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Experts Meeting on Security Detention Report

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EXPERTS MEETING ON SECURITY DETENTION REPORT*

Prepared by
Tyler Davidson[†] & Kathleen Gibson[‡]

The International Committee of the Red Cross and the Frederick K. Cox International Law Center at Case Western Reserve University convened a two-day experts meeting at Case Western Reserve University School of Law in September 2007 devoted to legal and practical issues associated with security detention. Experts from governments, NGOs, academia, and the ICRC, participating in their personal capacity, were invited to reflect on the current state of the law governing security detention, to identify impediments to better protection of procedural rights in practice, and to brainstorm about issues that required further examination. This Report summarizes the presentations and discussions of the participants at the experts meeting.

TABLE OF CONTENTS

| | |
|---|-----|
| EXECUTIVE SUMMARY | 325 |
| <i>Security Detention—The International Legal Framework</i> | 326 |
| <i>Security Detention in Practice</i> | 326 |
| <i>The Way Forward</i> | 326 |
| INTRODUCTION..... | 326 |
| PANEL I: SECURITY DETENTION—THE INTERNATIONAL LEGAL FRAMEWORK | 328 |
| SPEAKER’S SUMMARY—SECURITY DETENTION UNDER INTERNATIONAL HUMAN RIGHTS LAW..... | 328 |
| <i>Introduction</i> | 328 |
| <i>Gaps within the Law</i> | 329 |
| <i>Sources of International Human Rights Law</i> | 329 |
| <i>The Scope of International Human Rights Law</i> | 330 |
| <i>A Working Definition of Security Detention</i> | 330 |

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| | |
|---|-----|
| <i>Permissible Grounds for Detention</i> | 330 |
| <i>Judicial Control</i> | 331 |
| <i>The Right to be Brought Promptly Before a Judge</i> | 331 |
| <i>The Right to Counsel</i> | 332 |
| <i>The Right to Notification of the Reasons for Detention</i> | 332 |
| <i>Treatment of the Detainee</i> | 332 |
| <i>Incommunicado Detention</i> | 332 |
| <i>Derogation</i> | 333 |
| <i>Restrictions on Derogations from the Right to Liberty</i> | 333 |
| <i>Discrimination Under the Law</i> | 334 |
| <i>Compensation for Unlawful Detention</i> | 334 |
| SPEAKER'S SUMMARY—SECURITY DETENTION UNDER INTERNATIONAL HUMANITARIAN LAW | 334 |
| <i>Sources of International Humanitarian Law</i> | 334 |
| <i>International Armed Conflict: The Initial Standard for Detention</i> | 335 |
| <i>Review of the Initial Detention</i> | 335 |
| <i>Ability to Appeal the Initial Detention Decision</i> | 336 |
| <i>Periodic Review of Detention</i> | 336 |
| <i>Notice as to the Reasons for Detention</i> | 337 |
| <i>Non-International Armed Conflict</i> | 337 |
| <i>International Humanitarian Law in Practice</i> | 337 |
| <i>The NATO Kosovo Force</i> | 337 |
| <i>International Practice Generally</i> | 338 |
| <i>Adequacy of the Framework</i> | 339 |
| SPEAKER'S SUMMARY—CONVERGENCE AND DIVERGENCE OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW | 339 |
| <i>Gaps within the Law</i> | 339 |
| <i>Addressing the Shortcomings of Humanitarian and Human Rights Law</i> | 340 |
| DISCUSSION | 342 |
| <i>What Should be Done with the Guantanamo Detainees?</i> | 342 |
| <i>Security Threat versus Knowledge of Potential Threats</i> | 343 |
| <i>Flexibility of Standards</i> | 344 |
| <i>When Does International Human Rights Law Apply?</i> | 344 |
| <i>Seven Preliminary Issues</i> | 345 |
| PANEL II: SECURITY DETENTION IN PRACTICE | 346 |
| SPEAKER'S SUMMARY—SECURITY DETENTION AND THE UNITED KINGDOM..... | 346 |
| <i>Legislative Developments</i> | 347 |
| <i>Controlling the Terror Threat</i> | 347 |
| <i>The Control Orders System</i> | 348 |
| <i>The Control Orders Test</i> | 349 |
| <i>Judicial Supervision of Control Orders</i> | 349 |

| | |
|---|-----|
| <i>Procedural Challenges to Control Orders</i> | 349 |
| <i>Substantive Challenges to Control Orders</i> | 350 |
| <i>Deprivation of Liberty: The JJ Case</i> | 350 |
| <i>Deprivation of Liberty: The E Case</i> | 351 |
| <i>Other Strategies</i> | 351 |
| SPEAKER'S SUMMARY—SECURITY DETENTION AND THE UNITED STATES..... | 352 |
| <i>Returns and Transfers</i> | 353 |
| <i>The Guantanamo Bay Military Commissions</i> | 354 |
| <i>The Iraq Case</i> | 354 |
| <i>The National Security Court Idea</i> | 355 |
| SPEAKER'S SUMMARY—SECURITY DETENTION AND ISRAEL..... | 356 |
| <i>Security Detention Inside Israel</i> | 356 |
| <i>Security Detention Inside the Occupied Territories</i> | 358 |
| <i>Problems with Adherence to the Laws</i> | 359 |
| <i>Problems within the Laws Themselves</i> | 360 |
| DISCUSSION..... | 362 |
| <i>Security Detention in Canada</i> | 362 |
| <i>Effectiveness of U.K. Monitoring Devices and Special Counsel</i> | 365 |
| <i>Current Numbers of Detainees in Iraq and Israel</i> | 365 |
| <i>Debate on the National Security Courts Idea in the U.S.</i> | 366 |
| <i>The Importance of Judicial Review</i> | 369 |
| <i>The Role of Counsel</i> | 370 |
| <i>Evidentiary Standards</i> | 371 |
| <i>Conclusions</i> | 371 |
| PANEL III: THE WAY FORWARD..... | 372 |
| <i>The Permissibility of Administrative Detention</i> | 372 |
| <i>The Viability of Criminal Prosecutions in the U.S.</i> | 373 |
| <i>Defining the Parameters of Security Detention</i> | 374 |
| <i>Classified Information and Special Advocates</i> | 377 |
| <i>Safeguards against Indefinite Detention</i> | 378 |
| <i>Next Steps</i> | 378 |
| ANNEX: EXPERTS MEETING PARTICIPANTS..... | 379 |

EXECUTIVE SUMMARY

The International Committee of the Red Cross (ICRC) and the Frederick K. Cox International Law Center at Case Western Reserve University in Cleveland, Ohio, organized a two-day experts meeting in Cleveland from September 14 to September 15, 2007, devoted to legal and practical issues associated with security detention.

The meeting participants, who included experts from governments, NGOs, academia, and the ICRC participating in their personal capacity, were invited to reflect on the current state of the law governing security

detention, to identify impediments to better protection of procedural rights in practice, and to brainstorm about issues that required further examination.

Discussions at the meeting took place in three consecutive panels.

Security Detention—The International Legal Framework

The first panel was devoted to an examination of existing international standards as a means of framing the debate. The experts heard presentations on international human rights law (HRL) and international humanitarian law (IHL) rules relevant to security detention, as well as a presentation on the convergence and divergence of HRL and IHL as applied to this type of detention. The discussion centered, among other things, on the fate of detainees currently held in Guantanamo Bay, on the permissibility of detention for intelligence gathering purposes, and on the applicability of international human rights law.

Security Detention in Practice

The second panel heard three expert presentations summarizing security detention systems in the United Kingdom, the United States, and Israel. The presentations revealed a variety of approaches in security detention procedures, with widely varying rules on a range of practical issues, including access to and types of counsel, as well as judicial review. A brief overview of Canadian security detention laws was also provided in the discussion, which subsequently centered on the viability and implications of establishing a separate regime of national security courts in the U.S. to administer security detention. The experts highlighted the role of counsel and the judiciary in security detention proceedings, as well as the issue of evidentiary standards as requiring further examination.

The Way Forward

In the third and final panel, the participants opined on several topics, including: the permissibility of administrative detention, the viability of criminal prosecutions in the U.S., the parameters of security detention, the use of classified information and special advocates, and safeguards against indefinite detention. The meeting concluded with a discussion focusing on possible next steps in the debate on security detention, which demonstrated a wide variety of views.

INTRODUCTION

Deprivation of liberty for imperative reasons of security without criminal charge, i.e., internment, is an exceptional measure of control that may be taken in armed conflict, whether international or non-international. The peacetime equivalent, commonly referred to as administrative deten-

tion, is currently being more and more widely practiced by states for the purpose of protecting state security or public order, particularly in response to acts of terrorism or in order to prevent such acts.

Practice has shown that, whether in armed conflict or outside of it, persons subject to internment or administrative detention frequently lack the most basic procedural tools that would allow them to seek release, and to obtain it where the reasons for detention do not or no longer exist. Detainees are often not adequately apprised of the reasons for their detention and in many cases are not informed at all. Just as importantly, they often have no ability to contest the reasons for their internment/administrative detention or can do so only in proceedings that cannot be said to meet basic standards of impartiality and independence. Access to the outside world, including to family and friends, is habitually denied and, in some cases, persons are held outside of officially recognized places of detention. While detaining authorities argue that curtailment of the above-mentioned and other procedural safeguards is necessary for reasons of national security, they seldom provide more than cursory explanations for why a specific detainee does or may represent such a threat.

Even though the relevant bodies of international law—international humanitarian and human rights law—contain basic provisions establishing the obligations of the detaining authorities, it may be argued that neither legal framework provides sufficient procedural safeguards from abusive deprivation of liberty to persons interned or administratively detained. Furthermore, states have been adopting widely varying national legislation or regulations on internment/administrative detention over the past several years with apparently little reference to the international standards that do exist.

Given the protection problems associated with internment and administrative detention, as well as the fact that this type of deprivation of liberty is coming into more frequent use, the International Committee of the Red Cross (ICRC) and the Frederick K. Cox International Law Center at Case Western Reserve University in Cleveland, Ohio, organized a two-day experts meeting to allow for a substantive exchange of views on the outstanding legal and practical issues associated with security detention among persons knowledgeable in this field.¹ This report reproduces presentations

¹ The terms “internment,” “detention” (unless further qualified), “security detention” and “administrative detention” are used interchangeably throughout this report. They refer to situations in which a person is deprived of liberty without the intention of the detaining authority to bring criminal charges. Such measures are considered exceptional and, assuming the prerequisite criteria are met, may only be ordered for imperative reasons of security in armed conflicts, or for the purpose of protecting state security or public order in non-armed conflict situations.

made during the meeting and provides a summary of the main points that emerged during the discussions.

The meeting brought together experts in both international humanitarian law and international human rights law, attending in their personal capacity (a list of the participants is provided in the Annex). It was conducted under the Chatham House Rule; accordingly, there is no attribution of any of the opinions expressed.

PANEL I: SECURITY DETENTION—THE INTERNATIONAL LEGAL
FRAMEWORK

SPEAKER'S SUMMARY—SECURITY DETENTION UNDER INTERNATIONAL
HUMAN RIGHTS LAW

The first expert presentation in this panel focused on the international human rights standards applicable to security detention. The expert made it clear that international human rights law (HRL) only allows security detention in a very limited set of circumstances, and even when allowed, such detention is subject to many limitations that apply at all times.

Introduction

The conference began with a presentation that addressed the legality of security detention under HRL. The expert said that the general consensus expressed in the human rights instruments was that where security detention is allowed, several requirements apply at all times. These include that detention not be arbitrary, that it be based on grounds and procedures previously established by law, and that it be subject to prompt and effective judicial control, at least on the detainee's initiative. Further, the instruments require that detainees be promptly informed of the reasons for their detention and, if they are foreign citizens, of their right to seek the assistance of a consular official. Finally, the documents provide that no detention may be secret and that all detainees must be registered; that no detainee may be held incommunicado for more than a few days (if even that long); that all detainees have the right to humane treatment, including access to regular medical attention; that detention must be proportional, be no more restrictive and last no longer than is strictly necessary; that there can be no discrimination in the treatment of nationals and foreigners, and that the detention must comply with other norms of international law, particularly international humanitarian law (IHL), if it occurs during an armed conflict. The extent to which this consensus reflects customary international law is a matter to be considered.

Gaps within the Law

Despite the requirements outlined above, the expert still felt that several gaps exist within HRL as it pertains to security detention. Most notable is the requisite threshold of evidence or information required to justify a detention. The expert noted that human rights instruments clearly state that detention must not be “arbitrary,” but provide little guidance beyond that point. Second, the human rights instruments lack any explicit requirement of periodic review. However, the expert felt that the case law might address this gap. He noted that the consensus outlined above regarding the requirements for detention under human rights law were derived from many different texts. While some standards appeared in nearly every human rights instrument, others occurred in only a few. This leads to a lack of uniformity, clarity, and certainty under the law, which needs to be addressed.

Sources of International Human Rights Law

The expert went on to describe the main sources of international HRL. These include the International Covenant on Civil and Political Rights (ICCPR),² which has 160 state parties, and in the expert’s opinion in many respects reflects customary international law. The regional human rights conventions include: The European Convention on Human Rights (ECHR),³ which has approximately forty-five state parties, the African Charter on Human and Peoples’ Rights (AfCHPR),⁴ which has over fifty state parties, and the American Convention on Human Rights (ACHR),⁵ which has around twenty-five state parties. Further sources are: the Universal Declaration of Human Rights;⁶ the United Nations Body of Principles for All Persons in Detention⁷ adopted by the U.N. General Assembly in 1988; the American Declaration of Human Rights (which is applied to the U.S. by the Inter-American Commission on Human Rights),⁸ and finally, the United

² International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR].

³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

⁴ African Charter on Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58 [hereinafter AfCHPR].

⁵ American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 17955, 1144 U.N.T.S. 144 [hereinafter ACHR].

⁶ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

⁷ U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988), [hereinafter U.N. Basic Principles].

⁸ American Declaration of the Rights and Duties of Man, May 2, 1948, OEA/Ser.L/V/II.23, doc. 21 rev. 6 (adopted by the Ninth International Conference of Ameri-

Nations Convention Against Torture,⁹ which has 140 state parties and the basic provisions of which are considered customary international law.

