

Human rights and indefinite detention

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“Indefinite imprisonment without charge or trial
is anathema in any country which observes the rule of law.”
Lord Nicholls of Birkenhead in his ruling of 16 December 2004¹

Abstract

International human rights law abhors a legal black hole. It applies wherever a State exercises its jurisdiction, not only in peacetime but also during armed conflict, as a compliment to humanitarian law. The deprivation of liberty is subject to certain conditions, and even initially lawful detention becomes arbitrary and contrary to law if it is not subject to periodic review. Indefinite detention is incompatible with Article 9 of the International Covenant on Civil and Political Rights. While temporary derogation from this provision is allowed in Article 4 of the ICCPR, such derogation is only possible “in time of public emergency which threatens the life of the nation” and “to the extent strictly required by the exigencies of the situation.” Persons deprived of their liberty are entitled to a prompt trial or release, and in cases of arbitrary detention, they are entitled to compensation. Neither the war on terror nor restrictive immigration policies justify indefinite detention.

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Persons deprived of their liberty are never *de jure* in a black hole. In principle, they enjoy legal protection under at least two legal regimes — municipal law and international human rights law. In times of armed conflict, they are also entitled to the additional protection of a third legal regime, that of international humanitarian law.

However, *de facto* tens of thousands of persons throughout the world are subjected to indefinite detention, frequently incommunicado, and governments try to justify such irregular imprisonment on the basis of “national security,” “state of emergency,” “illegal migration” and other so-called extraordinary circumstances.

Temporary derogation from some provisions of the applicable legal regimes is possible, but subject to specified conditions, notably the criterion of “public emergency threatening the life of the nation,”² and the principle of proportionality, which limits such derogation “to the extent strictly required by the exigencies of the situation.”³ Derogations cannot be open-ended, but must be limited in scope and duration. Legal analysis of the justification proffered by States for the limitations of rights frequently reveals that such derogations are not valid under either municipal or international law.⁴

The phenomenon of indefinite detention affects many categories of persons, including persons held as security risks, “terrorists,” “enemy combatants,” and common criminals held in pre-trial detention without bail, but also asylum-seekers, undocumented migrants, persons awaiting deportation, and persons under psychiatric detention.⁵ For the purposes of this article we shall examine the legality of indefinite detention against a number of criteria — not only the temporal element, i.e. the sheer length of the detention or the time-lapse before being brought before a judge, but also other elements such as the uncertainty about the actual termination of said detention, the illegality in the

- 1 Lord Nicholls of Birkenhead in the eight to one majority ruling of the House of Lords on the appeal of 11 detainees held at the high-security Belmarsh prison dubbed the “British Guantánamo”. *A(FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, paragraph 74 of judgment of 16 December 2004. BBC News “Terror detainees win Lords appeal”; available at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/uk_news/4100> (last visited 17 January 2005). Glenn Frankel “British anti-terror law reined in”, *Washington Post*, 16 December 2004. In the same sense, Lord Leonard Hoffmann commented: “there are no adequate grounds for abolishing or suspending the right not to be imprisoned without trial, which all inhabitants of this country have enjoyed for more than three centuries”, cited in Amnesty International Press Release of 16 December 2004.
- 2 Article 15, paragraph 1, of the European Convention on Human Rights and Fundamental Freedoms. See also Article 4, paragraph 1, of the International Covenant on Civil and Political Rights: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed...”
- 3 *Ibid.*
- 4 A. de Zayas “La dérogation et le Comité des Droits de l’Homme des Nations Unies” in Daniel Prémont *et al.* (eds.), *Droits Intangibles et Etats d’Exception*, Bruylant, Brussels, 1996, pp. 213-234.
- 5 In its General Comment No. 8 concerning Article 9 of the International Covenant on Civil and Political Rights, the Committee noted “that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.”; in “International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies”, UN Doc. HRI/GEN/1/Rev.7 (2004), p. 130, para. 1.

manner of effecting arrest (i.e. with or without a judicial warrant of arrest), the justification for the deprivation of liberty given to the detainee, the possibility of having access to counsel and to one's family (i.e. illegality of incommunicado detention), the possibility of testing the legality of the detention before a competent tribunal, and the conditions of detention (i.e. with respect to the inherent dignity of the human person, and without being subjected to irregular interrogation methods).

