law Review* 1, no. 1, p. 32; A. Walen & I. Venzke, ‘Unconstitutional Detention of Nonresident Aliens: Revisiting the Supreme Court’s Treatment of the Law of War in Hamdi v. Rumsfeld’, 2007 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67, pp. 856-857 therefore criticize the whole concept.

95 *Ex parte Quirin*, 317 US 1, 31 (1942).

96 The CSRT have been created after the Supreme Court had called for the need for an examination of the status as an ‘unlawful enemy combatant’. See for further information: <[http://www.defense.gov/news/combatant\\_Tribunals.html](http://www.defense.gov/news/combatant_Tribunals.html)> (last visited 28 August 2013). Crit. J.S. Lutz, *Die Behandlung von ‘illegalen Kämpfern’ im US-Amerikanischen Recht und Völkerrecht*, 2011, p. 209.

97 MCA 2006, § 948a.

98 F. Meyer, ‘Habeas Corpus und Suspension Clause’, 2009 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 69, p. 2.

99 See MCA 2009, § 948a(6).

100 MCA 2009, § 948a(7).

101 MCA 2009, § 948b(e).

102 Concerning the differences see J. Mariner, ‘A First Look at the Military Commissions Act of 2009, Part One’, *Find law*, 4 November 2009, <<http://writ.news.findlaw.com/mariner/20091104.html>> (last visited 28 August 2013): ‘cosmetic change, not a real improvement’; also crit. M.C. Bassiouni, *The Institutionalization of Torture by the Bush Administration*, 2010, p. 255.

103 A. Walen & I. Venzke, ‘Unconstitutional Detention of Nonresident Aliens: Revisiting the Supreme Court’s Treatment of the Law of War in Hamdi v. Rumsfeld’, 2007 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67, pp. 856-858.

104 J.S. Lutz, *Die Behandlung von ‘illegalen Kämpfern’ im US-Amerikanischen Recht und Völkerrecht*, 2011, p. 145; H. Keller & M. Forowicz, ‘A New Era for the Supreme Court After Hamdan v. Rumsfeld?’, 2007 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67, p. 93;

duty not to disguise his combatant activity by masquerading as a civilian: if he does so, he loses his prisoner of war status.<sup>105</sup> Some scholars understand the concept more broadly, including within it those taking part in hostilities without having a right to do so, i.e. without being combatants.<sup>106</sup> In any case, the concept may only, if at all, limit the rights of combatants; it does not apply to civilians.<sup>107</sup> In addition, in a non-international armed conflict where the distinction between combatant and civilian does not legally exist but all persons are, as a matter of principle, civilians there is no room for the concept.<sup>108</sup>

In applying these definitions to al Qaeda and the Taliban only the former could possibly have behaved unlawfully by actively taking part in hostilities without having a formal combatant status and thus a right to do so. In contrast, the Taliban belonged to the armed forces of Afghanistan and were therefore lawful combatants.<sup>109</sup> But even with regard to al Qaeda the exclusion of a person from prisoner of war status or any other IHL protection on the basis of mere membership of al Qaeda without taking into account the actual engagement, e.g. in hostilities, is too formalistic and arbitrary. Further, it is not compelling that everybody who ‘purposefully and materially supported hostilities against the United States or its coalition partners’ abuses the purposes of IHL and can therefore be treated as an unprivileged or unlawful combatant. Indeed, conduct violating IHL does not entail the loss of the status as a prisoner of war but only a criminal prosecution for the respective war crimes.<sup>110</sup>

In any case, the IHL protection cannot be removed in total. Even if one, *arguendo*, considers al Qaeda and Taliban members to be unlawful or unprivileged combatants, their detention has to end as soon as the hostilities are over.<sup>111</sup> Even if one denies the application of GC III and IV, the basic rights embodied, for example, in Common Article 3 GC and the fundamental ‘laws of humanity’ in the sense of the Martens Clause<sup>112</sup> remain applicable to the detainees’ situation.<sup>113</sup> As to fair trial rights the

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cf. also J. Fitzpatrick, ‘Jurisdiction of military commissions and the ambiguous war on terrorism’, 2002 *American Journal of International Law* 96, no. 2, p. 349: ‘analogy to the Second World War (...) is quite weak’.

105 Y. Dinstein, ‘Unlawful Combatancy’, 2002 *Israel Yearbook on Human Rights* 32, p. 249; J. Callen, ‘Unlawful Combatants and the Geneva Conventions’, 2004 *Virginia Journal of International Law* 44, p. 1026.

106 Cf. G.H. Aldrich, ‘The Taliban, Al Qaeda, and the Determination of Illegal Combatants’, 2002 *American Journal of International Law* 96, no. 4, p. 893, p. 892; J.P. Bialke, ‘Al-Qaeda & Taliban: Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict’, 2004 *Air Force Law Review* 55, pp. 4-5.

107 A. Walen & I. Venzke, ‘Unconstitutional Detention of Nonresident Aliens: Revisiting the Supreme Court’s Treatment of the Law of War in *Hamdi v. Rumsfeld*’, 2007 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67, p. 858.

108 K. Ambos, *Internationales Strafrecht*, 2011, § 7 marginal note 246 with footnote 115; K. Dörmann, ‘The legal situation of “unlawful/unprivileged combatants”’, 2003 *International Review of the Red Cross* 85, no. 849, p. 47; K. Dörmann, ‘Combatants, Unlawful’, in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, 2012, Para. 36; J. Wiczczonek, *Unrechtmäßige Kombattanten und humanitäres Völkerrecht*, 2005, pp. 44 et seq.