The Scope of International Human Rights Law

The expert next discussed the scope of application of international human rights law. The expert felt that despite the view of some members of the United States government, the international human rights texts and jurisprudence make it clear that HRL applies in both times of peace and times of armed conflict. The International Court of Justice and other bodies have pointed out that HRL applies concurrently in situations of armed conflict, subject to the *lex specialis* of IHL.¹⁰ The same conclusion can be reached based on the derogation provisions of several human rights treaties, including the ACHR, which explicitly states that certain rights may be derogated from during times of war.¹¹ Finally, the expert contended that HRL applies extraterritorially, at the very least where a state has effective control of a person whose rights are affected, as is the case with detention.

A Working Definition of Security Detention

The expert then discussed the definition of security detention. Although the speaker did not come up with a precise or elaborate definition, detention for the purpose of criminal prosecution was excluded. Such detention triggers an array of rights, which may overlap with those granted to security detainees, but are much more extensive. As far as the expert could determine, security detention is resorted to for two main reasons: to remove a danger to security at large, and to allow for interrogations for security or intelligence purposes. The expert also raised the question of whether detention with a view to expulsion or deportation, when the grounds for such detention are related to national security, should be included in this definition.

Permissible Grounds for Detention

The expert next addressed the permissible grounds for security detention, if it is permitted at all. First, as is set forth in the ICCPR,¹² the

can States, Bogota, Colombia, May 2, 1948) [hereinafter ADHR]. This is the standard applied to the United States by the Inter-American Commission on Human Rights, because the U.S. has not ratified the ACHR.

⁹ Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter UNCAT].

¹⁰ Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, 1996 I.C.J. 18 (July 8).

¹¹ ACHR, *supra* note 5, art. 27(1).

¹² ICCPR, *supra* note 2, art. 9(1).

UDHR,¹³ the ACHR,¹⁴ the AfCHPR,¹⁵ and implicitly in the ECHR,¹⁶ detention may not be arbitrary. Second, the grounds for detention must be established by prior law, a requirement set forth in the ICCPR,¹⁷ ACHR,¹⁸ AfCHPR,¹⁹ and the ADHR.²⁰ The ECHR takes a different approach by enumerating the only permissible grounds for detention.²¹ Although security detention is not included in the list, the ECHR allows for derogation,²² and such derogation may allow for security detention. However, this is not entirely clear. On the other hand, it is fairly clear that the ICCPR, ACHR, AfCHPR, and the ADHR allow security detention, as long as it is not arbitrary, it is previously established by law, and if certain other conditions, discussed *infra*, are met.

Judicial Control

The expert then discussed the judicial controls applicable to security detention. There must be a judicial proceeding to determine the lawfulness of detention. This is true for all forms and justifications of detention under the ICCPR,²³ ACHR,²⁴ and the ADHR.²⁵ It is probably also a requirement under the ECHR, assuming security detention is allowed at all. The AfCHPR²⁶ and the U.N. Basic Principles²⁷ require a similar type of control, except that the detainee may also be brought before authorities other than a court.

The Right to be Brought Promptly Before a Judge

The expert next looked at the right to be brought promptly before a judge (even without a request from the detainee). Under the ACHR, this right exists regardless of the type of detention involved.²⁸ However, under

¹³ UDHR, *supra* note 6, art. 9.

¹⁴ ACHR, *supra* note 5, art. 7(3).

¹⁵ AfCHPR, *supra* note 4, art. 6.

¹⁶ ECHR, *supra* note 3, art. 5.

¹⁷ ICCPR, *supra* note 2, art. 9(1).

¹⁸ ACHR, *supra* note 5, art. 7(2).

¹⁹ AfCHPR, *supra* note 4, art. 6.

²⁰ ADHR, *supra* note 8, art. 25.

²¹ ECHR, *supra* note 3, art. 5(1).

²² *Id.* art. 15(1).

²³ ICCPR, *supra* note 2, art. 9(4).

²⁴ ACHR, *supra* note 5, art. 7(6).

²⁵ ADHR, *supra* note 8, art. 18.

²⁶ AfCHPR, *supra* note 4, art. 7.

²⁷ See U.N. Basic Principles, *supra* note 7, princ. 32.

²⁸ ACHR, *supra* note 5, art. 7(5).

the ECHR²⁹ and the ICCPR,³⁰ the right is linked to detention on criminal charges. The U.N. Body of Principles requires that any detention be ordered by or subject to the control of a judicial or other authority. The AfCHPR is silent as to this right.

The Right to Counsel

The right to counsel was also discussed by the expert. He pointed out that it is provided for only in the U.N. Body of Principles,³¹ but added that it may be implicit in the other texts. Further, the Body of Principles requires that places of detention be visited regularly by an authority other than the holding authority.³² Also, both the detainees and the place in which they are held must be registered, and such information must be communicated to the outside world.³³

The Right to Notification of the Reasons for Detention

The expert then highlighted a common requirement of all the instruments—that the detainee be notified of the reasons for his or her detention.³⁴ Further, where the detainee is a foreign national, he or she must also be informed of the right to meet with their consular officer.³⁵

Treatment of the Detainee

The expert pointed out that detainees may not be subjected to torture or to other cruel, inhuman or degrading treatment or punishment, under both the Convention against Torture and customary international law. The U.N. Body of Principles requires that a detainee be provided with an initial medical examination, and medical care as needed.

Incommunicado Detention

The expert pointed out that no detainee can be held incommunicado for more than a few days at the most. The UN Body of Principles requires that communications between counsel, or family members and the detainee

²⁹ ECHR, *supra* note 3, art. 5(3).

³⁰ ICCPR, *supra* note 2, art. 9(3).

³¹ U.N. Basic Principles, *supra* note 7, princ. 17.

³² *Id.* princ. 29(1).

³³ *See id.* princ. 12(1)(b), (d).

³⁴ *See* U.N. Basic Principles, *supra* note 7, princ. 10; ACHR *supra* note 5, art. 7(4); ICCPR, *supra* note 2, art. 9(2); ECHR, *supra* note 3, art. 5(2).

³⁵ The right to consular communication is set forth in the U.N. Basic Principles. U.N. Basic Principles, *supra* note 7, princ. 16(2). The International Court of Justice and the Inter-American Court of Human Rights have both upheld it in various cases.

be allowed.³⁶ The case law of the major human rights treaty regimes confirms this.

Derogation

The expert noted that derogation from the ECHR is a precondition for security detention, if this type of detention is allowed under the European Convention at all. The basic ground for derogation in the ICCPR,³⁷ ECHR,³⁸ and the ACHR³⁹ is the existence of a public emergency threatening the life of the nation. Once it is established that such an emergency exists, the necessity and proportionality of any derogation must also be justified. The right to liberty itself is derogable; however, the judicial controls protecting detainees are not derogable under the ACHR⁴⁰ and are considered non-derogable by the Human Rights Committee under the ICCPR.⁴¹ This is almost certainly also the case under the ECHR, especially having in mind the European Court of Human Rights decisions in *Brannigan*⁴² and *Aksoy*,⁴³ in both cases the court emphasized the importance of judicial controls.

Restrictions on Derogations from the Right to Liberty

Subsequently, the expert discussed the topic of proportionality in relation to a derogation from the right to liberty, stressing that a person's liberty cannot be limited any more than is strictly necessary. In the case of *A. v. Secretary of State*, the U.K. Law Lords, interpreting the ECHR, ruled that the prolonged deprivation of liberty imposed on foreign, but not U.K. terrorist suspects, did not meet the proportionality test set forth in Article 15 of the ECHR.⁴⁴ Further, the opinion stated, in dicta, that the same principles would apply with respect to a derogation under the ICCPR.⁴⁵

³⁶ U.N. Basic Principles, *supra* note 7, princ. 16.

³⁷ ICCPR, *supra* note 2, art. 4(1).

³⁸ ECHR, *supra* note 3, art. 15(1).

³⁹ ACHR, *supra* note 5, art. 27(1).

⁴⁰ *Id.* art. 27(2).

⁴¹ U.N. Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

⁴² See *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993) (holding that a public emergency in Northern Ireland sufficiently justified the British government's derogation under Article 15 ECHR, which permits derogations of certain rights in time of war or other situations such as public emergencies).

⁴³ See *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260.

⁴⁴ See *A and Others v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, ¶ 30.

⁴⁵ *Id.* ¶ 19.

Discrimination Under the Law

Finally, the expert turned to the concept of discrimination, particularly between nationals and non-nationals. In *A v. Secretary of State*, the highest court in the U.K. determined that imprisoning foreign nationals believed to represent a security threat, but not U.K. nationals who posed a similar threat, constituted discrimination in violation of Article 15 of the ECHR.⁴⁶

Compensation for Unlawful Detention

Compensation for unlawful detention is required by both the ICCPR and the ECHR.

SPEAKER'S SUMMARY—SECURITY DETENTION UNDER INTERNATIONAL HUMANITARIAN LAW

The second expert presentation in this panel discussed security detention under IHL. The expert pointed out that the IHL rules were designed with a significant amount of inherent flexibility, in order to allow states to “craft” them to meet their needs in practice.

Sources of International Humanitarian Law

The expert began the presentation by discussing the relevant sources of IHL, including the Fourth Geneva Convention;⁴⁷ and for state parties, the First and Second Additional Protocols⁴⁸ (API and APII). The Fourth Geneva Convention establishes four main requirements related to internment in international armed conflict: the initial standard for detaining someone,⁴⁹ review of the initial detention decision,⁵⁰ appeal of that decision,⁵¹ and periodic review of the detention.⁵² Article 75 of API also adds the requirement of notice to the detainee of the reasons for his or her deten-

⁴⁶ See *id.* ¶ 46.

⁴⁷ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV].

⁴⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter APII].

⁴⁹ See GCIV, *supra* note 477, art. 42.

⁵⁰ *Id.* art. 43.

⁵¹ See *id.*

⁵² See *id.*

tion.⁵³ The expert considered these requirements to be important elements of the internment procedure required in international armed conflict, but useful in non-international armed conflict as well. She added that when one looks at state practice, these are the most common elements observed. She also pointed out that the Fourth Geneva Convention has two sets of rules for security detention: one that applies to detention in the state party's own territory, and another to detention in occupied territory, where there is slightly more flexibility. The expert assumed that the difference in standards exists because the detaining authority is operating outside the structures of its own system. She also noted that law of war treaties provide virtually no guidance regarding security detention in non-international armed conflict.

International Armed Conflict: The Initial Standard for Detention

As to the initial standard for internment in a state party's territory, the expert explained that internment may not occur unless it is deemed "absolutely necessary."⁵⁴ The commentary to the Fourth Geneva Convention provides some examples of when that may be considered to be the case, such as subversive activity, actions of direct assistance to an enemy, detention of members of organizations whose object it is to cause disturbances, and acts of sabotage or espionage.⁵⁵ The rule in occupied territory is that, when the occupying power considers it necessary for imperative reasons of security, it may subject a protected person to internment.⁵⁶ This standard reflects the need to balance security and the seriousness of a deprivation of liberty without the expectation of a criminal process. The expert also pointed out that as soon as the imperative security reasons no longer exist, the person must be released.⁵⁷

Review of the Initial Detention

The expert then went on to discuss the requirement of review of the initial detention decision for internment in the territory of a party to an international armed conflict. Article 43 of the Fourth Geneva Convention requires that a detainee have the near-term ability to challenge his or her de-

⁵³ API, *supra* note 488, art. 75(3).

⁵⁴ See GCIV, *supra* note 477, art. 42.

⁵⁵ THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY ON GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR art. 42, 257–59 (Jean S. Pictet et al. eds., Maj. Ronald Griffin & C.W. Dumbleton trans., 1958), available at <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=380&t=com> [hereinafter GCIV Commentary].

⁵⁶ GCIV, *supra* note 477, art. 78.

⁵⁷ See *id.* art. 132.

tention before a court or an independent administrative board.⁵⁸ The treaty leaves it to the state to choose which option it uses. However, if the state chooses an independent administrative board, the commentary suggests that the board must consist of more than one person and must be independent and impartial.⁵⁹ This review is not automatic—the detainee must request it. However, once review is requested, it must occur promptly. There is some inherent flexibility in the meaning of “promptly,” which takes into consideration the time it takes to set up a board, large case loads, and other institutional factors.⁶⁰ The rules are silent as to type of courts (military or civilian), and as to what type of information the court/administrative board should look at when assessing the validity of the initial detention, as well as what information courts/administrative boards should examine on appeal and periodic review.

Ability to Appeal the Initial Detention Decision

The expert then discussed the third requirement: the ability of a detainee to appeal the initial detention decision. The Fourth Convention is silent on the right of appeal for detainees within the territory of the detaining power; however, detainees in occupied territories are granted this right, and such a decision must be made with the least possible delay.⁶¹ The Convention is silent as to what type of body should decide the appeal, but the commentary assumes for practical reasons that it will be the same type of body, either a court or administrative board that made the initial decision.⁶²

Periodic Review of Detention

As to the fourth requirement, periodic review of a person's detention, the expert pointed out that this is an automatic provision and the detainee need not request such a review. The Fourth Convention requires a state to review detention status periodically, and at least twice yearly for all detainees held within a state's own territory.⁶³ Further, the Convention requires the court or administrative board to have a view favorable to the amendment of the initial detainment decision.⁶⁴ In other words, the Convention builds in a slight bias in favor of release. Where the detainee is held in an occupied territory, the Convention is less specific as to what body must

⁵⁸ See *id.* art. 43.

⁵⁹ GCIV Commentary, *supra* note 555, art. 42.

⁶⁰ *Id.* art. 43.

⁶¹ See GCIV, *supra* note 477, art. 78.

⁶² GCIV Commentary, *supra* note 555, art. 43.

⁶³ GCIV, *supra* note 477, art. 43.

⁶⁴ *Id.*

do the review (there is no mention of a court or administrative board). Also, the review for detainees held in occupied territory allows for more flexibility in the timing of the review, requiring a review every six months, if possible.⁶⁵ Finally, detainees in occupied territory do not get the release preference granted detainees within the territory of the state. The expert was unsure as to exactly why these differences existed.

Notice as to the Reasons for Detention

The expert then discussed the fifth requirement, notice to the detainee of the reasons for his or her detention. As laid out in API, a state does not need to give a detainee specific reasons for his or her detention. Instead, it is only required to “promptly” inform the detainee generally, and in broad terms, of why he or she is detained.⁶⁶ The commentary suggests that appropriate categories of notice could include reasons such as: legitimate suspicion, precaution, unpatriotic attitude, nationality, and origin.⁶⁷

Non-International Armed Conflict

The expert stated that existing law of war treaties provide virtually no guidance on procedural rules for administrative detention in non-international armed conflict. Neither Common Article 3 nor APII contain any rules regarding reviews or appeals of detention.