The first part of this paper focuses on relevant international norms applicable to the deprivation of liberty. The second part looks at national and international case-law. The third part surveys international redress mechanisms. The fourth part addresses the remedies available to the victims. The fifth suggests action that the international legal community may undertake to vindicate the human right to liberty and security of person, including what civil society may do when governments flout the norms.

Applicable norms

There are many norms of municipal and international law that guarantee the right to liberty and security of person, and, in particular, stipulate the right to test the legality of one's detention before a competent and impartial tribunal. In common-law countries this right is enshrined in the famous writ of *habeas corpus*, in continental-law jurisdictions it is codified in specific statutes, in Latin American countries it is known under the right to *amparo*.

It is also important to note the difference between rules of hard law (treaties, statutes), which are justiciable before national and international tribunals, and those of soft law (resolutions and declarations), which are of a promotional nature and frequently expand on the rules of hard law. Both contribute to the emergence of a universal human rights culture.

Universal norms

Among the relevant norms of international human rights law, reference may be made to the Universal Declaration of Human Rights, Article 9 of which stipulates: "No one shall be subjected to arbitrary arrest, detention or exile." The corresponding provision in the International Covenant on Civil and Political Rights⁶ (ICCPR) is Article 9, paragraph 1, which stipulates: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

In its jurisprudence the United Nations Human Rights Committee, the body responsible for monitoring compliance by States party to the ICCPR, has

6 UNTS, Vol. 999, p. 171, 16 December 1966, entered into force 23 March 1976; 154 States Parties as of January 2005.

made it clear that detention which may be initially legal may become “arbitrary” if it is unduly prolonged or not subject to periodic review.⁷ In its General Comment No. 8 concerning Article 9, the Committee lays down the elements that must be tested in determining the legality of preventive detention: “If so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of Article 9(2) and (3), as well as Article 14, must be granted.”⁸

This general protection under Article 9, paragraph 1, applies to all persons under detention, whether administrative (e.g. asylum-seekers) or criminal detention.

Article 9, paragraph 3 of the ICCPR stipulates: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.” Prolonged pre-trial detention without bail is thus incompatible with Article 9 and requires specific justification and periodic review.⁹

In the context of the so-called war on terror, it is important to recall that the ICCPR applies both in times of peace and in times of armed conflict. In its General Comment No. 31 of 29 March 2004, the Human Rights Committee clarified: “The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of the Covenant rights, both spheres of law are complementary, not mutually exclusive.”¹⁰

7 Alfred de Zayas “The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights”, in G. Alfredsson *et al.* (eds), *International Human Rights Monitoring Mechanisms*, Martinus Nijhoff Publishers, The Hague, 2001, pp. 67-121. Also A. de Zayas, “Desarrollo jurisprudencial del Comité de Derechos Humanos”, in Carlos Jiménez Piernas (ed.), *Iniciación a la Práctica en Derecho Internacional*, Marcial Pons, Madrid, 2003, pp. 215-277. See in particular case No.305/1988 (*Van Alphen v. The Netherlands*) UN Doc. A/45/40, Vol. 2, Annex IX, Sect. M, para. 5.8: “The drafting history of Article 9, paragraph 1, confirms that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.” Manfred Nowak, *U.N. Covenant on Civil and Political Rights. Commentary*, N.P. Engel, Kehl, Strasbourg, 1993, pp. 172 ff.

8 General Comment, No. 8, *op. cit.* (note 5), p. 131, para. 4.

9 *Ibid.* See also Bolaños v. Ecuador, case No. 238/1987, where the Committee found a violation of Article 9, paragraph 3, because Mr Bolaños was held in pre-trial detention for over five years. UN Doc. A/44/40, Annex X, Sec. I, para. 8.3.