109 See note 59 with the main text, *supra*.

110 Cf. Art. 82 et seq. GC III, in particular Art. 85 GC III; R. Wolfrum & C.E. Philipp, ‘The Status of the Taliban: Their Obligations and Rights under International Law’, 2002 *Max Planck Yearbook of United Nations Law* 6, p. 598; C.E. Philipp, ‘Taliban’, in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, 2012, Para. 11. Contra with regard to ‘battlefield unlawful combatants’ J. Callen, ‘Unlawful Combatants and the Geneva Conventions’, 2004 *Virginia Journal of International Law* 44, pp. 1028-1030.

111 Y. Dinstein, ‘Unlawful Combatancy’, 2002 *Israel Yearbook on Human Rights* 32, p. 269; J.S. Lutz, *Die Behandlung von ‘illegalen Kämpfern’ im US-Amerikanischen Recht und Völkerrecht*, 2011, p. 369. According to D. Gartenstein-Ross, ‘The Future of Preventive Detention Under International Law’, in S. Müller et al. (eds.), *The Law of the Future and the Future of Law: Volume II*, 2012, p. 262, there are 48 detainees at Guantánamo who will not be prosecuted but are detained for preventive reasons.

112 The Martens Clause was introduced into the Preamble to the 1899 Hague Convention (II) and states that, notwithstanding the absence of specific regulations, in any case ‘populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience’. The Clause appears in substantially the same form in the Preamble to the 1907 Hague Convention (IV): ‘(...) the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.’ On the controversial interpretation of the Martens Clause see e.g. R. Ticehurst, ‘The Martens Clause and the Laws of Armed Conflict’, 1997 *International Review of the Red Cross* 37, no. 317, pp. 125-134.

113 D. Zechmeister, *Die Erosion des humanitären Völkerrechts in den bewaffneten Konflikten der Gegenwart*, 2007, pp. 116-119; K. Dörmann, ‘The legal situation of “unlawful/unprivileged combatants”’, 2003 *International Review of the Red Cross* 85, no. 849, pp. 66-73. Although the US is not a State Party of Additional Protocol I (<<http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>> [last visited 28 August 2013]), cf. Art. 44(2) GC AP I: ‘While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war’. Cf. also *Hamdan v Rumsfeld*, 548 US 557 (2006), pp. 65-69; the District Court held that: ‘Thus at some level – whether as a prisoner-of-war entitled to the full panoply of Convention protections or only under the more limited protections afforded by Common Article 3 (...) the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there.’ (District Court of Columbia, *Hamdan v Rumsfeld*, Civil Action No. 04-1519, 8 November 2004, [US District Court for the District of Columbia], <[http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/8a0164a7babe0c94c12576f100321475/\\$FILE/45357856.pdf/US%20-%20Hamdan%20v%20Rumsfeld%20District%20Court%202004.pdf](http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/8a0164a7babe0c94c12576f100321475/$FILE/45357856.pdf/US%20-%20Hamdan%20v%20Rumsfeld%20District%20Court%202004.pdf)> [last visited 28 August 2013], p. 16); likewise J.S. Lutz, *Die Behandlung von ‘illegalen*

US Supreme Court accepts some restrictions during armed conflict, e.g. acceptance of hearsay as proof or a presumption in favour of the Government's evidence.<sup>114</sup> This view conflicts, however, with the view of the UN Human Rights Committee (HRC) that, pursuant to Article 14 ICCPR, even in an armed conflict the presumption of innocence and the right to defence are non-derogable rights.<sup>115</sup> As to military commissions the Supreme Court demanded that 'some practical need explains deviations from court-martial practice.'<sup>116</sup> It further confirmed as 'judicial guarantees which are recognized as indispensable by civilized peoples' that 'an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.'<sup>117</sup> The Government's 'compelling interest' in restricting the disclosure is irrelevant as long as there is no express statutory provision.<sup>118</sup>

In conclusion, the Supreme Court's and the HRC's practice as well as the rationale of IHL, i.e., both inductive-comparative and teleological-deductive reasons, demand that even under a concept of unlawful enemy combatancy or unprivileged enemy belligerency, as a minimum, Common Article 3 GC and fundamental 'laws of humanity' in the sense of the Martens Clause apply. Thus, every person detained by US forces can invoke, as a minimum, the basic judicial guarantees including the right to a fair trial.

### 4.3. International human rights law

IHRL is not only applicable in times of peace but also during armed conflict. While IHL could be seen as *lex specialis* in the latter situation<sup>119</sup> this does not entail a complete suspension of human rights but, rather, that they remain applicable as 'fall-back' guarantees.<sup>120</sup> For the ICJ there exists a complementarity of both regimes in the form of overlapping circles.<sup>121</sup> Thus, the *lex specialis* rule is not to be understood as a rule of conflict of laws (repealing human rights law) but in terms of a hierarchy giving IHL priority but applying human rights law in a subsidiary, complementary sense.<sup>122</sup> For instance, human rights law has to be consulted to interpret certain guarantees provided for by IHL, e.g. the scope of the judicial guarantees in the sense of Common Article 3 GC.<sup>123</sup> Even if one were to give the *lex specialis* character of IHL a repealing effect the right to a fair trial would still be guaranteed by IHL itself, i.e., by Common Article 3 GC I-IV, Articles 84-108 GC III or Articles 64-78 GC IV.<sup>124</sup>

In terms of human rights treaty law, first of all the ICCPR must be examined. On a regional level the American Declaration of the Rights and Duties of Man is applicable.