International Humanitarian Law in Practice

The expert then explored trends in actual practice reflecting how states have conducted administrative detention during armed conflict. The expert concluded that real world practice follows fewer rules than are set forth in the Fourth Convention, partly because that treaty does not apply to many armed conflict situations in which states find themselves today.

The NATO Kosovo Force

Although the expert had examined a number of multi-national and single-state administrative detention frameworks, the expert primarily discussed the Kosovo Force (KFOR) rules and how they were applied. KFOR’s authority to detain is found in a UN Security Council resolution that provides that member states may take all necessary means to fulfill

⁶⁵ *Id.* art. 78.

⁶⁶ *See* API, *supra* note 48, art. 75.

⁶⁷ CLAUDE PILLOUD ET AL., COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICT, art. 75 (Yves Sandoz, Christophe Swinarski, Bruno Zimmermann eds., 1987) [hereinafter API Commentary].

their responsibilities.⁶⁸ Although detention was not specifically referred to in the resolution, the expert felt it was implied.

In 2001, the commander of KFOR issued a detention directive establishing the rules for security detention; however, the directive has not been released to the public. The expert attempted to determine the substance of the directive by looking at criticism directed at it. Based on the criticism, the expert compared the directive to the provisions of the Fourth Convention discussed above.

As to the requirement of the initial standard for detention, the expert determined that under the KFOR directive detention could only be used as a last resort when the civil authorities were unable to take action addressing a threat to KFOR or the safe and secure environment of Kosovo. Detention for intelligence value was not enough. Finally, detention was only allowed when "absolutely necessary."

The expert noted that under KFOR rules detainees had the right to be informed why they were detained. Also, under those rules, the length of detention depended on the command level of the person authorizing it. For example, the on-site commander could authorize detention for up to 18 hours, the multi-national brigade commander could authorize detention for up to 72 hours, and the KFOR Commander could authorize detention in 30-day increments. Linked to this is the review of the initial detention decision. Under the KFOR rules, it seems that a detainee could submit a petition to the Commander to contest his or her detention. The Commander could convene a panel that could offer recommendations, but the final decision appeared to rest solely with the Commander. As far as the expert could tell, the KFOR rules mention nothing about the right to appeal, and some international groups had questioned whether the Commander's decision could be considered an independent review. Finally, under the KFOR rules, the detainee could hire a lawyer and contact his or her family.

International Practice Generally

More generally, the expert determined that no set of detention rules authorizes collective detentions. Also, detainees should be released when they no longer pose a threat. Almost every set of detention rules that the expert reviewed required some sort of notice to either the International Committee of the Red Cross, the country of which the detainee is a national, or to the detainee's family. The independent reviews set forth in the detention procedures varied widely, from requiring both administrative and judicial review, to only requiring review by a senior military commander. Also, the time frame between such reviews varied greatly from state to state, with some being as frequent as every thirty days and others occurring once a

⁶⁸ S.C. Res. 1244, ¶ 7, U.N. Doc S/RES/1244 (June 10, 1999).

year. Finally, states' detention rules were varied as to whether legal assistance and lawyers were permitted.

Adequacy of the Framework

The expert concluded by discussing the adequacy of the procedural protections. The expert said it would be useful to establish a more robust set of rules governing security detentions in non-international armed conflict situations. However, the limitations inherent to fighting a war must be kept in mind. The expert felt that, because the lines between armed conflict and non-armed conflict are becoming blurred in today's world, having a single set of rules for administrative detention may be somewhat advantageous, especially given that the same set of individuals (i.e. state security forces), may be charged with conducting the detentions in both circumstances. On the other hand, the expert felt there were several disadvantages to having one set of rules applicable in both peace and war. For example, the expert felt that a state's need for security detention is greater during armed conflict than during peacetime as the very instability caused by war reduces the utility of standard law enforcement tools.

SPEAKER'S SUMMARY—CONVERGENCE AND DIVERGENCE OF
INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL
HUMANITARIAN LAW

The third expert presentation in this panel centered on the convergence and divergence of HRL and IHL in the area of security detention. The expert said that although both HRL and IHL have rudimentary frameworks in place for the administration of security detention, neither framework sufficiently protected the individuals affected.

Gaps within the Law

The expert began by noting that, while both HRL and IHL treaty law have norms related to security detention, neither provides sufficient procedural safeguards for the individual involved. IHL is particularly rudimentary in situations of non-international armed conflict governed only by Common Article 3 of the Geneva Conventions as treaty law. HRL, which is assumed to provide complementary protection in non-international armed conflicts, does not always cover the gaps, particularly for countries not party to one of the main HR treaties. Moreover, the right to liberty (provided the requisite criteria are met), is derogable under the treaties, and human rights case law, apart from suggesting that judicial review is always necessary, diverges on most other conditions of and requirements for security detention. She observed that there is a practical need to clarify a set of procedural safeguards for security detention in all circumstances.

Addressing the Shortcomings of Humanitarian and Human Rights Law

The expert then outlined a series of procedural principles and safeguards that could be used to regulate security detention based on both IHL and HRL. The expert said that these principles and safeguards apply to any detention for security reasons, whether in peacetime or during armed conflict, and provide a minimum baseline in all circumstances. The expert observed that governments will likely feel these principles and safeguards go beyond what is possible in armed conflicts, while human rights groups will feel they do not go far enough. However, the expert stressed that the recommendations are to be applied on a case-by-case basis, interpreted to meet the specific needs of a given situation, and would therefore hopefully satisfy both governments and human rights groups.

The first general principle mentioned by the expert is that security detention can only be an exceptional measure.⁶⁹ While there is little international jurisprudence on what constitutes an “exceptional” measure, there is no doubt that security detention cannot be related to a person’s past conduct, but must instead be based on the current and future threat posed by an individual’s activities. Security detention cannot be used as punishment or as a general deterrent.⁷⁰ Security detention for intelligence gathering purposes is unacceptable if the person detained does not otherwise present a threat.

The next principle discussed by the expert pertained to the use of security detention in lieu of criminal proceedings.⁷¹ The expert said that this was a common practice: governments place individuals in the “looser” security detention regime rather than bring them to trial, even when there is a functioning criminal justice system. By placing individuals in a security detention regime governments avoid the requirements of a criminal process. This practice, however, severely limits a person’s right to liberty and deprives a detainee of the ability to prove his or her innocence.

The third general principle requires that all cases of security detention be dealt with on an individual basis.⁷²

Fourth, the expert said that security detention must cease as soon as the reasons for it cease to exist.⁷³ While the outer limit for security detention

⁶⁹ See Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and other Situations of Violence*, 87 INT’L REV. OF THE RED CROSS 375, 380 (2005), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/review-858-p375> (included as Annex I to the ICRC’s Report on “IHL and the Challenges of Contemporary Armed Conflicts,” presented to the 30th International Conference of the Red Cross and Red Crescent, October 2007).

⁷⁰ Deterrence in this context applies to both deterrence of the person detained, and deterrence of others.

⁷¹ Pejic, *supra* note 69, at 381.

⁷² *Id.*

⁷³ *Id.* at 382.

under IHL is the end of active hostilities, even under this body of law a person must be released if the reasons for detention no longer exist with respect to a detainee at any time prior to that point.⁷⁴

The fifth general principle discussed by the expert provides that security detention must conform to the principle of legality.⁷⁵ Security detention must be based on reasons, and be undertaken in accordance with procedures, laid out in both domestic and international law.

The expert then went on to identify a few specific procedural safeguards for security detention that should be followed in all circumstances, acknowledging that there would not be enough time to go through the entire list. The expert noted that in practice these safeguards are often circumvented, especially during armed conflict.

The first safeguard identified by the expert is that all detainees have the right to be informed promptly, in sufficient detail, of the reasons for their detention.⁷⁶ One of the most critical issues in this context is the quality of information that a detainee must receive in order to be able to appeal his or her detention. The expert contended that there is no guidance from IHL and HRL on this point, and that in practice there is a constant struggle between a detaining authority's security needs, such as the protection of intelligence sources, and the rights of detainees. A standard should be found to enable meaningful challenge of the reasons for detention by detainees.⁷⁷

The second safeguard identified by the expert is a detainee's right to have the lawfulness of his or her detention reviewed by an independent and impartial body. The key issue, differently regulated under IHL and HRL, is what constitutes an "independent and impartial" body. IHL provides that during international armed conflict, either a court or an administrative board would be appropriate.⁷⁸ HRL provides that the process must be judicial.⁷⁹

However, in practice, in many situations of violence—whether classified as armed conflict or peacetime—there are no independent or functioning courts or lawyers, which means that fulfilling the requirements of judi-

⁷⁴ API, *supra* note 488, art. 75(3).

⁷⁵ Pejic, *supra* note 69, at 383; ICCPR, *supra* note 2, art. 9(1); AfCHPR, *supra* note 4, art. 6; ACHR, *supra* note 5, art. 7(2); ADHR, *supra* note 8, art. 25.

⁷⁶ API, *supra* note 488, art. 75(3).

⁷⁷ Such a standard would be in line with Articles 43 and 78 of GCIV, where Article 78 grants the right to appeal the initial detention decision, and Article 43 allows for the detainees to have their detention reconsidered as soon as possible. *See id.* arts. 43, 78. In either case, the commentaries suggest that the detainees must be allowed to undertake steps to have their detention reviewed. *See* GCIV Commentary, *supra* note 47, art. 78. The right to be informed of the reasons for one's detention is also clearly provided in Article 9(4) of the ICCPR. *See* ICCPR, *supra* note 2, art. 9(4). This leads to a general conclusion that the right to contestation of a detention is required by both IHL and HRL.

⁷⁸ *See* GCIV, *supra* note 477, art. 43.

⁷⁹ ICCPR, *supra* note 2, art. 9(4).

cial review can be extremely difficult. Determining the appropriate body for security detention review remains an unsettled point, one that can be resolved on a case by case basis.

The third safeguard identified by the expert was the right to periodic review, derived from IHL. The expert said that while there is no explicit right to periodic review under HRL, it is implicit in the right of detainees to submit challenges to their detention as long as they are detained.⁸⁰

The final safeguards discussed by the expert were the right to legal counsel and the right of detainees and their counsel to be present in security detention proceedings. Neither IHL nor HR treaty law explicitly provide for these rights, but they are essential to enabling a detainee to effectively challenge his or her detention. Given the security dimension involved, practice has shown that governments are allowed to take reasonable steps to protect sensitive information or sources, but the modalities involved remain unresolved.

DISCUSSION

What Should be Done with the Guantanamo Detainees?

An expert began the discussion by asking what a detaining state may do with a detainee whose country does not want him or her back. One expert said that HRL recognizes personal liberty as a fundamental right⁸¹ and that once a detainee no longer presents a security threat, and is not serving a criminal sentence,⁸² the detaining state is obligated to release him or her within its territory. This is not to say the detaining country must grant the detainee citizenship; however, the state may in essence be “stuck” with the detainee unless it can find a receiving country. The expert said this applies to some of the detainees held at Guantanamo Bay, who should be allowed to come to the U.S. mainland.

Several experts disagreed. An expert observed that the standard for detention under IHL is quite high,⁸³ and that even if a detention is no longer

⁸⁰ *Id.*; ACHR, *supra* note 5, art. 7(6); ADHR, *supra* note 8, art. 18.

⁸¹ ICCPR, *supra* note 2, art. 9(1); ECHR, *supra* note 3, art. 5(1); AfCHPR, *supra* note 4, art. 6; ACHR, *supra* note 5, art. 7; UDHR, *supra* note 6, art. 3; U.N. Basic Principles, *supra* note 7, princ. 10; ADHR, *supra* note 8, art. 1.

⁸² *See Zadvydas v. Davis*, 533 U.S. 678, 699–701. The Court held that foreign nationals pending deportation may be held for up to six months while the United States attempts to find a country that will take them. After that six month period, the government must present a very strong justification for continued detention and if no such justification exists, the person must be released. *Id.*

⁸³ GCIV, *supra* note 477, art. 42 (only allowed if deemed “absolutely necessary”); *see also* GCIV, *supra* note 477, art. 78 (only justified in an occupied territory by “imperative reasons of security”).

authorized under the IHL, a detainee may nonetheless present a continued threat that would prevent his or her entry into the detaining state. One expert said that he believed political opposition would prevent the Guantanamo detainees from ever being released into the United States. Another expert said that the American people might not necessarily object. The expert noted that several detainees who were determined to no longer pose a security risk, including some who had been found guilty of a crime, had been successfully released in Britain without a public outcry.

An expert observed that the U.S. Senate recently passed a resolution declaring that the Guantanamo detainees should neither be released on U.S. soil, nor be transferred to stateside detention facilities.⁸⁴ However, one expert said that the resolution may have been passed with some confusion, as it was contained in an education bill, and was supported by several members of the House who made it clear that they believed Guantanamo should be closed, and the detainees brought to Ft. Leavenworth. Another expert said that the resolution may have only passed in the Senate to avoid negative campaign commercials in the upcoming elections, adding that she believed a comprehensive solution for the Guantanamo detainees will require the admission of some of them into the U.S., in order to garner public support around the world.

Security Threat versus Knowledge of Potential Threats

An expert said that both IHL and HRL indicate that an individual who has a significant amount of knowledge about potential security threats, but who does not himself pose such a threat may not be detained.⁸⁵ In response, one expert pointed out that material witness statutes allow for witnesses to be detained prior to trials to ensure that they are available to testify. He said that the material witness detention scheme could possibly be transposed to the detention of persons representing a “material intelligence source.” However, the expert expressed uncertainty as to whether in practice there would be many persons who could be held exclusively for intelligence purposes, given that individuals with knowledge of possible threats tend to, independent of such knowledge, constitute a substantive threat themselves. Another expert said that in Justice O’Connor’s controlling opi-

⁸⁴ S. Amdt. 2351, Sense of Senate on the Detainees at Guantanamo Bay, Cuba, 110th Congress (2007) (amending S. Amdt. 2327, a substitute amendment to H.R. 2669). Several members of the House supported a motion to instruct House members of the conference committee on H.R. 2669 to agree to the Senate amendment relating to the sense of the Senate on the detainees at Guantanamo Bay, Cuba. *See, e.g.*, 153 CONG. REC. 129, H10038–41 (Sept. 4, 2007) (statements of Rep. Hoekstra (Mich.), Rep. Miller (Cal.), and Rep. Wilson (S.C.)).