10 See also General Comment No. 31, in “International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies”, UN Doc. HRI/GEN/1/Rev.7 (2004), p. 195, “The nature of the general legal obligation imposed on States party to the Covenant”;

Moreover, the application of the Covenant may not be trumped by transferring a person outside the national borders of the State concerned (e.g. to Guantanamo naval base on leased Cuban territory)¹¹ or to a private or public subcontractor:¹² “A State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”¹³ And, as indicated in the Committee’s General Comment No. 15, “the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.”¹⁴

Besides constituting a violation of Article 9 of the ICCPR, indefinite detention may also entail a violation of other provisions of the Covenant, including Article 14, which guarantees a prompt trial before a competent and impartial tribunal, Article 7, which prohibits torture and inhuman or degrading treatment or punishment, and Article 10, which provides for humane treatment during detention. There can be little doubt that indefinite detention entails inhuman treatment and that in certain circumstances it may even constitute a form of torture.¹⁵ Moreover, indefinite detention of children would be incompatible with the obligation of States Parties under Article 24, paragraph 1, of the Covenant to ensure special “measures of protection as are required” by virtue of their status as minors.

Whereas Article 4 of the Covenant permits temporary derogation from Articles 9, 14 and 24 thereof, it does not allow any derogation from Article 6 (right to life) or Article 7. Any derogation, however, must be notified to the Secretary-General of the United Nations and must satisfy strict requirements. In its General Comment No. 29, the Human Rights Committee stated: “Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature (...) Not every disturbance or catastrophe qualifies as a public

adopted on 29 March 2004, para. 11. The International Court of Justice, too, has observed “that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant, whereby certain provisions may be derogated from in a time of national emergency”; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1996] ICJ Reports, p. 226, para. 25.

- 11 Alfred de Zayas, “The status of Guantánamo Bay and the status of the detainees”, 37 *UBC Law Review*, Vol. 37, 2004, pp. 288 ff.
- 12 An American citizen Ahmed Abu Ali is being detained in Saudi Arabia and reportedly tortured. US District Judge John Bates wrote in an opinion on the case that Mr. Abu Ali’s lawyers “have not only alleged, but have presented some un rebutted evidence that [his] detention is at the behest and ongoing direction of United States officials.” “Saudi subcontractors”, *Washington Post*, 20 December 2004, page A22.
- 13 General Comment No. 8, *op. cit.* (note 5), General Comment No. 31, *op. cit.* (note 10), para. 10.
- 14 General Comment No. 15 on “The position of aliens under the Covenant”, adopted at the Committee’s twenty-seventh session in 1986, in “International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies”, UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 140 ff.
- 15 In connection with the Belmarsh prison case, a report was published on 13 October 2004, prepared by 11 consultant psychiatrists and one consultant clinical psychologist concerning the serious damage to the health of eight of the detainees.

emergency which threatens the life of the nation (...) A fundamental requirement for any measures derogating from the Covenant (...) is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency...”¹⁶

In the context of the “war on terror” the United Kingdom has formally derogated from Article 9 of the Covenant. In contrast, the United States has not notified any derogation from the Covenant to the United Nations Secretary-General, notwithstanding the obvious incompatibility with the Covenant of many of the provisions of the PATRIOT Act¹⁷ and of numerous Executive Orders.

As indicated above, indefinite detention may raise issues under the peremptory international law rule against torture. Because of the psychological effects that indefinite detention may have on individuals, it may also entail violations of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁸ In this connection, indefinite detention has also been criticized by the International Committee of the Red Cross, which has access to the detainees at Guantánamo Bay and has observed their deteriorating psychological condition, leading to a high number of suicide attempts.¹⁹

In addition to the protection of international human rights law, persons subjected to detention enjoy the more specific protection of international humanitarian law in times of armed conflict. Of particular relevance are the Third and Fourth Geneva Conventions of 1949 and the 1977 Additional Protocols I and II thereto. Article 118 of the Third Geneva Convention²⁰ clearly stipulates that prisoners of war cannot be detained indefinitely: “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” The test here is the cessation of active hostilities, whether or not a peace treaty has been signed. This provision goes well beyond Article 75 of the 1929 Geneva Prisoners-of-War Convention, which stipulated: “When belligerents conclude an armistice convention, they shall normally cause to be included

16 General Comment No. 29, “Derogation during a state of emergency”, in “International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies”, UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 184 ff.