#### 4.3.1. International Covenant on Civil and Political Rights

The US ratified the ICCPR in 1992, Cuba only signed it in 2008.<sup>125</sup> While Guantánamo Bay formally belongs to Cuba, the US has full jurisdiction and control over it on the basis of a 1903 Lease Agreement with Cuba.<sup>126</sup> While this agreement is in line with the applicable (customary) international law and is

*Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, pp. 325-358, esp. pp. 347-348. Concerning the customary nature of these guarantees see J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, pp. 351-352, 356; on the application to terrorists in connection with an armed conflict *ibid.*, pp. 357-358, 376.

114 *Hamdi v Rumsfeld*, 542 US 507 (2004), pp. 26-27.

115 HRC, General Comment No. 29 (31 August 2001), UN Doc. CCPR/C/21/Rev.1/Add.11, Para. 6; see also W. Kälin & J. Künzli, *The Law of International Human Rights Protection*, 2009, p. 461.

116 *Hamdan v Rumsfeld*, 548 US 557 (2006), p. 70.

117 *Hamdan v Rumsfeld*, 548 US 557 (2006), pp. 70-72.

118 *Hamdan v Rumsfeld*, 548 US 557 (2006), pp. 70-72.

119 Cf. J.B. Bellinger III, 'Opening Remarks, U.S. Meeting with U.N. Committee Against Torture', *US Department of State*, May 5, 2006, <<http://www.state.gov/j/drl/rls/68557.htm>> (last visited 28 August 2013) concerning the applicability of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

120 B. Schäfer, *Zum Verhältnis Menschenrechte und humanitäres Völkerrecht*, 2006, p. 17; cf. M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, 2011, pp. 232-235.

121 *Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory (Wall Opinion)*, [2004] ICJ Reports, p. 136, Para. 106; cf. also J. Toman, 'The Status of Al Qaeda/Taliban Detainees Under the Geneva Conventions', 2002 *Israel Yearbook on Human Rights* 32, p. 276.

122 C. Johann, *Menschenrechte im internationalen bewaffneten Konflikt*, 2012, pp. 174-175.

123 W. Kälin & J. Künzli, *Universeller Menschenrechtsschutz*, 2008, p. 196.

124 See also Th. Buergenthal & D. Thürer, *Menschenrechte*, 2010, pp. 116-117.

125 <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-4&chapter=4&lang=en)> (last visited 28 August 2013).

126 Cf. the Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, 23 February 1903, for the text see <[http://avalon.law.yale.edu/20th\\_century/dip\\_cuba002.asp](http://avalon.law.yale.edu/20th_century/dip_cuba002.asp)> (last visited 28 August 2013). The relevant Article III reads:

'While on the one hand the United States recognizes the continuance of the *ultimate sovereignty of the Republic of Cuba* over the above

still in force,<sup>127</sup> it does not change the formal territorial sovereignty of Cuba over Guantánamo which, in turn, entails that the ICCPR does not apply to this territory. This leads us to the question of a possible *extraterritorial application* of the ICCPR. Article 2(1) ICCPR provides:

‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’<sup>128</sup>

Although the text seems to suggest a conjunctive reading of the requirements ‘within its territory’ and ‘subject to its jurisdiction’ with the result that both have to be fulfilled,<sup>129</sup> the HRC affirmed the extraterritorial applicability in several cases, e.g., with regard to an Uruguayan detention on Argentinian territory,<sup>130</sup> Iraq’s human rights obligations as the occupation power in Kuwait,<sup>131</sup> the Federal Republic of Yugoslavia’s responsibility for crimes committed by Serbian nationalists on the territory of Croatia and Bosnia-Herzegovina<sup>132</sup> and, last but not least, Israel’s responsibility for human rights violations occurring in the occupied Palestinian territories. This last case is especially noteworthy, since the HRC stressed ‘the exercise of effective jurisdiction by Israeli security forces’<sup>133</sup> and thus relied on the principle of *effective control*.<sup>134</sup> On this basis the HRC issued the following General Comment in 2004:

‘States Parties are required (...) to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that 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. (...) [T]he enjoyment of Covenant rights is not limited to citizens of States Parties (...). This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained (...).’<sup>135</sup>

The criteria of jurisdiction<sup>136</sup> and (effective) control for holding states responsible for extra-territorial human rights violations have also been confirmed within other Human Rights regimes, i.e., by the

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described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement *the United States shall exercise complete jurisdiction and control* over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.’ (emphasis added).

127 J.S. Lutz, *Die Behandlung von ‘illegalen Kämpfern’ im US-Amerikanischen Recht und Völkerrecht*, 2011, pp. 59-67. Subsequently there have been further agreements, especially the Relations with Cuba Treaty, providing that the leasing agreement will continue until *both* parties agree to an abrogation or modification (Art. III).

128 Emphasis added.

129 M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, 2011, p. 222; M.J. Dennis, ‘Application of Human Rights Treaties Extraterritorially in Time of Armed Conflict and Military Occupation’, 2005 *American Journal of International Law* 99, no. 1, p. 122 with examples in footnote 24.

130 *Delia Saldias de Lopez v Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1(1984), p. 88, Para. 12.1.