⁸⁵ *See* GCIV, *supra* note 477, arts. 42, 78, and 132.

nion in *Hamdi*,⁸⁶ it was made clear that individuals cannot be detained solely on the grounds of their intelligence value.

Flexibility of Standards

An expert queried whether standards for detention must be flexible enough to take into account the resources of the detaining power. One expert said that in any armed conflict, the required standards and procedures for dealing with detainees must be consistent for all parties to the conflict. The expert noted that even in a non-international armed conflict, where one of the parties is often a guerilla force without regularly constituted courts or lawyers, both parties are still subject to the same standards. However, the expert said that he felt an argument could be made that if one side in a conflict has vastly greater resources, it should be held to a higher standard. Another expert said that the United States and other powerful states may respond with the argument that imposing different obligations on parties to an armed conflict would undermine the principle of equality.

One expert noted that while equality of obligations is fundamental under humanitarian law, the principle refers mainly to the treatment of individuals in the power of parties to an armed conflict, and not to the procedural aspects of detention. Parties are therefore not necessarily required to have the same legal procedures for detention. She referenced Common Article 3 of the Geneva Conventions,⁸⁷ which requires the use of a “regularly constituted court,” and Article 5 of APII, which contains no reference to such a court.⁸⁸ The expert said that reference to a “regularly constituted court” was omitted from APII because the drafters realized that a non-state actor would likely not have such courts. However, the expert noted that failure to hold non-state actors to some type of court requirement would be to completely ignore the principle of equality, which must be avoided.

When Does International Human Rights Law Apply?

An expert questioned whether a state must apply HRL whenever it has effective control of a security detainee, regardless of location, or whether a detainee must be within its territory and jurisdiction. In response, an expert said that the U.N. Human Rights Committee held in the Uruguayan cases that the “territory and jurisdiction” phrase was disjunctive, and that an individual is under a state’s effective power and control when he or she is within its jurisdiction, even if not in its territory.⁸⁹ The expert said that this

⁸⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁸⁷ GCIV, *supra* note 47, art. 3.

⁸⁸ APII, *supra* note 488, art. 5.

⁸⁹ U.N. Human Rights Committee, *Communication No. 52/1979: Uruguay*, 29/07/81 § 12.2, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981); U.N. Human Rights Committee,

interpretation has remained consistent since the Uruguayan cases. It has been affirmed by the Human Rights Committee and also expressed by the Inter-American Commission on Human Rights and the European Court of Human Rights.⁹⁰

The expert outlined the *Banković* case, in which the European Court of Human Rights held that NATO's bombing of the Belgrade TV and Radio station was not governed by the ECHR because NATO did not have effective power and control of the area or the people involved.⁹¹ Conversely, the Court found that Turkey's arrest of Abdullah Öcalan in Kenya triggered its human rights obligations because Mr. Öcalan was under Turkey's effective power and control.⁹² The expert observed that, by definition, a person is under a state's power and control when he or she is detained. Therefore, all detentions must meet the standards outlined in the relevant human rights instruments, regardless of whether the person is located within a state's territory.

Seven Preliminary Issues

An expert pointed out seven issues that must be taken into consideration during any discussion of security detention. First, there must be an established definition of detention. The expert asked whether detention begins when a person is stopped at a check-point, or at some later time? At what point do international human rights standards become applicable?

The second issue raised by the expert concerned state responsibility. The expert discussed the European Court of Human Rights' decision in *Samarati*, which held that U.N. operations established by the Security Council acting under Chapter VII of the U.N. Charter that are: (1) fundamental to the U.N.'s mission of establishing international peace and security, and (2) require the support of the U.N. members in order to be effective, cannot be interpreted in a manner that would subject the acts or omissions of the ECHR contracting parties to the scrutiny of the Court as long as the acts or omissions are covered by a Chapter VII resolution, and occurred prior to or in the course of the operation.⁹³ The expert said that this very broad statement on state responsibility is of relevance for all states.

Communication No. 25/1978: Uruguay 26/07/82 § 7.2, U.N. Doc. CCPR/C/16/D/25/1978 (July 26, 1982); U.N. Human Rights Committee, *Communication No. 110/1981: Uruguay 29/03/84* § 7, U.N. Doc. CCPR/C/21/D/110/1981 (March 29, 1984).

⁹⁰ *Coard v. United States*, Case No. 10.951, Inter-Am. C.H.R., Report No. 109/99 (1999); *Cyprus v. Turkey*, 4 Eur. H.R. Rep. 482 (1978).

⁹¹ *Banković and Others v. Belgium and Others*, 2001-XII Eur. Ct. H.R. 333, 359.

⁹² *Öcalan v. Turkey*, 2005-IV Eur. Ct. H.R. 131, 134.

⁹³ *Samarati v. France, Germany and Norway*, App. No. 78166/01, Eur. Ct. H.R. May 2, 2007.

Third, the expert discussed the issues surrounding procedural requirements for security detention and the consequences of failing to implement them. He pointed to the *Al-Jedda* case in Britain, which held that detention might not be unlawful in all cases where the procedures were not properly followed.⁹⁴

The expert then raised the issue of transfers, or more particularly, the question of what the standard is for transferring detainees between countries. There is some general guidance in the Third Geneva Convention Article 12,⁹⁵ and GCIV Article 45,⁹⁶ however, these articles do not provide specific guidance on the standards that must be followed.

Closely connected is the fifth issue raised by the expert, namely, the transferring state's monitoring obligations. The expert specifically queried what the standards for monitoring are and what the transferring country's obligations are once a detainee is transferred.

The sixth issue raised by the expert related to the extent to which detainees are granted rights under the domestic law of a state, particularly where a detainee is under its effective control, but outside its territory.

Lastly, the expert asked to what extent Article 103 of the U.N. Charter trumps human rights instruments and other international law norms, with the exception of *jus cogens*.⁹⁷

PANEL II: SECURITY DETENTION IN PRACTICE

SPEAKER'S SUMMARY—SECURITY DETENTION AND THE UNITED KINGDOM

The first expert presentation in this panel concerned security detention practice in the United Kingdom. The expert discussed legislative and jurisprudential developments regarding security detention, how international

⁹⁴ R (on the application of Al-Jedda) v. Secretary of State for Defence, [2007] UKHL 58 (Eng.).

⁹⁵ Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 12, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII] ("Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.").

⁹⁶ GCIV, *supra* note 47, art. 45. ("Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody.").

⁹⁷ U.N. Charter art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

law standards have been relevant to developing this practice, and the human rights implications of the U.K.'s control order regime and its alternatives.

Legislative Developments

The expert began by explaining that the Human Rights Act 1998,⁹⁸ which incorporated the ECHR,⁹⁹ now dominates jurisprudential thinking on security detention in the U.K. As a result of the Act, international standards are now automatically taken into account when developing internal British security detention standards. To this end, as part of the legislative process, national security-related legislation must be made compatible with the ECHR. The expert noted that when challenges to such legislation come before the domestic courts, if it is reasonably possible the courts must interpret the law consistent with the ECHR. If the legislation is determined to be incompatible, it must be sent back to Parliament and amended accordingly.

The expert then discussed the activities of the U.K.'s Joint Parliamentary Committee on Human Rights, which scrutinizes legislation with human rights implications and looks at Remedial Orders allowing legislation to be amended in response to judgments of U.K. courts and the European Court of Human Rights.

According to the expert, the legislative developments have also been accompanied by a great deal of judicial activism in national security matters, with less deference to the government and higher standards of judicial review. The effect is that when cases challenging the U.K.'s security detention practices come before the European Court of Human Rights at Strasbourg, the U.K. is much more likely to win. Thus, the expert stated, the U.K.'s view is that domestically they have resolved the human rights issues regarding security detention.

Controlling the Terror Threat

The expert then explained that the narrative about the U.K.'s responses to terrorism centers on one fundamental human rights problem. The U.K. government's preferred option in dealing with foreign nationals who are deemed to pose a terrorist threat is deportation. However, jurisprudence under the ECHR provides that the U.K. cannot deport an individual to a place where there is a real risk that he or she will be subjected to treatment impermissible under Article 3 of the ECHR.¹⁰⁰

⁹⁸ See Human Rights Act 1998 c. 42 (Eng.), available at http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1.

⁹⁹ ECHR, *supra* note 3.

¹⁰⁰ ECHR, *supra* note 3, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

The expert added that the U.K. government's next favored option would have been to indefinitely detain foreign nationals under the Immigration and Asylum Act of 1999.¹⁰¹ This method was referred to euphemistically as a "three walled prison" because those subject to the measures could end their detention by opting to leave the U.K.¹⁰² However, the legislation was challenged before the House of Lords in the *Re A* case, where the Lords strongly condemned it as discriminatory, and held that security detention is a security, not an immigration issue.¹⁰³ The Law Lords pointed out that similar legislation would clearly not stand if it discriminated between races or genders. The Law Lords did not address whether the detentions in question would have been permissible without the discriminatory element, and the decision contains language both ways. After the Law Lords decision, the U.K. government changed course and started issuing control orders.

The Control Orders System

The expert explained that control orders involve the imposition of a series of conditions upon individuals by the government. These conditions are tailored to each individual case to ensure effective disruption and prevention of terrorist activity. A non-exhaustive list of the possible conditions includes: restrictions on mobile phone and internet usage; geographic limitations related to where a person may pray or the mosque he or she may visit; restrictions on visitors or requiring advance permission for visits, and banning all association with someone also subject to control orders. The expert added that there is also a provision for emergency orders.

There are two types of control orders: derogating and non-derogating. Generally, control orders are intended to work within the protections of the ECHR and do not require the U.K. to derogate from the treaty's Article 5 right to liberty.¹⁰⁴ The expert pointed out that while derogating control orders are permitted by the legislation, none has yet been issued.

The expert noted that under the system for non-derogating control orders, the Home Secretary must apply to the courts to impose a control order based on an assessment of the intelligence information. If an order is made, the case is automatically referred for a judicial review of the decision. A court may consider the case in open or closed session, depending on the

¹⁰¹ See Immigration and Asylum Act 1999, c. 33, (Eng.), available at http://www.opsi.gov.uk/ACTS/acts1999/ukpga_19990033_en_1.

¹⁰² The expert noted that most chose not to leave the U.K., but rather elected to remain detained indefinitely.

¹⁰³ According to the expert panelist, the court provided that if it was an immigration issue, there might be an inherent assumption that the government could treat foreigners differently, but this was not the case here.

¹⁰⁴ ECHR, *supra* note 3, art. 5(1).

nature of the information under consideration. When courts are considering closed material, the individual subject to the control order cannot be present, nor can his lawyers. However, a system of special advocates has been created to represent the interests of the individual. The special advocates are not technically the individual's legal representative and cannot divulge the information to the individual at any point.

The expert further explained that there are time limits to control orders. They can only be imposed for 12 months, but may be extended. If an individual subject to a control order fails to comply with the control order obligations, he or she can be subject to prosecution and sentenced up to five years. There are also anonymity protections for those subject to control orders. Virtually everyone subject to a control order in the U.K. has applied for anonymity, and most of the applications have been granted.

The Control Orders Test

The expert then discussed the control order test, which provides that the Home Secretary may make a control order against an individual if he or she: (a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism related activity; and (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to issue a control order imposing obligations on that individual.

Judicial Supervision of Control Orders

The expert added that, although the U.K. government wanted minimal judicial interference with control orders, Parliament wouldn't accept that, and, as mentioned, there is now an automatic referral to a court when a control order is imposed. When assessing a control order, an independent reviewer is allowed access to all the information concerning the order, and acts as a limiting check on the process. Courts can quash the control order, one or more obligations imposed by the order, or give directions to the Home Secretary for the revocation of the order or for the modification of the obligations imposed by the order.

Procedural Challenges to Control Orders

The expert explained that an individual subject to a control order can challenge the order on any of the grounds in the ECHR. Procedural challenges include those alleging a violation of Article 6¹⁰⁵ fair trial rights,

¹⁰⁵ *Id.* art. 6.

which was the claim in the *Re MB* case (2006).¹⁰⁶ The first judge to hear this case held that although Parliament said it wanted to involve judges in reviewing control orders, the closed nature of the hearings meant that courts heard only one side and could not possibly decide anything fairly. The judge held that control orders are conspicuously unfair and overlaid with a “thin veneer of legality.”¹⁰⁷

The expert noted that the Court of Appeals judges disagreed and held that control orders did satisfy the standards of Article 6, partly because the orders are civil, not criminal, and are therefore subject to different standards. The judges also stated that the standard of review used in control orders would satisfy the standards of Article 6. The judges further noted that, under domestic ECHR jurisprudence, there is some recognition that there might be certain circumstances where proceedings may be conducted without the usual standards of fair trial, but would nonetheless still satisfy the Article 6 standards. The court found that, given this recognition, the use of special advocates and closed control order hearings was permissible. The House of Lords agreed that the legislation could operate in practice in a manner that complied with Article 6 of the ECHR.

Substantive Challenges to Control Orders

The expert then discussed how, when responding to substantive challenges to control orders, the government’s essential argument was that all the conditions imposed by control orders thus far amounted only to restrictions on liberty, not a deprivation of it, and control orders therefore did not violate or derogate from the ECHR. These substantive legal arguments have also recently been before the courts.

Deprivation of Liberty: The JJ Case

The *JJ case* (2006),¹⁰⁸ the expert explained, was the first major substantive challenge to control orders before the courts. Six individual plaintiffs were subject to a number of control order restrictions including: electronic tagging, which had to be worn at all times; 18-hour-a-day curfews; required reporting to a monitoring company; limitations on visitors and pre-arranged meetings outside the residence; police searches; limitations on use of communications equipment and mosque attendance; restriction to geographical areas; notification requirements for international depar-

¹⁰⁶ Sec’y of State for the Home Dep’t v. MB, [2006] EWCA (Civ) 1140 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1140.html>.

¹⁰⁷ In Re MB, [2006] EWHC (Admin) 1000, ¶ 103 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2006/1000.html>.

¹⁰⁸ Sec’y of State For the Home Dep’t v. JJ and Others [2006] EWHC (Admin) 1623 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2006/1623.html>.

ture and arrival; bank account monitoring; limitations on money transfers and sending of documents or goods; and prohibitions on entering air or sea ports.

The High Court found that the cumulative effect of all these obligations did constitute a deprivation of liberty and could therefore not be contained in a non-derogating order. As there had been no derogation in issuing the control orders they were therefore necessarily unlawful. The Court of Appeal and the House of Lords agreed, holding that in this case the control orders were clearly on the wrong side of the line.