17 Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (H.R. 3162, “USA PATRIOT ACT”) permits indefinite detention — also of immigrants and other non-citizens, with no requirement that those being detained indefinitely be removable as terrorists. See online archives of the American Civil Liberties Union. <<http://archive.aclu.org/congress/1102301e.html>> (last visited 17 January 2005).

18 UNTS, Vol. 660, p. 195, 21 December 1984, entered into force on 26 June 1987.

19 Neil A. Lewis, “Red Cross criticises indefinite detention in Guantánamo Bay”, *New York Times*, 10 October 2003, page 1. “Red Cross blasts Guantánamo” BBC News, 10 October 2003. The senior Red Cross official in Washington D.C. Christophe Girod, stated that it was intolerable that the complex was used as “an investigation centre, not a detention centre (...). The open-endedness of the situation and its impact on the health of the population has become a major problem.”

20 *Convention (III) relative to the Treatment of Prisoners of War*, 12 August 1949, UNTS, Vol. 75, p. 135, entered into force on 21 October 1950.

therein provisions concerning the repatriation of prisoners of war.” The vague language of the 1929 Convention allowed the victorious Allies to circumvent the spirit of the Convention and keep German prisoners of war in detention for many years after Germany’s unconditional surrender. The clear intention of Article 118 of the 1949 Convention was therefore to ensure that prisoners of war would be released “without delay” and not held in indefinite detention.²¹

Important in this context is, of course, the determination of who is entitled to prisoner-of-war status. Article 5 of the Third Geneva Convention requires that “[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

Under Article 142 of the Third Geneva Convention, the Convention is not subject to denunciation during hostilities; even if a State were to denounce it, that State would remain bound by customary international law, including the Martens clause²² and the customary rule on the release of prisoners of war and their humane treatment.

As for other persons detained during an international armed conflict, there is a growing consensus that they would enjoy protection under the Fourth Geneva Convention of 1949. As the International Criminal Tribunal for the former Yugoslavia held in *Prosecutor v. Delalic et al, Celebici Camp case*, “There is no gap between the Third and Fourth Geneva Conventions and (...) if an individual is not entitled to protection of the Third Convention (...) he or she necessarily falls within the ambit of Convention IV.”²³

The above norms apply to the various categories of persons deprived of their liberty. A special case is presented by the growing number of asylum-seekers who are subjected to indefinite detention. In this connection it is important to mention the revised guidelines of the United Nations High Commissioner for Refugees on applicable criteria and standards relating to the detention of asylum-seekers. While this is “soft law”, States ought to take a careful look at these provisions, including Guideline 7: “Given the very negative effects of detention on the psychological well-being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within the following vulnerable categories: Unaccompanied elderly persons. Torture or trauma victims. Persons with a mental or physical disability...” The increasing use of detention as a restriction of the freedom of movement of asylum-seekers on the grounds of their illegal entry remains a matter of major concern to UNHCR.

21 Jean S. Pictet (ed.), *Commentary: III Geneva Convention relative to the Treatment of Prisoners of War*, International Committee of the Red Cross, Geneva, 1960, pp. 540 ff.

22 Helmut Strehel, “Martens Clause”, in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 3, 1997, p. 326.

23 *Prosecutor v. Delalic et al.*, Judgment IT-96-21-T, 16 November 1998, para. 271.