131 HRC, Reports by States Parties submitted under Art. 40 of the Covenant, Consideration of Reports, Iraq (1991), UN Doc. A/46/40, p. 158.

132 HRC, Concluding observations: Yugoslavia (28 December 1992), UN Doc. CCPR/C/79/Add.16, pp. 2-3.

133 HRC, Concluding Observations: Israel (18 August 1998), UN Doc. CCPR/C/79/Add.93, p. 3.

134 D. Lorenz, *Der territoriale Anwendungsbereich der Grund- und Menschenrechte*, 2005, p. 43; see also K. Ambos & J. Alkatout, ‘Has “Justice Been Done”? The Legality of Bin Laden’s Killing Under International Law’, 2012 *Israel Law Review* 45, no. 2, p. 345.

135 HRC, General Comment No. 31 (80) (29 March 2004), UN Doc. CCPR/C/21/Rev.1/Add.13, Para. 10. General Comments are the most important means of interpretation of the ICCPR (D. Lorenz, *Der territoriale Anwendungsbereich der Grund- und Menschenrechte*, 2005, p. 35).

136 M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, 2011, p. 19 stresses that the term ‘jurisdiction’ in human rights treaties means the jurisdiction of the state, not of a court. In this context it is a synonym for factual power and control (*ibid.*, p. 34).

European Court of Human Rights (ECtHR)<sup>137</sup> and the Inter-American Human Rights Commission (IAHRC),<sup>138</sup> and by the ICJ in its *Wall Opinion* in 2004.<sup>139</sup>

In light of these precedents the will of the States Parties is of no importance<sup>140</sup> and following an inductive-comparative approach, the conjunctive reading of the two elements ‘within its territory’ and ‘subject to its jurisdiction’ must be rejected.<sup>141</sup> Indeed, also from a teleological-deductive perspective, it would make little sense and undermine the effective human rights protection if states with effective control over extraterritorial human rights violations would be exempted from responsibility for the mere fact that these violations did not occur in their own territory. Effective control entails state responsibility because only the state which has effective control can prevent violations from occurring in the first place.<sup>142</sup> The only remaining question then is to what extent the effective sovereign has to implement the Covenant abroad. This, of course, depends on the scope of its control. If the respective state lacks, for example, institutions outside its territory to comply with its human rights obligations it cannot be made responsible for a failure to comply.<sup>143</sup> In any case, as far as the US control over Guantánamo is concerned there can be no doubt that it is effective and comprehensive as the running of the detention facility and the military commissions’ trials show. Thus, the ICCPR applies extraterritorially by way of the US’ effective control.

According to the wording of Article 4 ICCPR the right to a fair trial may, however, be derogated from ‘in time of public emergency’. This requires, first of all, an exceptional threat, such as a war or other public emergency that threatens the life of the nation.<sup>144</sup> Although it is accepted that a terrorist threat can also constitute such a threat,<sup>145</sup> this requirement has to be interpreted restrictively. For example, the HRC stressed that even during an armed conflict a threat to the nation’s life does not follow automatically.<sup>146</sup>

137 *Bankovic and Others v Belgium and Others*, appl. no. 52207/99, 12 December 2001, Para. 71: ‘In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the *effective control* of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, *exercises* all or some of the *public powers* normally to be exercised by that Government.’ (emphasis added). See most recently *Hirsi Jamaa and Others v Italy*, appl. no. 27765/09, 23 February 2012, Paras. 70-82 and concerning British prisons and operations in Iraq *Al-Saadoon and Mufdhi v United Kingdom*, appl. no. 61498/08, 2 March 2010; *Al-Skeini and Others v United Kingdom*, appl. no. 55721/07, 7 July 2011, Paras. 131-50. For further case law see S. Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’, 2012 *Leiden Journal of International Law* 25, no. 4, p. 858 (pp. 872-874), identifying three constitutive elements of jurisdiction (effective power, overall control and normative guidance). Cf. also J.S. Lutz, *Die Behandlung von ‘illegalen Kämpfern’ im US-Amerikanischen Recht und Völkerrecht*, 2011, pp. 384-385.

138 *Armando Alejandro Jr et al. v Cuba*, Case 11.589, Report No 86/99, 19 September 1999, Para. 23: ‘Since individual rights are inherent to the human person, all the American States are obliged to respect the protected rights of any person subject to their jurisdiction. Although this ordinarily refers to persons who are within the territory of a State, in certain circumstances it can refer to behavior having an extraterritorial locus, where a person is present on the territory of one State, but is subject to the *control* of another State, generally through the acts of the agents abroad of the latter State. In principle, the investigation has no reference to the nationality of the alleged victim or his presence in a given geographical zone, but rather to whether in those specific circumstances the State observed the rights of a person subject to its *authority and control*.’ (emphasis added); *Coard and Others v United States*, Case 10.951, Report No 109/99, 29 September 1999, Para. 37 (almost verbatim).

139 *Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory (Wall Opinion)*, [2004] ICJ Reports, Paras. 109-111: ‘The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. The constant practice of the Human Rights Committee is consistent with this. (...) The *travaux préparatoires* of the Covenant confirm the Committee’s interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence. (...) In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.’

140 Concerning the *travaux* in detail: M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, 2011, pp. 224-226. See concerning the extraterritorial application in times of armed conflict: M.J. Dennis & A.M. Surena, ‘Application of the International Covenant on Civil and Political Rights in times of armed conflict and military occupation: the gap between legal theory and state practice’, 2008 *European Human Rights Law Review* 6, p. 731.