Deprivation of Liberty: The E Case

The expert next discussed the *E case* (2007)¹⁰⁹ challenging control order restrictions, which featured lesser, more finely balanced restrictions. The individual subject to the order was on a 12-hour curfew, and was allowed to live in his own home with his wife and children. The individual was able to live a largely normal life, the court thought, with social contacts and freedom to attend his mosque and educational institution and meet people there, though he was still prohibited from making prearranged meetings. The High Court again found these control order restrictions to be a violation of the ECHR, but the Court of Appeals disagreed. The Court of Appeals said the orders did not constitute a deprivation of liberty as such, but instead constituted limitations on the liberty of the individual. The court also rejected allegations that the orders violated Article 3¹¹⁰ and Article 8¹¹¹ of the ECHR. The House of Lords agreed with the Court of Appeal.

The expert noted that there was also a challenge in the *E case* claiming that, as a pre-condition to the making of a control order, the Home Secretary must consult with the chief of the police force about whether evidence exists that could realistically be used to prosecute an individual on a terrorism-related offense. However, the House of Lords denied this claim and found that the duty to consult with the police with regard to prosecution would only lead to the control order being quashed in exceptional cases.

Other Strategies

The expert said that the U.K. government authorities acknowledge that control orders are not perfect. They also argue, however, that if one accepts the premise that the nation faces a real terrorist threat, each option that may be utilized in dealing with this threat has a human rights footprint;

¹⁰⁹ Sec'y of State for the Home Dep't v. E [2007] EWHC (Admin) 233 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2007/233.html>.

¹¹⁰ ECHR, *supra* note 3, art. 3.

¹¹¹ *Id.* art. 8.

there are no neutral options, and control orders represent a third or fourth tier choice.

In addition to control orders, the expert noted, the U.K. government has utilized a number of other means in attempting to counter the terrorist threat. Human rights nongovernmental organizations, in particular, are encouraging the U.K. to prosecute persons suspected of terrorist activity and to introduce new terrorism-related criminal offenses, which the government has largely done. There are more terrorism-related criminal offenses on the books now, including inchoate offenses such as attending terrorist training camps, or glorifying terrorism. The expert added that there is also currently an effort by human rights organizations to urge to government to extend the use of intercept intelligence, such as telephone tapping, to terrorism-related criminal proceedings. Such intelligence is not currently used in criminal prosecutions in the U.K., but is used in control order proceedings.

The expert observed that the U.K. government has also worked to get around restrictions on deporting an individual if there is a real risk the person will be subjected to torture or ill treatment, by means of memorandums of understanding or similar legal arrangements with receiving countries such as Algeria, Jordan and Libya. The expert noted that it has been largely accepted by the U.K. courts, albeit not with respect to all the accompanying modalities, that an agreement with another government could be sufficient to reduce risk below the "real risk" standard and thus ensure compliance with ECHR jurisprudence.

The expert added that the U.K. is also challenging the Article 3 based deportation ban before the European Court of Human Rights on the grounds that the real risk of torture or ill treatment faced by an individual upon deportation must be balanced against the risk the individual poses to the national security of the sending state.

Finally, the expert noted that the U.K. government has the yet-unused option of implementing derogating control orders to avoid being bound by the European Convention's standards. The House of Lords has been relatively deferential on issues of national security and, as the current control order system has been found by U.K. courts to be non-discriminatory, this is a valid and possible option. The expert commented that it is also possible, if unlikely, that the U.K. could denounce the ECHR altogether.

SPEAKER'S SUMMARY—SECURITY DETENTION AND THE UNITED STATES

The second expert presentation in this panel concerned security detention practice by the United States. The expert discussed the United States' ongoing efforts to increase the rate of returns and transfers out of U.S. security detention and to improve detention processes in Guantanamo Bay, Cuba, and Iraq.

The expert began by noting that the United States faces the difficult problem of holding people who need to be detained for security purposes, but who cannot be tried. There are a number of different perspectives on the types of laws that must be applied to such detention, as well as perhaps an increasing recognition internationally of the value of these differing perspectives. For example, many European countries have found that criminal processes do not accomplish all that is necessary in the face of the current terrorism threat. The expert then referenced a lecture by State Department Legal Advisor John Bellinger, delivered the previous year at the London School of Economics,¹¹² in which he opined that domestic criminal law does not itself adequately address the threat posed by terrorism. Detaining individuals for short periods without charges is often insufficient for dealing with terrorists; terrorist plots take longer to investigate, as such investigations often rely on information and evidence from abroad. Further, even when detaining authorities conclude that they lack sufficient evidence to charge an individual criminally, they often cannot simply release the person because of the severe danger they still pose.

The expert commented that the United States has been taking the differing views on how to deal with terrorist suspects into account. He added that, although not departing from a law of war framework, the United States has added substantial additional layers of process for determining who may be detained and has provided for civilian court review of detention decisions. The United States also has taken significant steps to increase transfers of individuals out of U.S. security detention, and is improving processes at the Guantanamo Bay detention facility.

Returns and Transfers

The expert explained that the United States does not want to detain individuals any longer than necessary and that it has tried to improve the pace of returns and transfers. The United States has implemented different processes, has reached out to allies, and has been less rigid in the form of diplomatic assurances required from receiving countries. Early on, diplomatic assurances had to take the form of an international agreement; as a result, the United States transferred very few individuals in 2004 and 2005. By moving to a policy requiring less formal assurances, the United States was able to transfer more than 100 individuals in 2006. Thus far in 2007, although the number of transferable individuals is now lower, the United States has transferred 60 individuals and counting.

¹¹² John B. Bellinger III, *Legal Issues in the War on Terrorism*, LONDON SCHOOL OF ECONOMICS Oct. 31, 2006, available at http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061031_JohnBellinger.pdf.

However, the expert added that accelerating the pace of transfers has its own problems. The United States does not want to return anyone to a situation in which the person would face ill-treatment, and U.S. officials question whether they can trust diplomatic assurances from certain countries. Dozens of U.S. delegations have undertaken missions to receiving countries in order to conclude the necessary transfer arrangements and work on this issue continues.

The Guantanamo Bay Military Commissions

The expert next commented that, in regards to the Guantanamo Bay military commissions and the Military Commissions Act (MCA),¹¹³ virtually all civilian court protections are now provided for under current U.S. law and regulation governing the military commissions, including Supreme Court review. The process that has developed for the conduct of the military commissions has gone beyond that required by the law of war, and whether one would conclude that HRL is supplanted under the doctrine of IHL as *lex specialis* or not, HRL principles have played a role as well. Nonetheless, the United States understands that there is still a lot more to do. U.S. officials are trying to learn lessons from the difficult experiences occasioned since September 11, 2001, including by looking ahead and thoughtfully considering the views of others, including coalition partners and the ICRC.

The Iraq Case

The expert then observed that the convergence of the laws of war and of UN charter law, as discussed in the earlier panel, is visible in U.S. operations in Iraq today. In that context, the United States has essentially applied the Fourth Geneva Convention post occupation, based on the relevant UN Security Council Resolution (UNSCR 1483 (2003)), and the letters annexed thereto, which expressly referred to Article 78 of the Fourth Convention.¹¹⁴ The expert noted that the U.S. authorities have, to the best of their abilities, applied these principles to processes in Iraq, although intractable problems remain given the huge numbers of detainees. Still, a constant effort is being made to expand rehabilitative and educational facilities within the internment construct, and to look at reconciliation processes and how they can be improved. Although there have also been a couple of large detainee releases, the United States would like to be able to do more.

To this end, the expert noted, there are at least three levels of review when an individual is captured in Iraq. Initially, the detaining unit commander and lawyer, if one is assigned, determine whether an individual

¹¹³ Military Commissions Act of 2006, 10 U.S.C. §§ 948a-b (2006).

¹¹⁴ See GCIV, *supra* note 477, art. 78.

should be detained. Often, operational sweeps conducted to secure an area from enemy threats pull in a great many people; the review at this stage is conducted given the situation and facts at hand to try to determine who needs to be detained. Between forty and fifty percent of captured individuals are released at this point.

The second level of review is conducted by the Multi-National Force—Iraq (MNF-I) Staff Judge Advocate (SJA) when detainees reach the theater internment facility. The SJA reviews the information provided by the capturing unit and, at this point may, request further information.

The third and most robust level of review is conducted by the Combined Review and Release Board. This Board has a majority Iraqi membership, although MNF-I members are present as well. At this point, the Board reviews evidence against the detainee and considers the level of threat posed by the individual. Detainees are informed of this process and may make written submissions to the Board. This level of review must be completed within six months after an individual is detained. Approximately 30-35 percent of these reviews result in the release of the individual.

The expert added that in addition to this screening and review process, which leads to a large number of releases, there are referrals to Iraqi criminal processes, including an Iraqi criminal court called the Central Criminal Court of Iraq (CCCI). The CCCI, initially created by the Coalition Provisional Authority, has tried between 2400-2500 cases and still continues to operate quite effectively.

The National Security Court Idea

The expert concluded by noting that one potential strategy for the United States in dealing with security detention was raised in a July 2007 Jack Goldsmith and Neal Katyal editorial.¹¹⁵ The editorial suggested that the U.S. Congress put together a comprehensive system of preventive detention overseen by a specialized national security court composed of federal judges with life tenure. The authors pointed out that there are other specialty courts in the United States, such as patent and tax courts, and noted that the advantages of such a system would lie in avoiding the “patchwork system” of detentions used thus far. The authors suggested that both citizens and non-citizens should come before the court but that, as it would not be a criminal court, not all criminal protections would attach, although there would be appeal rights, and persons could perhaps be transferred into existing criminal processes when appropriate.

¹¹⁵ Jack Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES July 11, 2007 at A19, available at http://www.nytimes.com/2007/07/11/opinion/11katyal.html?_r=1&oref=slogin.

SPEAKER'S SUMMARY—SECURITY DETENTION AND ISRAEL

The final expert presentation in this panel focused on the use of administrative detention by Israel. This expert discussed the way security detention in Israel and the Occupied Territories raises questions as to the particular application of administrative detention laws in these areas, and showed how this highlights possible inherent problems within the whole security detention concept.

The expert began by explaining that the process of administrative detention in Israel started during the British Mandate with the Defense (Emergency) Regulations of 1945, which essentially allowed any military commander to impose administrative detention of unlimited duration.¹¹⁶ When Israel declared independence from Britain in 1948 it adopted these detention laws and developed them in Israel and, later, in the Occupied Territories, in diverging ways. Today, the expert noted, the administrative detention legal regimes in Israel and in the Occupied Territories are quite different.¹¹⁷

Security Detention Inside Israel

Inside Israel, the expert commented, administrative detention is used very rarely. After Israel's independence in 1948, the Israeli Parliament added various nonbinding regulations to the British Mandate rules, of which a significant addition was to allow detainees to appeal. This legislation was used against Jewish individuals, including members of Irgun and other underground movements, and, in the 1950s and 1960s, against Palestinian citizens of Israel.

¹¹⁶ Regulations 108 and 111 of the Defense (Emergency) Regulations of 1945 empowered the High Commissioner and Military Commander to order the detention of a person if either official believed it necessary for maintaining public order or securing public safety or state security. See B'Tselem, Israeli Information Center for Human Rights in the Occupied Territories, Defense (Emergency) Regulations, available at http://www.btselem.org/english/Legal_Documents/Emergency_Regulations.asp.

¹¹⁷ In addition to the primary sources of laws and cases, in this section the expert made use of data and information collated in the research and reports of a number of organizations, including: Daphna Golan, Detained Without Trial: Administrative Detention in the Occupied Territories Since the Beginning of the Intifada (Oct. 1992), available at <http://www.btselem.org/english/publications/index.asp?TF=03>; Jessica Montell, Prisoners of Peace: Administrative Detention During the Oslo Process (July 1997), available at <http://www.btselem.org/english/publications/index.asp?TF=03>; Position Paper, Proposed Law: Imprisonment of Combatants Not Entitled to Prisoner-of-War Status, available at <http://www.btselem.org/english/publications/index.asp?TF=03>. See generally The Association for Civil Rights in Israel, available at <http://www.acri.org.il/eng/>; HaMoked: Center for the Defence of the Individual, available at <http://www.hamoked.org>.

The expert added that, in 1979, the Emergency Powers (Detention) Law was passed authorizing emergency detention.¹¹⁸ Although this law provides that it is only to apply during a state of emergency declared by the Knesset, this has essentially no substantive implications, since Israel has been in a declared state of emergency since its inception.¹¹⁹

Under the Emergency Powers (Detention) Law detention orders may be issued for a maximum of six months, with the possibility of further six month extensions. The authority for issuing a detention order sits with the Defense Minister who cannot delegate this power to anyone else, although the Chief of Staff can order detention for up to 48 hours. The Law further provides that detainees must be brought before a district court within 48 hours of arrest and every three months thereafter and that appeals can be made to the Supreme Court. The courts can depart from the rules of evidence in the interests of justice, in which case the proceedings must take place behind closed doors.

The expert noted that this remained the only law authorizing security detention in Israel until the 2000 Lebanese “bargaining chips” affair, which involved 21 Lebanese individuals detained by Israel beginning in 1986 and held for many years as leverage to ensure the return of missing Israeli soldiers. Some of the detainees had been convicted in Israel on various counts, such as membership in illegal organizations, and were sentenced from two to eight years. Citing national security grounds Israel continued to hold the detainees, including those whose sentences had expired.

The expert then observed that, when first challenged before the courts in 1997, the continued detention of the bargaining chips was interpreted by the Israeli Supreme Court as legitimate under national security grounds.¹²⁰ Only when the practice was made public, after some of the detainees had been in detention for ten or more years, was there a certain amount of public outcry. Another challenge to the detention practice then came before the Israeli Supreme Court, this time before a nine judge expanded panel. This time the Court essentially reversed its earlier decision¹²¹

¹¹⁸ Emergency Powers (Detention) Law, 33 L.S.I. 89 (1978–79) (Isr.).

¹¹⁹ Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. L. 721, 725 n. 18, 766-67 (2001), available at <http://www.law.arizona.edu/Journals/AJICL/AJICL2001/vol183/GrossArticle.pdf>. See also B'Tselem: Israel Information Center for Human Rights In the Occupied Territories, Administrative Detention, http://www.btselem.org/english/Administrative_Detention/Israeli_Law.asp The initial declaration of a state of emergency, first instituted in 1948, remained in effect for many years without being reviewed by the Knesset. In 1992, Israel adopted a different method requiring the Knesset to renew the state of emergency every year for a period of up to one year.