Regional international law

In the regional systems of human rights protection, Article 5, paragraph 1, of the European Convention on Human Rights and Fundamental Freedoms (ECHR)²⁴ stipulates: “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...” Article 5, paragraph 4, stipulates: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

Pursuant to Article 15, the European Convention is subject to derogation. In the context of the “war on terror” the United Kingdom has derogated from Article 5 of the ECHR, as it did with regard to Article 9 of the ICCPR. The effect of the House of Lords ruling of 16 December 2004 in the Belmarsh prison case is, however, that this derogation is deemed invalid.

In the Inter-American regional system, Article 7 of the American Convention on Human Rights²⁵ stipulates: “Every person has the right to personal liberty and security. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. No one shall be subject to arbitrary arrest or imprisonment (...). Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.”

In the African regional system, Article 6 of the African Charter of Human and Peoples’ Rights²⁶ stipulates: “Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

The above international norms reflect a universal consensus that an individual cannot be deprived of liberty except pursuant to specific legislative authority and with respect for procedural safeguards. Nevertheless, the reality is that not only military dictatorships but also democracies detain political opponents, refugees and aliens, sometimes indefinitely, under a variety of pretexts. It is for domestic and international tribunals to test the legality of such detentions and to ensure the release and compensation of persons who have suffered arbitrary arrest and detention.

Recent legislation in the context of the war on terrorism gives cause for concern. A case in point is Malaysia’s Internal Security Act (ISA) which, as a preventive detention law originally enacted in 1960 during a national state of

24 Council of Europe, *European Convention on Human Rights/Convention européenne des Droits de l’homme, Collected Texts/Recueil de textes*, Strasbourg, 1981.

25 OASTS, No. 36, UNTS, Vol. 1144, p. 123, of 22 November 1969, entered into force on 18 July 1978.

26 Adopted at Nairobi on 26 June 1981, entered into force on 21 October 1986.

emergency as a temporary measure to fight a communist rebellion, has lately seen quite a renaissance.²⁷ Under Section 73(1) thereof, the police may detain any person for up to 60 days, without warrant or trial and without access to legal counsel, merely on the suspicion that “he has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof...”²⁸

Case-law

Indefinite detention violates the constitution and bills of rights of most countries, as well as a number of international treaties. Norms, of course, are subject to interpretation. The case-law provides concrete illustration and further development of the codified norms.

War on terror: National case-law

In the context of the “war on terror” some countries have adopted legislation allowing the indefinite detention of terrorism suspects. Particularly worrisome are certain pieces of legislation adopted in countries that are bound by the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms, and the American Convention on Human Rights.

In the United Kingdom the 11 Muslim detainees in the Belmarsh prison case, most of whom have been held since December 2001, successfully challenged their indefinite detention and obtained a favourable ruling from the House of Lords on 16 December 2004, which reversed the Court of Appeal finding of October 2002 that indefinite detention was compatible with the United Kingdom’s human rights obligations. It is now up to the British Parliament to repeal or modify Article 23 of the Anti-terrorism, Crime and Security Act of 2001 (ATCSA), which the Lords have ruled to be incompatible with the British Human Rights Act and with the European Convention on Human Rights. In particular, the Lords found that indefinite detention discriminates on the grounds of nationality (Article 14 of the ECHR), because it applies only to foreign nationals suspected of terrorism, notwithstanding a comparable threat from terrorism suspects holding United Kingdom nationality. As noted by Baroness Hale of Richmond: “The conclusion has to be that it is not necessary to lock up the nationals. Other ways must have been found to contain the threat which they present. And if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners. It is not strictly required by the exigencies of the situation.”²⁹ The 11 Muslim detainees, however, have not yet been released or

27 Human Rights Watch, “Malaysia’s Internal Security Act and suppression of political dissent”, available at: <<http://www.hrw.org/backgrounder/asia/malaysia-bck-0513.htm>> (last visited 17 January 2005).

28 Malaysia, *Internal Security Laws*, Malaysian Law Publishers, Kuala Lumpur, 1982, p. 52 ff.

29 House of Lords, *A(FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, Opinion of 16 December 2004, para. 231.

indicted. If this situation persists, the detainees could submit a complaint to the European Court of Human Rights and demand their release.