141 M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, 2011, p. 226.

142 Cf. S. Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’, 2012 *Leiden Journal of International Law* 25, no. 4, p. 865; M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, 2011, p. 53.

143 C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2008, p. 131.

144 C. Macken, *Counter-terrorism and the Detention of Suspected Terrorists*, 2011, p. 80.

145 C. Macken, *Counter-terrorism and the Detention of Suspected Terrorists*, 2011 p. 81 (with further references).

146 HRC, General Comment No. 29 (31 August 2001), UN Doc. CCPR/C/21/Rev.1/Add.11, Para. 3; cf. also *Legal Consequences of the*

Instead, the threat must present a certain gravity.<sup>147</sup> With regard to the detention of suspected terrorists, it is therefore necessary that the terrorist threat is ‘actual or imminent’, affecting the state as a whole and thereby threatening the ‘continuance of the organised life of the community’ so that ordinary countermeasures (permitted by the human rights treaties) are insufficient.<sup>148</sup> Even if one suggests that these requirements have been satisfied immediately after 9/11, it is doubtful that this should still be considered true eleven years later.<sup>149</sup> Apart from these doubts, the US has never notified, as required by Article 4(3) ICCPR, the UN Secretary-General of any state of emergency.<sup>150</sup> It can therefore be concluded that no such state of emergency allowing for a derogation from the right to a fair trial existed at any time.

Even if one assumes, for the sake of argument, that such an emergency existed or still exists it does not completely suspend all fair trial guarantees even if Article 4 ICCPR suggests doing so. On the contrary, a minimum level of rights necessary to protect non-derogable rights (such as the prohibition of torture,<sup>151</sup> the presumption of innocence<sup>152</sup> or the right to challenge the lawfulness of one’s detention by way of habeas corpus<sup>153</sup>) remains in force. Also, trials which may result in the death penalty must comply with fair trial standards under all circumstances.<sup>154</sup> What is more, the list of non-derogable rights mentioned in Article 4(2) ICCPR is not congruent with peremptory norms of international law which, given their character as ‘peremptory norms’, can never be derogated from.<sup>155</sup> Basic fair trial rights such as the presumption of innocence or the right to defence can also be counted among these peremptory norms.<sup>156</sup>

#### 4.3.2. Regional level: American Declaration of the Rights and Duties of Man

While neither the US nor Cuba are parties to the American Convention on Human Rights,<sup>157</sup> the right to a fair trial is provided for in the American Declaration of the Rights and Duties of Man to which both Cuba and the US are parties as members of the Organization of American States (OAS).<sup>158</sup>

While the character and status of the Declaration are controversial – it was only adopted as a ‘declaration’ by the Ninth International Conference of American States together with the OAS Charter<sup>159</sup> and thus did not originally produce any legally binding effects<sup>160</sup> – the Inter-American Court of Human Rights (IACtHR) has given it a binding character being ‘a source of international obligations related to the Charter of the Organization.’<sup>161</sup> Notwithstanding this, the US denies its binding character and insists

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*construction of a Wall in the Occupied Palestinian Territory (Wall Opinion)*, [2004] ICJ Reports, p. 136, Para. 106.

147 J. Oraá, *Human rights in states of emergency in international law*, 1996, p. 20.

148 C. Macken, *Counter-terrorism and the Detention of Suspected Terrorists*, 2011, p. 82.

149 C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2008, p. 131.

150 K.E. Dahlstrom, ‘The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay’, 2003 *Berkeley Journal of International Law* 21, no. 3, p. 670.

151 E. Schmid, ‘The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights’, 2009 *Goettingen Journal of International Law* 1, no. 1, pp. 43-44.

152 HRC, General Comment No. 32 (23 August 2007), UN Doc. CCPR/C/GC/32, Para. 6.

153 F. de Londras, *Detention in the ‘War on Terror’*, 2011, p. 65; Commission on Human Rights, Opinions adopted by the Working Group on Arbitrary Detention, Opinion No. 11/2000 (Peru), UN Doc. E/CN.4/2001/14/Add.1, pp. 75-77.

154 HRC, General Comment No. 32 (23 August 2007), UN Doc. CCPR/C/GC/32, Para. 6.

155 HRC, General Comment No. 29 (31 August 2001), UN Doc. CCPR/C/21/Rev.1/Add.11, Para. 11: ‘The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law.’

156 HRC, General Comment No. 29 (31 August 2001), UN Doc. CCPR/C/21/Rev.1/Add.11, Para. 11.

157 <[http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm)> (last visited 28 August 2013). Crit. J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2003, pp. 340-341.

158 See <[http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States\\_sign.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm)> (last visited 28 August 2013); cf. Th. Buergenthal & D. Thürer, *Menschenrechte*, 2010, pp. 298-300.

159 C.M. Grossman, ‘American Declaration of the Rights and Duties of Man (1948)’, in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, 2012, Para. 2.

160 Th. Buergenthal & D. Thürer, *Menschenrechte*, 2010, pp. 299-300; in detail C. Medina Quiroga, ‘The inter-American system for the protection of human rights’, in C. Krause (ed.), *International protection of human rights*, 2009, pp. 477-478.