¹²⁰ *Israel to Continue Prison Without Trial*, BBC NEWS, Mar. 5, 1998, http://news.bbc.co.uk/2/hi/middle_east/62159.stm.

¹²¹ See CrimA 7048/97 Anonymous v. Minister of Defence [2000] ILDC(12) 1 (Isr.).

and held that Israel cannot detain persons unless they individually present a threat.¹²² Following this decision, the state released all but two of the bargaining chip detainees. The remaining two, who were considered high-value bargaining chips, were determined to pose an individual threat as required by the Court.

In 2002 a new law, known as the Law on Illegal Combatants¹²³ was passed, essentially tailored for the two remaining “bargaining chip” detainees. The law defined an “illegal combatant” as a “person who takes part in hostile activity against Israel, either directly or indirectly, or belongs to a force engaged in hostile activity against the State of Israel,” and who is not entitled to prisoner of war status under IHL. The expert commented that one of the most troubling parts of this law is its presumption that, as long as hostilities continue, the release of an individual will harm national security unless proven otherwise. It is thus the detainee who must prove that he or she is not a threat.

The expert further observed that this law was originally tailored for the Lebanese detainees and was not intended to apply to Israeli citizens or to those from the Occupied Territories. However, because the Second Intifada started while Israel was in the process of passing the legislation, it was changed to include Palestinian residents. The law can also effectively be used for Israeli citizens, and to date has been used for Gaza residents and a Canadian of Lebanese descent.

Security Detention Inside the Occupied Territories

The expert explained that inside the Occupied Territories, which Israel took over in 1967, the inherited British Mandate rules were the initial regulations on security detention. However, Israel soon issued military orders which slightly changed the Mandate rules so that they would be closer to the requirements set out in the Fourth Geneva Convention.

The expert noted that in 1980 a new Military Order was issued regulating the authority and procedure for administrative detention in the Occupied Territories. Since then, new orders have been issued every few years, adapting, updating, changing and replacing this Order in an effort to conform to domestic and international law. Such changes have related to who has the authority to order administrative detention, whether and after how long a detainee needs to be brought before a judge, after how long a detention order is reviewed, and to what body a detainee can appeal.

Given the many changes, the expert here observed that current laws and regulations on administrative detention in the Occupied Territories are often difficult to ascertain. Generally speaking, current laws provide that a

¹²² *Id.*

¹²³ Incarceration of Unlawful Combatants Law, 5762-2002, 1 (Isr.).

military commander can authorize administrative detention for six months subject to renewal, that the detainee must be brought before a judge within 96 hours (though this regulation seems to change most often), and that detainees can appeal to the Israeli Supreme Court.

Unlike in Israel, the expert added, administrative detention is used frequently in the Occupied Territories. In the first five years of the First Intifada, there were almost 15,000 detention orders issued in total. Currently, there are about 800 detainees in Israeli custody in the Occupied Territories, though this number has fluctuated from a low of about 20 during the Peace Process, to its typical range from the high hundreds to about 1,000 detainees.

The expert commented that while there is a recognized need by the Israeli authorities to conform to domestic and international law in their security detentions in Israel and the Occupied Territories, many problems remain. These problems can be divided into two types: (1) adherence to the law, and (2) problems within the laws themselves.

Problems with Adherence to the Laws

The expert observed that one problem regarding adherence to the security detention laws in Israel and the Occupied Territories is that the actual use of security detention often does not seem to be for its intended security purposes. Instead, detention is frequently used for criminal punishment rather than for the prevention of future threat. Vague and expansive definitions of “security” in the laws further enable this practice. For example, security detention orders are regularly issued against individuals suspected of committing an offense after an unsuccessful criminal investigation or a failure to obtain a confession in interrogation. Further evidence of this practice is the shortening of detention periods by judges with reference to the nature of a person's previous activities instead of the future threat he or she may pose, in a manner that corresponds to the way a judge reviews a criminal case and institutes punishment for past crimes.

In addition, although the courts have held that the government cannot detain someone for their political opinions, there have been a number of reported cases of administrative detention levied by Israel for political purposes. For example, administrative detention has been used to put pressure on individuals to collaborate in some way. Detention has also been used against a number of political leaders during the First Intifada, and, more recently, against people who were active against the separation barrier. Similarly, during the Oslo Peace Process years, release from administrative detention was often made contingent on the detainee first signing a statement supporting the Peace Process.

The expert noted that another problem with Israel's adherence to its administrative detention laws is its failure to utilize lesser restrictions. Methods other than detention, such as geographical restrictions to certain areas

or cities, have been used with Israelis and Jewish settlers in the Occupied Territories. However, with Palestinian individuals, it seems to be either detention or nothing.

Of further concern, the expert observed, is the often automatic and categorical, rather than individual, imposition of administrative detention by Israel. Detention proceedings typically follow a common formula comprising the threat the individual poses and an automatic number of months of detention. In reading the released transcripts from almost any proceeding, one could transpose the names of one individual with another and it would look the same. In addition, there are problems with the often automatic extension of security detention. On the rare occasions where judges order that an individual be released commanders can issue a new detention order citing “new” evidence. While there may actually be new evidence in some cases, the practice nonetheless remains somewhat suspect because of the frequency with which it happens.

Finally, the expert noted that there are problems with the constant and continuing application of emergency laws by Israel. The Israeli government has said that it is difficult to cancel the longstanding state of emergency because a number of laws, such as those regulating strikes in the public sector, rely on the continued state of emergency. It is interesting to note that when there is a real emergency in Israel—during the First Lebanon War in 1982, for instance—then “emergency-emergency” regulations are passed.

Problems within the Laws Themselves

The expert next observed that one problem within the security detention laws in Israel and the Occupied Territories is the lack of adequate oversight. Though Israel recognizes that there must be a court or judge involved in the decision to detain, questions remain as to what constitutes a competent body for these determinations, and what the role of the court and the scope of judicial review should be. Should the review process just be procedural, to look at whether a commander was acting within his authority when he issued an order, or should the courts also look at the evidence and ask whether the detention itself is justified? Although the latter view seems to be the one accepted in Israel, the courts very rarely deny a detention order on the grounds of it being unjustified according to the evidence.

The expert further noted that the courts in Israel have recognized that judges must sometimes act to protect detainee rights, because the detainee’s counsel does not have access to classified evidence used by the government. However, in reality, the judges are not always equipped to act in this capacity. They often do not see interrogation transcripts and do not conduct in-depth inquiries into the evidence itself or into the integrity of the material. Further, the judge lacks the first-person knowledge that the detai-

nee has about the case, and is therefore limited to the information provided by the security services.

The expert noted that it is also important to remember the non-legal, socio-political elements in administrative detentions in Israel and the Occupied Territories. Israeli courts are operating in a perceived national security threat situation where the country's security services, who belong to the same nationality as the judges, present evidence to the judges against individuals of a different nationality. This divide makes it even less likely that the courts will ever overrule the security services in favor of the detainees.

The expert concluded by observing that one of the biggest problems with respect to the Israeli security detention laws is the use of classified evidence in detention proceedings. The laws allow the courts to receive classified evidence that is unavailable to the detainee or their counsel in the name of state security. To this end, the use of such evidence in detention proceedings has become almost an automatic procedure, with detainees denied access to the majority of evidence other than a general statement saying that they present a risk. While the official position is that detainees will be given access to the maximum amount of evidence possible during the proceedings, and that they will be able to respond to the evidence, the expert read the following excerpt from a security detention appeal procedure to provide a picture of what is actually happening.¹²⁴

The detainee's advocate asks: What are the suspicions against him?

Prosecutor: That's in the classified information.

Advocate: Why was his detention requested?

Prosecutor: In the classified.

Advocate: I request you give some answer.

Prosecutor: I can't detail more than what's written in the order.

Advocate: How many pieces of evidence were brought before the military commander? How many events?

Prosecutor: In the classified.

Advocate: I request an answer in the non-classified.

Prosecutor: Classified.

Advocate: I request the gentleman to answer.

Prosecutor: Less than a hundred, not more than fifty.

Advocate: What is the nature of the information? I request it be unclassified.

Prosecutor: In the classified.

¹²⁴ Jessica Montell, *Prisoners of Peace: Administrative Detention during the Oslo Process 31–32* (July 1997) (unpublished report), *available at* http://www.btselem.org/English/Publications/Summaries/199707_Prisoners_of_Peace.asp.

Advocate: Are we talking about violent or military activity?

Prosecutor: I can't respond.

Advocate: Do the activities attributed to him involve violence?

Prosecutor: I'll answer in the classified, and the area I'll answer in the classified, I won't detail.

Advocate: Where does he live?

Prosecutor: El-Bireh, but I won't answer whether his activities are in el-Bireh.

Advocate: In the questions, is there information regarding the future, for God's sake?

Prosecutor: In the classified.

Advocate: Are all the pieces of information about conducting or planning violent activity?

Prosecutor: I won't answer that because it would implicate the sources of information.

Advocate: Why was the detainee detained?

Prosecutor: Because the accumulation of negative security material allowed the order.

Advocate: In what sense was it allowed?

Prosecutor: There are security considerations against the appellant, negative information which accumulated which met the criteria for administrative detention and the criteria are decisive security considerations.

The expert closed by noting that it is impossible to conduct a defense with such severely limited access to evidence, yet this is what happens time after time.

DISCUSSION

Security Detention in Canada

Following these presentations, two experts gave brief comparative overviews of the security detention system in Canada. The first expert began by observing that perhaps the most notable development was the February 2007 decision by the Canadian Supreme Court in *Charkaoui v. Canada* on a legal challenge to the Canadian security certificate program.¹²⁵

The expert explained that the security certificate program, which only applies to foreign nationals and other non-citizens, is contained within Canadian immigration legislation. Under this program, the federal government may issue a certificate naming any non-citizen who is, among other things, suspected of membership or ties to organized crime, or is perceived

¹²⁵ *Charkaoui v. Canada*, [2007] 1 S.C.R. 350, 2007 SCC 9 (Can.).

to pose a threat to national security.¹²⁶ Individuals named in a certificate are then inadmissible to Canada and are subject to a removal order.¹²⁷ The second expert explained that this program, in one form or another, has been in place since the late 1970s. Since the program's inception, however, only 30 certificates have been issued, with just a handful issued following the September 11, 2001 attacks. By comparison, there are about 9,000 immigration removals each year in Canada.

The experts also discussed how, in the *Charkaoui* case, the Supreme Court found that despite the Canadian government's efforts to find the right balance between the rights of individuals and the need for national security, the government unconstitutionally restricted individuals' access to the confidential information that was the basis of the issuance of the certificates. According to the experts, the Court held that sections of the Immigration and Refugee Protection Act,¹²⁸ which was enacted shortly after the September 11, 2001 and which contained the security certificate program, violated Sections 7, 9 and 10 of the Canadian Charter of Rights and Freedoms.¹²⁹ The experts further noted that the Court deferred the effect of its decision for a year, and asked the Canadian government to find alternatives that would be less intrusive for the rights of the concerned persons within that time.¹³⁰

The first expert added that the Court rejected a separate argument in the same case, according to which the security certificate program discriminated on the basis of nationality, because the certificates could only be issued against non-permanent residents and aliens and not against Canadian citizens. According to this expert, the Court found that because the program is geared toward deportation and the individual involved has no right to remain in Canada the program is not discriminatory, as non-citizens have fundamentally different rights from Canadians in this regard. The expert observed that, when this decision is compared to the U.K. system discussed earlier it seems "ridiculous" because Canadian citizens who assist foreign

¹²⁶ Immigration and Refugee Protection Act (2001 S.C. ch. 27), Vol. 24 Can. Gaz. No. 4, § 77, available at <http://canadagazette.gc.ca/partIII/2001/g3-02404.pdf>, amended by, 2008 S.C., ch. 27 (Can.), available at <http://laws.justice.gc.ca/PDF/I-2.5.pdf>.

¹²⁷ *Id.* § 81.

¹²⁸ *Id.* §§ 33, 77–85.

¹²⁹ Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982, Ch. 11 (U.K.), available at http://laws.justice.gc.ca/en/charter/CHART_E.pdf.

¹³⁰ This revised legislation received Royal Assent on February 14, 2008, and came into force on February 22, 2008. The new legislation introduces a special advocate whose role is to protect the interests of a person named in a certificate by participating in closed court proceedings. The legislation also provides foreign nationals with the same detention review rights as permanent residents. Immigration and Refugee Protection Act (2001 S.C. ch. 27), 2008 S.C., ch. 27, §§ 83, 56 (Can.), available at <http://laws.justice.gc.ca/PDF/I-2.5.pdf>.

nationals can pose as much of a threat as non-citizens, and it is this threat that justifies holding them.

Both experts noted that, similar to the U.K. government, the Canadian government would prefer to simply deport individuals believed to pose a threat, but that it is restrained by Canadian laws prohibiting deportation to places where persons would be at risk of torture or ill treatment. The two experts seemed to disagree, however, as to the seriousness and care with which the relevant authorities approached the issue. This first expert observed that Canadian law regarding the government's duty to ensure that no one is deported to a country in which they would be at risk of torture or other ill treatment seems to be taken much less seriously than in the U.K. The expert mentioned the Canadian Supreme Court decision in *Suresh v. Canada*,¹³¹ which provides that the Canadian government cannot deport an individual to a state where he or she might face torture save in "exceptional circumstances."¹³² According to the expert, there are often exceptional circumstances in terrorism cases and, as a result, there have been an alarming number of attempts to deport individuals to countries that practice torture. The expert concluded by noting that any discussion about processes to control security detention must be intimately connected to the state's duty to refrain from deporting individuals to countries where they will be tortured or ill-treated, because without that duty, deportation will simply be made quicker.

The second expert observed that the issue of removal to a country that practices torture is very sensitive and one the Canadian government takes very seriously in every case. There is a very careful assessment by the government, and assurances are sought, though the expert acknowledged that such assurances are not always completely reliable. The expert noted further that the "exceptional circumstances" ground has not been invoked

¹³¹ *Suresh v. Canada*, [2002] 1 S.C.R. 3, 2002 SCC 1 (Can.), available at <http://www.canlii.org/en/ca/scc/doc/2002/2002scc1/2002scc1.html>.