Persons suspected of terrorism in the United States have been similarly subjected to indefinite detention. Since January 2002 more than 700 persons have been held as terrorism suspects at the United States naval base in Guantánamo Bay, Cuba, pursuant to a Military Order issued by President George W. Bush: "Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism."³⁰

In a number of early cases, several federal district and circuit courts held that the United States Constitution and the Bill of Rights did not apply to aliens detained in Guantánamo,³¹ who did not even have the right to *habeas corpus*. They were deemed to be in a "legal black hole."³² In the meantime, as many as 200 persons have been released from Guantánamo,³³ but approximately 500 are still held in indefinite detention and only four of them have been charged³⁴ with rather vague offences such as "conspiracy to commit war crimes."

On 28 June 2004, by a six to three judgment, the Supreme Court of the United States rejected the fiction of the legal black hole and held that the persons being held in Guantánamo Bay are entitled to counsel and to challenge the legality of their detention.³⁵

Meanwhile military commissions have been operating in Guantánamo to determine the threat, if any, posed by the detainees to American security. But Pentagon officials have confirmed that Guantánamo detainees may still be kept in detention even if they are found not guilty by a military tribunal.³⁶

Not only foreigners but also American citizens have been held incommunicado and subjected to indefinite detention as "enemy combatants." One of them, Yaser Hamdi, was initially held in Guantánamo and subsequently transferred to a naval brig in Charleston, South Carolina, where he was held in solitary confinement. He challenged his detention on the grounds that for American citizens Congressional authorization of detention is required by 18 USC § 400(a) — which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Hamdi

30 66 F.R. 57833 (2001).

31 Alfred de Zayas, *op. cit.* (note 11), pp. 277-341. See e.g. *Coalition of the Clergy v. Bush*, 189 F. Supp. 2nd 1036 (C.D. Cal. 2002).

32 Lord Johan Steyn, "Guantánamo Bay: The legal black hole", 27th F.A. Mann Lecture to the British Institute of International and Comparative Law, 53 ICLQ 1-15 (2004).

33 "U.S. to free 140 Guantánamo war detainees" Reuters, 30 November 2003; "Transfer of juvenile detainees completed" (concerning the release to their home countries of three juvenile detainees who had been detained in Guantánamo for two years), Department of Defence News Release No. 057-04, 29 January 2004; "Delight at release of Guantánamo men", BBC News, 11 March 2004 (it is interesting to note that all Guantánamo detainees released to the United Kingdom were freed without charge by British authorities shortly after their arrival and interrogation); Alan Cowell, "4 Britons and an American to be freed at Guantánamo", *New York Times*, 12 January 2005.

34 BBC News, 6 August 2004, <<http://news.bbc.co.uk/1/hi/world/americas/3541126.stm>> (last visited 17 January 2005).

35 *Al Odah et al v. United States* (No. 03-343) 2004, *Rasul v. Bush* (No. 03-334) 2004. <<http://127.0.0.1:8080/%2E%2Flegal%2F41541db54%2Epdf>> (last visited 17 January 2005).

36 BBC News, Nick Childs, BBC Pentagon Correspondent "US may hold cleared detainees", 25 February 2004, <<http://news.bbc.co.uk/go/pr/fr/-/2/hi/Americas/3487958.stm>> (last visited 17 January 2005).

successfully took his case to the Supreme Court, which on 28 June 2004 held that he was entitled to counsel and to challenge his detention. In the Court's majority opinion Justice Sandra Day O'Connor stated that "a state of war is not a blank check for the president."³⁷ Rather than give Mr Hamdi a trial, the United States government struck a deal with him whereby he was released in October 2004, after nearly three years in pre-trial detention, and deported to Saudi Arabia.³⁸

Another US citizen still in indefinite detention is José Padilla, who is being held in solitary confinement on a military brig in South Carolina. In principle, according to the Fifth Amendment to the US Constitution, US citizens cannot be detained without charge. However, the Bush Administration has circumvented this constitutional right by labelling Mr Padilla as an "enemy combatant," although he was not captured in Afghanistan or Iraq but at O'Hare airport in Chicago.³⁹ This aberration is now being tested before a US federal court. In the meantime Mr Padilla remains held indefinitely.