161 Advisory Opinion OC-10/89 July 14, 1989, (IACtHR), Para. 45: ‘For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission’s Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.’ This evolutionary interpretation is quite common in international jurisprudence, see in detail: M. Dawidowicz, ‘The effect of the passage of time on the interpretation of treaties: some reflections on Costa Rica v Nicaragua’, 2011 *Leiden Journal of International Law* 24, no. 1, pp. 201-222.

that it does not confer any obligations.<sup>162</sup> Despite the US' persistent objection,<sup>163</sup> the Inter-American Commission on Human Rights (IACHR) has found several violations of the Declaration by the US.<sup>164</sup> If one agrees with the position of the IACHR and the Court, the Declaration would also bind the US and would thus oblige it to comply with minimum due process guarantees, even under a state of emergency.<sup>165</sup>

#### 4.4. US Constitution

On the basis of, inter alia, the due process clause of the Fifth and Fourteenth Amendment to the US Constitution (the latter binding upon state and local governments)<sup>166</sup> a person can challenge his detention by way of a writ of *habeas corpus*, an extraordinary legal action to be brought before a judge or court.<sup>167</sup> A sentence can also be challenged on the ground that it was based on a violation of the Constitution.<sup>168</sup> A suspension of the writ is only allowed when there is a 'Rebellion or Invasion' amounting to a danger to 'public safety' (the so-called Suspension Clause).<sup>169</sup>

The Bush Administration suggested, relying on the Supreme Court Decision in *Johnson v Eisentrager*, that the writ of *habeas corpus* is not applicable to alien detainees detained outside US territory.<sup>170</sup> In this case, the respondents, 21 German prisoners of war, were captured by the US Army and tried and convicted by an American military commission in China for violations of the laws of war committed there. Afterwards they were imprisoned in the American military prison in Landsberg, located in a part of Germany occupied by the US. Without being within US territorial jurisdiction at any time, they petitioned the District Court of Columbia for a writ of *habeas corpus* because of a violation of, among other things, the Fifth Amendment and the GC 1929, in particular its Articles 60 and 63.<sup>171</sup> The majority of the *Johnson* Court denied the possibility of a writ of *habeas corpus* considering that the prisoners were 'at no relevant time (...) within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction

162 K.E. Dahlstrom, 'The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay', 2003 *Berkeley Journal of International Law* 21, no. 3, p. 671; Response of the Government of the United States of America to Inter-American Commission on Human Rights Report 85/00 of October 23, 2000 concerning Mariel Cubans (Case 9903), <<http://www.cidh.org/Respuestas/USA.9903.htm>> (last visited 28 August 2013): 'With regard to each implication or direct assertion in the Commission's report that the American Declaration of the Rights and Duties of Man itself accords rights or imposes duties, some of which the United States has supposedly violated, the United States reminds the Commission that the Declaration is no more than a recommendation to the American States. Accordingly, the Declaration does not create legally binding obligations and therefore cannot be "violated."' (emphasis omitted).

163 See P. Dumberry, 'Incoherent and ineffective: the concept of persistent objector revisited', 2010 *International Criminal Law Quarterly* 59, no. 3, p. 787.

164 See e.g. *Roach and Pinkerton v United States*, Res. No 3/87, Case 9647; *Michael Domingues v United States*, Report No 62/02, Merits, Case 12.285.

165 In particular, the gravity threshold regarding a state of emergency can be compared to that required by Art. 4 ICCPR (see J. Oraá, *Human rights in states of emergency in international law*, 1996, pp. 22-27 and Section 4.3.1. International Covenant on Civil and Political Rights, supra). Apart from that, the right of due process can be seen as a non-derogable right (A.-L. Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, 1998, p. 462). Accordingly, the IACHR recently declared a Guantánamo detainee's petition to be admissible with respect to alleged violations of, among others, Art. XXVI ADRDM (the right to due process of law) 'fundamentally on the basis of failure to adequately determine Mr. Ameziane's legal status; his arbitrary imprisonment during a decade without charge or judicial review; the acts of physical and psychological torture and cruel, inhuman, and degrading treatment he has allegedly suffered while in Kandahar and Guantánamo; the deprivation of developing his private and family life; and the lack of adequate and effective judicial remedies for the violations he has allegedly suffered.' (*Djamel Ameziane v United States*, Petition 900-08, Report No. 17/12, 20 March 2012, <<http://www.oas.org/en/iachr/decisions/2012/USAD900-08EN.doc>> [last visited 28 August 2013], Para. 48).

166 I.G. Dimitrakopoulos, *Individual Rights and Liberties Under the U.S. Constitution*, pp. 151-152 with further references.

167 A.U. Davenport, *Basic Criminal Law*, 2012, p. 20; J.L. Ingram, *Criminal Procedure*, 2008, p. 69; C.-F. Stuckenberg, 'Habeas corpus ad subjiciendum: Zugang zu ordentlichen Gerichten für die Gefangenen von Guantánamo Bay', 2009 *Juristenzeitung* 64, p. 87. Concerning the evolution of a writ of habeas corpus and its reception in the US cf. F. Meyer, 'Habeas Corpus und Suspension Clause', 2009 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 69, pp. 10-19; R.H. Fallon & D.J. Meltzer, 'Habeas corpus jurisdiction, substantive rights, and the war on terror', 2007 *Harvard Law Review* 120, no. 8, p. 2037.

168 J.L. Ingram, *Criminal Procedure*, 2008, p. 467.

169 Art. I § 9 cl. 2 US Constitution: 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.'

170 Cf. P.F. Philbin & J.C. Yoo, 'Memorandum: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba', *US Department of Justice*, <<http://texscience.org/reform/torture/philbin-yoo-habeas-28dec01.pdf>> (last visited 28 August 2013), pp. 6-7.