¹³² *Id.* ¶ 78. ("We do not exclude the possibility that in *exceptional* circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. . . . A violation of s. 7 will be saved by s. 1 only in cases arising out of *exceptional* conditions, such as natural disasters, the outbreak of war, epidemics and the like. . . . Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the UNCAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an *exceptional* discretion to deport to torture, *if any*, must await future cases.") (internal citations and quotation marks omitted) (emphasis added).

yet and that the Canadian government has never knowingly removed an individual to face a substantial risk of torture, so the issue remains hypothetical. The expert observed that there is no shortage of effort or goodwill on the part of the Canadian government to strike the right balance.

Effectiveness of U.K. Monitoring Devices and Special Counsel

The experts' general discussion began with a few questions aimed at clarifying points from the presentations and then turned to the viability of establishing a separate regime of national security courts in the U.S. and its implications. The experts also discussed the roles of counsel and the judiciary in security detention proceedings, and highlighted proper evidentiary standards as an issue requiring further examination.

An expert noted that four individuals subject to control orders and wearing electronic bracelets and other monitoring devices have absconded in the U.K., and questioned the U.K. expert as to how promising the available technology is regarding these devices. The expert also noted that the United States has a special advocates system at the Guantanamo Bay military commissions similar to that described in the U.K. and Israel, although the commissions rely on military lawyers. The expert asked whether the lawyers who act as special advocates for detainees in the U.K. are as frustrated as their Israeli counterparts or whether they are able to be effective.

The U.K. expert responded by explaining that the use of electronic bracelets in the U.K. control order system is drawn from criminal law, and that it is his understanding that the devices can be quite easily taken off or broken. The bracelets are therefore not very effective on their own. The expert further noted that while most of the special advocates view the control orders process as inherently unfair, they believe that their activities can mitigate the unfairness. The advocates are also generally against the ban on talking to the detainee they are representing. The U.K. expert added that one argument for allowing the advocates access to the detainees is that since they are already entrusted with secret information, they should also be trusted to have contacts with the individuals they represent.

Current Numbers of Detainees in Iraq and Israel

The U.S. expert was asked about the number of people currently held in Iraq and whether all three steps of the process outlined above was followed for each of them. The U.S. expert replied that there are more than 20,000 people currently detained in Iraq and that they are all going through the review procedures, though some of them are still in the initial stages. The third level of review before the Combined Review and Release Board is required within six months of arrest, so many thousands of detainees have already gone through this process.

The expert on Israel was then asked whether the number of administrative detainees within Israel proper remained low even after the Law on Illegal Combatants¹³³ was passed in 2002. The expert responded that administrative detention within Israel is still rarely used, even after the 2002 legislation. He also noted that most administrative detention problems arise in the Occupied Territories because that is where most of the cases originate, but that proportionally, an equal number of problems have arisen with the few administrative detention cases in Israel itself.

Debate on the National Security Courts Idea in the U.S.

The next expert commented on the Goldsmith and Katyal opinion piece¹³⁴ referred to earlier in the debate and posed a series of questions on how the procedural elements of the security detention regime proposed by the authors would work. For example, would the detainee have a lawyer? What levels of review would there be? What category of individuals would be subject to this system? Why not prosecute persons for federal crimes instead?

An expert responded that the issue of why certain individuals cannot be tried must certainly be raised. An administrative detention law should not be adopted in order to avoid disclosing in judicial proceedings that detainees have been held—for years—in conditions that amount to ill-treatment. The expert added that another issue is the applicable legal framework. He acknowledged that many people would say that IHL is the applicable legal framework given the existence of a “war on terror.” However, the expert rejected the notion of a roving war on terror that supplants HRL in all places and all times.

One expert observed that creating a preventive detention regime could become a slippery slope because this type of detention could be used as a normalized procedure rather than an exceptional measure. He asked at what point would it become clear that preventive detention is no longer necessary?

According to another expert, there is more than a national security argument for not using the traditional criminal justice model. There is also an enormous risk of losing the civil liberties protections built into the traditional criminal justice system if this system has to deal with a wide range of very grave terrorist threats. Because the U.S. has too many inchoate crimes as it is, and because there is too much prosecutorial discretion, it would be better to simply declare that there is a certain category of people who cannot be tried through the existing criminal justice system and must be preventively detained instead.

¹³³ Incarceration of Unlawful Combatants Law, 5762-2002, 1 (Isr.).

¹³⁴ Goldsmith & Katyal, *supra* note 115.

In response, an expert noted that while there is a portion of hard cases with respect to which the evidence is tainted or insufficient, such as the cases of the high-value detainees at Guantanamo, there is also likely enough evidence that is not tainted and that could be used to prosecute many more detainees under the existing system of inchoate crimes than is publicly stated. There is a real danger in claiming that an alternate system is the right response because it is unclear that such a system would offer anything in the way of real protection.

One expert, going back to an earlier point, asked about the definition of imperative reasons of security, and whether a state can detain people for intelligence purposes only. The experts responded that there is a general consensus that intelligence value can be a factor in detaining an individual, but is not sufficient cause to detain on its own.

An expert then made a series of arguments cautioning against the idea of establishing a national security court. First, centralizing detention functions in a special court rather than leaving them in the federal courts is a questionable solution. The Human Rights Committee long ago issued a general comment saying that it views the creation of special courts with considerable suspicion.¹³⁵ Special courts tend to become bodies in which procedural shortcuts are concentrated and also tend to become “clients” of the agencies that use them repeatedly. It would be much better to rely on a federal judge who would view any special request put forward in a national security case as a departure from the usual rules, requiring justification. This is likely to be a much stronger protection for the rule of law. Furthermore, while setting up a special court would create judges with a specialized expertise and a specialized Bar, such a Bar would be created anyway if there is venue concentration, as is the case with the habeas corpus proceedings concentration in Washington DC.

The same expert argued that, based on international experience, creating a separate jurisdiction for preventive detention would likely lead to the problems outlined in the presentation on Israel. It is probable that few people outside of Israel would view speaking out against the separation barrier or using people as bargaining chips to be permissible reasons for deprivation of liberty. Authorizing detention for long periods based simply on a prediction that an individual would be a threat is a very risky, potentially dangerous road to go down, even with judicial oversight. One must also think of the effect that the U.S. precedent would have on other countries, i.e. on the rule of law globally.

¹³⁵ Human Rights Committee, General Comment No. 13, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (April 12, 1984). The Committee noted that, “[q]uite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.” *Id.*

Another expert noted that, as a strategic matter, not using the normal criminal justice system plays into al Qaeda's hands and elevates its importance, instead of relegating its members to criminal suspects. Thus, creating an administrative detention regime may paradoxically inflate the significance of acts committed by its followers.

Responding to an earlier suggestion that creating a special national security court would help preserve the criminal justice system, another expert argued to the contrary. The Israeli experience demonstrates that an indefinite administrative detention system inevitably corrupts a country's criminal justice system because it creates a disincentive to use traditional means of prosecution whenever the government does not know if it has enough evidence against an individual or does not want to disclose the evidence it has. The expert asked how one would separate out crimes of terrorism from other types of violent crimes before a special court and whether such a distinction can genuinely be made? The expert noted that due process protections, freedom of speech rights and problems with vagueness of material support laws do not disappear in an administrative detention, as opposed to a criminal law context.

Another expert suggested that a significant merger between national security and other areas has already happened. The Antiterrorism and Effective Death Penalty Act of 1996¹³⁶ is an example of blending, and the warrantless searches authorized under the USA PATRIOT Act¹³⁷ are considered by proponents to be already applicable in regular criminal trials.

An expert said that, as there are really important distinctions between the categories of persons detained in Guantanamo Bay and elsewhere, the Guantanamo situation should be fenced off and dealt with separately rather than be used to spur new legislation, establishing an entirely new regime of administrative detention.

The same expert said that she believes the criminal justice model is generally adequate to deal with the threat of terrorism and that anecdotal evidence of prosecutorial difficulty in terrorism cases, such as in *United States v. Moussaoui*,¹³⁸ should not be used as proof of the need for a separate national security court. There have been many terrorism prosecutions, including those following the 1993 World Trade Center bombings, that were successful not only in obtaining convictions, but also in gathering intelligence from suspects in the course of prosecution.

¹³⁶ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 735, 110 Stat. 1214.

¹³⁷ USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹³⁸ *United States v. Moussaoui*, 483 F.3d 220, (4th Cir. 2007) (holding that victims of the Sept. 11 terrorist attacks could not intervene in a criminal conspiracy case in order to obtain access to certain non-classified evidence).

Finally, the same expert expressed difficulty in conceptualizing a regime of preventive detention that would not in reality be a regime of indefinite detention. The expert posed the question: when would it ever be concluded that a person with a demonstrated intent or desire to commit serious acts of terrorism no longer posed a security threat?

An expert agreed that the U.S. used to sentence suspected terrorists in a public, constitutional manner on a quite regular basis. The rules therefore do not necessarily need to be changed, possibly just adjusted.

Another expert disagreed with the idea of fencing off the Guantanamo situation and said that the reason for the debate surrounding Guantanamo today is that it could create a replicable international standard. That is why it was important to get it right in Guantanamo. Another expert stressed that any system of detention is open to abuse, adding that lessons must be learned from collective experience. The same expert concluded by pointing out that states have increasingly learned to manipulate the continuum between peacetime and wartime to create a situation in which it is impossible to know if there is an armed conflict or not. The U.S.'s "war on terror" is an example of such confusion. Thus, it is important that a set of minimum standards that apply across all frameworks be created, one that could not be discarded by claims that a different situation was involved.

Another expert then addressed the difficulties in using the criminal justice model in national security cases. The criminal system works best when the evidence, witnesses and criminal act take place or are located in a state's territory or in the territory of an ally with whom the state has an extradition agreement or a mutual legal assistance relationship. Thus, if a state rejects the IHL paradigm and applies a criminal law paradigm, there will be persons who slip through cracks, or whom the state must release. At the end of the day this is a policy call, but states must consider the implications.

The Importance of Judicial Review

An expert commented on the viability of the judicial system as a check on the imposition of security detention. One view of the federal courts in the U.S. is that they are the guarantors of liberty because state courts do not provide sufficient protection. However, the expert, looking at the federal courts today, and the Israeli experience described previously, expressed concern that judges and courts do not always provide the necessary oversight. In times of war there is a tendency in the courts to back off from oversight of military matters, although there are examples to the contrary as well (e.g., during the Vietnam War the courts protected the New York Times' right to publish the Pentagon Papers). The expert concluded by saying that while the judiciary may not be the ideal solution, there is no other.

One expert responded to this by saying that there is no other option but to rely on judges, and proposed that panels of two or three judges be instituted in national security cases instead of having them heard by an individual judge.

A second expert cautioned against romanticizing the role of judges in curbing abuse and pointed out that in military matters, judges often deferred to the Executive Branch and the military. However, the expert further stated that there is no better, more impartial or more independent decision-maker than a judge. Thus, the question is how can judicial review be made more meaningful? The same expert proposed that this be done partly by trying to structure an adversarial process. The British example of special advocates is one that is worth very careful study. This also means focusing on the extent of information that is provided to the judge and to counsel, and ensuring that the judges' role is open to public scrutiny. The expert concluded by noting that regardless of the weaknesses of the judicial system, the notion that decisions on personal liberty should be entrusted to the military or the Justice Department ought to be set aside.

An expert then referred to an earlier point on the need to create a minimum set of procedural rules that would apply to all situations of security detention, and stated that he did not think that was feasible. The expert also took issue with the idea, seemingly prevalent in the U.S., that there must be indefinite detention or nothing. In armed conflict, detention may last until the cessation of active hostilities, which can last a very long time, but there is still no notion of indefinite detention. Thus, with security detention there must be a point at which the detaining authority can determine factually whether the detainee is still a threat, and this must be subject to periodic judicial review.

The Role of Counsel

The same expert noted that there should be a discussion of how to improve the role of counsel in security detention proceedings. The presentations earlier indicated that there are a range of types and roles of counsel currently being utilized to varying degrees of effectiveness. Israel allows counsel, but the system does not appear to work because counsel has limited access to evidence. The U.K. system of special advocates may be best for an armed conflict situation, where allowing civilian lawyers regular access to a large detainee population may not be possible. The U.S. and U.K. in Iraq have allowed detainees to have counsel. The expert noted that the issue of counsel must be further examined, and questioned whether any experiences from criminal tribunals in safeguarding sensitive information may be useful.

Evidentiary Standards

It was then observed by an expert that one of the most troubling aspects of administrative detention is the evidentiary standard to be applied. In most countries, the state must prove guilt beyond all reasonable doubt in criminal trials. For civil detention, the state must prove by clear and convincing evidence that the individual is a danger to themselves or to society. For immigration detention, historically only a preponderance of evidence was required based on an assumption that an individual would be held only until he or she could be deported. However, it appears that in Israel and the U.K., the standard for administrative detention is only “reason to suspect,” which in the criminal context would be just enough to obtain an arrest or search warrant, or to secure an extradition, but would never suffice for an actual conviction. In the context of a conventional war, “preponderance of the evidence” and “reason to suspect” that a person constitutes a security threat would seem to be enough to detain. However, with terrorist activity taking place outside of the context of hostilities, it seems that long term deprivation of liberty should require a higher standard than “mere preponderance of evidence” or “reason to suspect.”

The U.K. expert responded that derogation orders can only be made by a court, and the standard used is the normal civil detention standard.

Conclusions

A U.S. expert concluded by noting that those who have supported the actions of the U.S. government in Guantanamo characterize the conflict against terrorism as an armed conflict. The IHL paradigm allows the detention of persons for long periods of time, with no right of review. Prisoners of war, for example, can be detained under the Third Geneva Convention¹³⁹ until the end of active hostilities. The expert noted that he had read few comments arguing that a POW should have the right to seek release (even though that is an issue for further debate). Article 75 of API¹⁴⁰ also permits detention and recognizes that it will continue until the circumstances justifying it have ceased to exist. However, in both of these examples, an end is contemplated. With administrative detention the problem is determining when the end is reached, and who decides whether the circumstances justifying detention have ceased. Should there be a more stringent standard as regards, in particular, the issue of the end of detention?

Another expert concluded the session by arguing for the creation of minimum procedural standards that would apply in all cases of administra-

¹³⁹ GCIII, *supra* note 95, art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

¹⁴⁰ API, *supra* note 488, art. 75(3).

tive detention, regardless of the legal qualification of a situation or the status of the individual involved. The creation of such standards would prevent uncertainty as to the applicable rules. He added that the standards would not apply to the detention of POWs.