171 Cf. *Johnson v Eisentrager*, 399 US 763 (1950); F. Stuckenberg, 'Habeas corpus ad subjiciendum: Zugang zu ordentlichen Gerichten für die Gefangenen von Guantánamo Bay', 2009 *Juristenzeitung* 64, p. 89. For the text of the Geneva Convention 1929 see <<http://www.icrc.org/ihl/INTRO/305>> (last visited 28 August 2013).

of any court of the United States' and that 'the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection'.<sup>172</sup>

By invoking the formal sovereignty of Cuba over Guantánamo, as already mentioned above, the Bush Administration argued that the Guantánamo detainees could not, for the same reasons as held by the *Johnson* Court, petition a writ of *habeas corpus*.<sup>173</sup> Yet, while *Johnson v Eisentrager* certainly has precedential value, the facts of the case are different from the situation of the Guantánamo detainees.<sup>174</sup> The Supreme Court stressed correctly the following relevant differences:<sup>175</sup> First, in *Eisentrager*, there was no dispute that the 21 German detainees were enemy combatants and thus prisoners of war. In the relevant Guantánamo case of *Boumediene*, however, the petitioners contested being enemy combatants in the first place – a status that was only verified by a procedure before the CSRT. In contrast to the 'rigorous adversarial process' testing the legality of *Eisentrager's* detention, the CSRT proceedings fell short of those basic procedural rights which would have eliminated the need for a *habeas corpus* review.<sup>176</sup> Second, the Supreme Court could see no reason why the military mission in Guantánamo would be compromised if the petitioners' detention would be reviewed by an independent tribunal; in contrast, the allies' reconstruction and aid efforts in occupied Germany could be put at risk by such a control by US tribunals detached from the realities of the occupation.<sup>177</sup> Third, perhaps the most relevant difference lies in the sovereignty situation: Whereas the Landsberg prison in Germany was under the joint control of the four Allied Forces, Guantánamo lies within the non-transient and 'constant jurisdiction' of the US.<sup>178</sup>

The Bush Administration's further argument to grant the *habeas corpus* right only to American citizens<sup>179</sup> is equally flawed, since 28 USC § 2241 also applies to foreign citizens.<sup>180</sup> From the historical conception as a prerogative writ,<sup>181</sup> focusing on those who detain and not those who are detained,<sup>182</sup> it follows that the writ of *habeas corpus* also applies in cases of alien detainees if they are under the actual sovereignty of the United States. Thus, as a result, the right to a writ of *habeas corpus* has 'full effect at Guantanamo Bay'.<sup>183</sup> This right has not been suspended. While 28 USC § 2241(5)(e) and the Detainee Treatment Act of 2005 (DTA) exclude 'enemy combatants' from the writ, the Government neither purported a formal suspension nor did it argue that it entails such a suspension automatically.<sup>184</sup>

172 *Johnson v Eisentrager*, 399 US 763, 777-8 (1950).

173 Cf. P.F. Philbin & J.C. Yoo, 'Memorandum: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba', *US Department of Justice*, <<http://texscience.org/reform/torture/philbin-yoo-habeas-28dec01.pdf>> (last visited 28 August 2013), pp. 6-7.

174 *Boumediene v Bush*, 553 US 723 (2008), pp. 36-41.

175 *Boumediene v Bush*, 553 US 723 (2008), pp. 36-41.

176 *Boumediene v Bush*, 553 US 723 (2008), p. 37.

177 *Boumediene v Bush*, 553 US 723 (2008), pp. 39-40.

178 *Boumediene v Bush*, 553 US 723 (2008), pp. 38-39; cf. *Rasul v Bush*, 542 US 466 (2004), p. 12; crit. F. Stuckenberg, 'Habeas corpus ad subjiciendum: Zugang zu ordentlichen Gerichten für die Gefangenen von Guantánamo Bay', 2009 *Juristenzeitung* 64, p. 93; A.R. Desai, 'How We Should Think about the Constitutional Status of the Suspected Terrorist Detainees at Guantanamo Bay: Examining Theories That Interpret the Constitution's Scope', 2003 *Vanderbilt Journal of Transnational Law* 36, pp. 1598-1601. Although these findings seem to correspond to the results concerning the applicability of international human rights law (cf. footnote 141 et seq. with the main text), the Supreme Court's concept of de facto sovereignty and the international law principle of effective control should not be mixed up, see in detail: F. de Londras, 'What Human Rights Law Could Do: Lamenting the Absence of an International Human Rights Approach in *Boumediene & Al Odah*', 2008 *Israel Law Review* 41, no. 3, pp. 562-595; S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', 2012 *Leiden Journal of International Law* 25, no. 4, footnote 35 and main text.

179 The Government's view in *Boumediene v Bush*, 553 US 723 (2008), p. 35; cf. B.J. Priester, 'Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants' 2005-2006 *Rutgers Law Journal* 37, no. 1, p. 90; R.H. Fallon & D.J. Meltzer, 'Habeas corpus jurisdiction, substantive rights, and the war on terror', 2007 *Harvard Law Review* 120, no. 8, p. 2053. There is now no US citizen detained in Guantánamo, as they were all brought to prisons in the territory of the United States (J.S. Lutz, *Die Behandlung von 'illegalen Kämpfern' im US-Amerikanischen Recht und Völkerrecht*, 2011, p. 35; cf. the list of detainees in footnote 81).

180 F. Stuckenberg, 'Habeas corpus ad subjiciendum: Zugang zu ordentlichen Gerichten für die Gefangenen von Guantánamo Bay', 2009 *Juristenzeitung* 64, p. 88; *Rasul v Bush*, 542 US 466 (2004), pp. 12-13.

181 F. de Londras, *Detention in the 'War on Terror'*, 2011, pp. 39-40.

182 P.D. Halliday & G.E. White, 'The Suspension Clause: English Text, Imperial Contexts, and American Implications', 2008 *Virginia Law Review* 94, p. 714; *Braden v 30<sup>th</sup> Judicial Circuit Court of Ky.*, 410 US 484, 494-5 (1973); *Rumsfeld v Padilla*, 542 US 426 (2004), pp. 5-6.

183 *Boumediene v Bush*, 553 US 723 (2008), p. 41. Crit. concerning the length of the habeas proceedings D. Gartenstein-Ross, 'The Future of Preventive Detention Under International Law', in S. Muller et al. (eds.), *The Law of the Future and the Future of Law: Volume II*, 2012, pp. 262-263.

184 *Boumediene v Bush*, 553 US 723 (2008), pp. 41-42. The Supreme Court then further examined whether the legal action before the CSRT and the Appeal Court of the District of Columbia is a sufficient substitute. It criticized the fact that the Appeal Court had no jurisdiction to examine the legality of the detention but only whether the CSRT's procedure complied with the procedure specified by the Secretary of Defense and whether this procedure was lawful. Moreover, it held that the Court of Appeal has only a limited role to play compared

Of course, the exercise of a writ of *habeas corpus* is only a procedural means to exercise the underlying constitutional rights which have to exist in the first place.<sup>185</sup> The Supreme Court left the question open which constitutional rights could ultimately be invoked by the detainees.<sup>186</sup> To preserve the writ's effectiveness, however, the petitioner must have the possibility to invoke at least constitutional core rights,<sup>187</sup> e.g. the due process clause of the Fifth (and Fourteenth) Amendment.<sup>188</sup>

## 5. Conclusion

The right to a fair trial is fully applicable with regard to alleged terrorists within the framework of the 'war on terror'. It constitutes a fundamental human right enshrined in several regimes that create an umbrella guaranteeing the basic judicial guarantees.

On the *international* level it is guaranteed by the GC during an *armed conflict*, notwithstanding its international or non-international character, for both the armed forces and for civilians. During detention, as a minimum, the fundamental 'laws of humanity' in the sense of the Martens Clause and Common Article 3 of the GC are applicable. This includes 'judicial guarantees which are recognized as indispensable by civilized peoples' (Article 3 (1)(d) GC). Even if one accepts the concept of unlawful combatants, the fair trial protection of the GC cannot be suspended. In times of *peace* the right to a fair trial is guaranteed by international human rights instruments. While they can be derogated from in times of emergency, certain minimum fair trial rights necessary to protect the non-derogable human rights continue to exist in all circumstances. Basic human rights also apply in armed conflict complementary to the IHL as *lex specialis*.

On the *national* level, the US Constitution and its Fifth Amendment are applicable even to alien citizens detained at Guantánamo Bay.

In sum, as one of the core principles of the law, the right to a fair trial can never be derogated from and must be respected in peace as well as in times of armed conflict. Thus, given its application even in extraordinary situations, it amounts to a general principle of transnational criminal law. ¶

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to ordinary habeas corpus proceedings. Considering the lack of assistance by counsel and the admission of hearsay evidence as examples of the detainee's limited means to discredit his status and the 'considerable risk of error in the tribunal's findings of fact' (p. 56), the Supreme Court denied that Congress had created a sufficient substitute (ibid., pp. 48-64). In 2011, President Obama issued an order which established a process to periodically review 'the executive branch's continued, discretionary exercise of existing detention authority in individual cases' (Executive Order No. 13567, §1(b); the order is available at <<http://www.fas.org/jrp/offdocs/eo/eo-13567.htm>> [last visited 28 August 2013]); see in detail L.A. Malone, 'The Legal Dilemma of Guantánamo Detainees from Bush to Obama', 2012 *Criminal Law Forum* 23, no. 4, pp. 356-359.

185 F. Meyer, 'Habeas Corpus und Suspension Clause', 2009 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 69, p. 36.

186 Crit. F. Meyer, 'Habeas Corpus und Suspension Clause', 2009 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 69, pp. 36, 38; cf. also R.H. Fallon & D.J. Meltzer, 'Habeas corpus jurisdiction, substantive rights, and the war on terror', 2007 *Harvard Law Review* 120, no. 8, p. 2048; L.A. Malone, 'The Legal Dilemma of Guantánamo Detainees from Bush to Obama', 2012 *Criminal Law Forum* 23, no. 4, pp. 350-351.

187 Cf. also R.H. Fallon & D.J. Meltzer, 'Habeas corpus jurisdiction, substantive rights, and the war on terror', 2007 *Harvard Law Review* 120, no. 8, p. 2064.

188 A. Walen & I. Venzke, 'Unconstitutional Detention of Nonresident Aliens: Revisiting the Supreme Court's Treatment of the Law of War in *Hamdi v. Rumsfeld*', 2007 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67, pp. 876-878; cf. also *Hamdi v. Rumsfeld*, 542 US 507 (2004), p. 26.