PANEL III: THE WAY FORWARD

In this session, participants provided opinions, questions and final thoughts on security detention issues discussed at the meeting. Comments were made during short, subject-specific discussions on the following topics: (1) the permissibility administrative detention; (2) the viability of criminal prosecutions in the United States; (3) defining the parameters of security detention; (4) classified information and special advocates; (5) safeguards against indefinite detention, and (6) next steps.

The Permissibility of Administrative Detention

One expert began the discussion by suggesting that the Council of Europe's standards on security detention¹⁴¹ be adopted as a worldwide standard, at least in situations outside of armed conflict. The expert noted that the ECHR's requirements that state parties derogate in order to undertake security detention created a built-in constraint on the extent of any such deprivation of liberty. Under this standard security detention may not be ordered in normal times, while in emergency situations it may only be undertaken if a specific judgment is made that it is necessary, and then only for the minimal period required.

The experts' discussion moved on to the parameters of derogation and what would constitute a public emergency justifying derogation. An expert asked whether, if the United States was a party to the ECHR and had wanted to derogate from it in the week after September 11, 2001, the European Court would have accepted that the situation constituted a public emergency. The experts agreed that that would have been the case, though most thought that the European Court would not accept that the current situation in the U.S. was an emergency. It was, however, noted by one expert that in the *Brannigan* case (1993),¹⁴² the European Court upheld the British government's judgment that it was facing a public emergency sufficient to justify derogation well past the worst of the Troubles in Northern Ireland.

An expert asked why the U.S. had declared an emergency after the September 11, 2001, attacks but did not derogate from any of its interna-

¹⁴¹ Article 5 of the ECHR does not allow security detention. The only way a state Party may use security detention is by derogation; in order to derogate, a state must be facing a public emergency threatening the life of the nation. Even then, a state may only derogate to the extent strictly required by the exigencies of the situation. *See* ECHR, *supra* note 3, art. 5.

¹⁴² *See* *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993).

tional treaty obligations. It was observed that the United Kingdom was the only country to enter a derogation following these attacks under both the ECHR¹⁴³ and the ICCPR.¹⁴⁴ One expert replied that the U.S. did not derogate because the U.S. administration does not believe that the ICCPR and the Convention Against Torture¹⁴⁵ apply extraterritorially and because, at that point, the hostilities were taking place in Afghanistan.

An expert noted that security detention is specifically allowed in international armed conflict and in non-international armed conflict by implication. The expert said that the question ought to be whether security detention should be allowed outside armed conflict, and observed that this issue was still largely unresolved. Governments are using administrative detention, and are increasingly including it in national security legislation. Human rights groups and civil society have opposed such detention, but universal HRL allows it by implication.¹⁴⁶

The discussion then turned to whether security detention undertaken by the U.S. in the “war on terror” is the result of an armed conflict or whether it is peacetime security detention. An expert observed that the U.S. has said that the “war on terror” is an armed conflict that extends beyond Afghanistan and Iraq, i.e. takes place wherever threats emerge, and is ongoing. The expert questioned whether any other country besides the U.S. has taken this position, and postulated that, as a general matter, no country has publicly adopted the same view.

The Viability of Criminal Prosecutions in the U.S.

One expert said that care must be taken in claiming that there are specific problems with the criminal justice system in the national security context, adding that there must be serious justification for moving to an alternative system. Another expert added that the U.S. Department of Justice’s white paper on terrorism, issued over a year ago, listed more than 260 terrorism prosecutions.¹⁴⁷

An expert then noted that one of the benefits of the European approach to derogation is that justification for any specific deprivation of liberty is examined in the context of a particular case. The courts under this

¹⁴³ Article 15 of the ECHR allows derogation, “In time of war or other public emergency threatening the life of the nation . . .” ECHR, *supra* note 3, art. 15.

¹⁴⁴ ICCPR, *supra* note 2, art. 4(1) (“In time of public emergency which threatens the life of the nation . . .”).

¹⁴⁵ UNCAT, *supra* note 9.

¹⁴⁶ According to the expert, the ICCPR definitely allows security detention, but there is some debate remaining as to whether the ECHR does as well.

¹⁴⁷ United States Department of Justice, Counterterrorism White Paper, Jun. 22, 2006, at 14, available at <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>.

system thus have the opportunity to consider whether an individual could be prosecuted criminally—and if so, are able to determine that security detention is not justified.

In response to this point, an expert said that while a security detention system with elaborate judicial review and a set of procedural protections might be an interesting proposition, he was still not persuaded that there was truly a need for it. The expert challenged the group to identify a single hypothetical situation that would justify such a system.

An expert then revisited the facts of the ECHR's *Brannigan* case,¹⁴⁸ and asked what could be done in a situation in which criminal prosecution was not possible due to a risk of disclosing the identity of informants or of classified methods of intelligence gathering.

Following up on an earlier issue, an expert questioned whether special security detention courts in peacetime might have the advantage of making it more attractive to use a judicial rather than administrative detention approach.

An expert queried whether there might not be an advantage in allowing modified or entirely classified criminal proceedings, similar to a Classified Information Procedures Act (CIPA)¹⁴⁹ criminal prosecution? Responding to this question, an expert noted that the security requirements involved are so restrictive that this solution would result in a fundamentally unfair trial. It would compromise the criminal justice system and that would arguably be much more damaging than instituting a system of administrative detention.

In a last comment on this issue, an expert observed that CIPA prosecutions are conducted according to a “try or release” system. The expert added that perhaps the U.S. government should either have to make confidential information readily available or state that a prosecution will not go forward. Alternatively, the government has the option—as in the *Moussaoui* case—of dropping the main charge and prosecuting a suspect on a lesser offense on the basis of unclassified evidence.

Defining the Parameters of Security Detention

The experts' discussion centered on four sub-issues: (1) what are “imperative reasons of security” justifying security detention; (2) the use of classified information and burdens of proof; (3) access to counsel, and (4) the requirement of independent and impartial judicial review.

An expert noted that there is little jurisprudence on what constitutes “imperative reasons of security” in armed conflict. He further noted that it

¹⁴⁸ See *supra* notes 42, 142 and accompanying text.

¹⁴⁹ 18 U.S.C. app. § 3 (2000).

would be interesting to undertake a review of definitions in domestic legislation as well as in case law.

The same expert noted, with respect to classified information, that it would be useful to determine how sources and evidence are protected in criminal trials, and whether there are lessons to be learned. The expert further observed that there are a range of models as to the role of counsel in security detention proceedings, and questioned whether there may already be an established model that could be instructive. The same expert noted that there is a lot of literature as to what constitutes an independent and impartial court in the criminal process, and asked how the requirements of independence and impartiality could be fulfilled outside a criminal trial context.

Another expert returned to the question of defining who is a security detainee, adding that there are three main categories of detainees, at least for the U.S. The first category are non-citizens detained at Guantanamo Bay, whom the U.S. is not likely to be willing to release. The second category are individuals captured and held abroad who might be members of a terrorist group, or who have trained with one, and who are likely to be subject to security detention. The third category are U.S. citizens, dual nationals, or residents who will perhaps be criminally prosecuted. He added that the category involved has a lot of impact on whether a person should be subject to security detention.

Another expert picked up on this point, noting that U.S. officials are interested in security detention for civilians because they anticipate that over the next 10 to 15 years, the terrorism threat will become homegrown and are not sure that the criminal justice system will be able to handle the situation. In other words, the real issue is not threats from abroad, but what to do with citizens or individuals within the U.S. who may pose a security risk.

An expert noted that both the U.S. and Canadian security detention regimes were related to immigration legislation, and asked, whether security detention is generally related to immigration law in other countries? An expert answered that, in general, countries outside the United States and Canada do not utilize immigration law for security detention. Another expert further observed that both HRL and IHL reject the idea that an individual who represents a security threat to a country may be differently protected under the law depending on whether he or she is a citizen or not. The fact that U.S. courts have made a distinction between citizens and non-citizens in the application of the laws and the protections they provide is very troubling, and will continue to be a point of divergence with others.

In response, one expert noted that the U.S. has consistently interpreted citizenship as membership in a political community to which particular benefits are attached and that the divergence in the application of the law between citizens and non-citizens is a product of that fundamental idea.

Another expert responded that this distinction is understandable for immigration purposes, but distinctions in application of rights beyond that area are of serious concern.

An expert noted that Article 5 of the ECHR¹⁵⁰ provides a list of permissible grounds of detention and that if anything more permissive than what the Europeans have had in place for decades were to be proposed, it would be a big step backwards. The expert suggested that the rest of the world should catch up with the Europeans.

Another expert commented that the Europeans are often at the forefront of human rights and have a much higher standard than the rest of the world. Unless the European approach has become customary international law, what should the rest of the world, not bound by the ECHR, apply in practice? The previous expert responded that, as a prudential matter, the law ought not to fall below the standards already set by Europeans.

Another expert interjected to point out that unless a state is obliged to derogate from a treaty obligation such as the ECHR, there is no mechanism in place to review the permissibility of grounds of detention. One expert subsequently disagreed with the statement that there is no derogation obligation outside of the ECHR, noting that the 140 state parties to the ICCPR presumably would have to derogate outside armed conflict to undertake any type of national security-based deprivation of liberty.

An expert then noted that this would exclude the United States, as the U.S. administration assumes that the ICCPR does not apply extraterritorially.

Another expert argued that there is nothing in the ICCPR prohibiting security detention, provided that detention is not arbitrary and that a state party enacts a law specifying the grounds and procedures for detention.

In a final comment on this issue, an expert responded that, while this may be an accurate point, state practice indicates that some states do

¹⁵⁰ ECHR, *supra* note 3, art. 5(1) ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.").

believe they must derogate. The expert noted that the U.K. thought so after September 11, 2001.

Classified Information and Special Advocates

The first issue raised was how to handle classified information. The discussion focused on the use of special advocates¹⁵¹ because, as one expert pointed out, the issues of classified information and counsel are inextricably linked. The same expert commented that a detainee represented by counsel with no access to the evidence against him or her is not being granted the basic procedural requirements of fair proceedings. The experts were of the view that the role of special advocates merited more discussion.

The conversation then turned to whether states can legitimately attempt to maintain the confidentiality of certain information used in security detention proceedings. One expert pointed out that if the answer is positive, then one must consider the conditions under which confidential information might be withheld. In other words, how can such information be used without resulting in obvious unfairness in the process? The expert went on to say that while reliance on special advocates might be one way of ensuring fairness in the proceedings, other ideas must be looked at as well. In this vein, the expert proposed allowing judges to play a major role in determining what information should remain confidential. He further suggested requiring that a party who wishes to keep certain information confidential provide a summary of such information to the detainee. The expert also pointed out that a special advocate could be involved in the negotiations over the content of such a summary. He stressed that whatever safeguards are put in place, the issue is whether they are sufficient to ensure fair proceedings.

Another expert suggested that, as regards special advocates and classified information, the common law adversarial model might be too restrictive and that a civil law inquisitorial model may be more effective. This idea was countered by yet another expert who argued that relying solely on the discretion of judges is not enough to ensure fair proceedings in national security cases. The expert pointed out that in many cases, judges are essentially on the same side as the detaining power, and although they may be impartial, in practice they generally do not probe as in-depth as would an advocate solely operating for a detainee. As a result, the expert felt there must be someone involved in the process clearly representing the detainee's best interests. In response, another expert said that even in civil law systems based on the inquisitorial model there is a lot of variation in the

¹⁵¹ Special Advocates are lawyers who have access to the classified information which provides the basis for a person's detention. Even though such lawyers would have access to the classified information, they are not allowed to share the classified information with their clients.

role of the advocates. Thus, concerns that a judge will not fully protect the interests of a detainee may not be necessary if advocates participate substantially in the proceedings.

Safeguards against Indefinite Detention

The experts discussed safeguards against indefinite detention. One expert felt that it was clear that periodic review of detention, its regularity and the nature of the authority responsible for it, a proper scheme of burdens and presumptions, and the evidentiary standard used to prove that a detainee continues to pose a security threat are all fairly accepted as part of a process that protects against indefinite detention. The expert then questioned what other safeguards might be implemented to further protect detainees. One expert proposed a system that would use a sliding scale for the necessary standard of evidence. During the first phases of detention, something similar to a "preponderance of the evidence" standard could be used, with more stringent standards for admission of evidence applied the longer an individual is detained.

Next Steps

Divergent views were expressed as to the way forward.

One expert felt that outside of Europe, and outside of the context of armed conflicts, international human rights standards were inadequate to address the issue of security detention; they needed to be strengthened, taking into consideration the needs of governments and the rights of detainees. With that in mind, the expert suggested that the focus after this meeting should be the development of standards, be it in a new international instrument, a protocol to an existing international instrument, or the creation of non-binding "soft law" guidelines, which could strengthen the current international human rights regime in the context of security detentions. An alternative could be the creation of another document like the "Cleveland Principles," which would focus exclusively on the topic of security detention.

The expert made it clear that it was too early to determine which of those options would be best. He felt that a consensus on the content of such a document, including the proper procedural and substantive norms for security detention outside armed conflict, would first have to be reached. Only then could the appropriate form of a future text be decided upon.

Another expert reflected on the idea of creating a minimum set of standards for all circumstances, saying that it would be practical, but adding that he did not see how two entirely different bodies of law could be combined. The expert said that the human rights treaties allow derogation in keeping with the principles of proportionality and necessity. It could be argued that outside of armed conflicts, states have an international obligation to provide effective procedural safeguards. However, no such argument

can be made under IHL, because no such rule exists under humanitarian law. Another expert supported the viewpoint that a single set of rules would not only be extremely difficult to create, but would also potentially “drag down” the human rights rules.

An expert pointed out that perhaps the best way to handle the debate on a minimum set of rules would be to do a rule-by-rule analysis of IHL and HRL. The expert said that such an analysis would help create a set of rules flexible enough to be applied at all times, one that respected both IHL and HRL.

Finally, another expert commented on the first discussant's point about the need to focus primarily on strengthening the human rights regime as it relates to security detention. He instead proposed the development of a set of guidelines that would be applicable to all situations. The expert felt this was the best route because the lines between armed conflict and peacetime were more blurred than ever, and because separating out the standards that would govern in each situation would leave room for abuse. He referred to the ICRC paper which suggests a minimum set of guidelines to be applied to all situations of security detention as matter of law and policy, and stated that it provided a good starting point for further reflection.¹⁵²

ANNEX: EXPERTS MEETING PARTICIPANTS

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¹⁵² Pejic, *supra* note 69.

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