National security: International case-law

In the 1970s and 1980s several countries in Latin America suffered internal unrest that led to military coups and government by military juntas. Under the pretext that the national security of their respective countries was at stake, the juntas adopted emergency legislation against "terrorism" (e.g. Uruguayan State Security Act, Law, No. 14068, *Acta Institucional* No. 4 of 1 September 1976 and No. 8 of July 1977), which enabled them to arrest without warrant (Uruguayan "prompt security measures") and hold suspects indefinitely or try them before military courts under charges of "subversive association" (*asociación subversiva*) and "conspiracy" (*conspiración contra la constitución*). A number of these cases came for examination before the Human Rights Committee, which found that indefinite detention, incommunicado detention or detention following the conclusion of a term of imprisonment constituted a violation of Article 9 of the Covenant. In case No. 5/1977 the Committee found a violation of Article 9, paragraph 1, because Luis María Bazzano "was kept in custody in spite of a judicial order of release."⁴⁰ In case No. 8/1977, a violation of Article 9, paragraph 1, was found because the persons concerned "were not released in the case of Alcides Lanza Perdomo, for five months and, in the case of Beatriz Weismann de Lanza for 10 months, after their sentences of imprisonment had been fully served."⁴¹ In case No. 9/1999 the

37 *Hamdi v. Rumsfeld*, Case No. 03-6696, 2004 U.S. LEXIS 4761 at 51.

38 Jerry Markon, "Hamdi returned to Saudi Arabia: U.S. Citizen's detention as enemy combatant sparked fierce debate", *Washington Post*, 12 October 2004, p. A02.

39 Robert A. Levy, "Jose Padilla: No charges and no trial, just jail", Cato Institute, 21 August 2003, <<http://www.cato.org/cgi-bin/scripts/printtech.cgi/dailys/08-21-03.html>> (last visited 17 January 2005).

40 *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Volume I, p. 42. UN Doc.CCPR/C/OP/1, New York, 1985.

41 *Ibid.*, p. 49 para. 16. See also case No. 43/1979 *Drescher v. Uruguay*, *Selected Decisions*, UN Doc. CCPR/C/OP/2, Volume 2, pp. 80 ff., para. 14; case No. 84/1981, *Dermitt v. Uruguay*, pp. 112 ff., para. 10; No. 107/1981, *Almeida de Quinteros v. Uruguay*, pp. 138 ff.; No. 139/1981 *Conteris v. Uruguay*, pp. 168 ff., para. 10.

Committee found that Article 9, paragraph 4, had been violated because during his detention Mr Santullo “did not have access to legal counsel. He had no possibility to apply for *habeas corpus*. Nor was there any decision against him which could be the subject of an appeal.”⁴² In case No. 52/1979, the Committee found a violation of Article 9, paragraph 1, because Mr López Burgos had been abducted from Argentina and brought by force into Uruguay, which constituted “an arbitrary arrest and detention.”⁴³

Incommunicado detention, moreover, has been found to constitute a violation of Articles 7 and 10 of the Covenant. In case No. 63/1979, the Committee noted that Mr Raul Sendic, the leader of the *Movimiento de Liberación Nacional* (MLP-Tupamaros) had been subjected to prolonged periods of solitary confinement in an underground cell, lack of food and general harassment, that he had been subjected to *plantón* (standing upright with eyes blindfolded) and being allowed to sleep or rest only for a few hours at a time, and that he had been denied family visits and medical treatment.⁴⁴ Similarly, in case No. 10/1977, the Committee found a violation of Article 10 of the Covenant because Mr Altesor had been held in incommunicado detention for 16 months.⁴⁵

Indefinite detention of refugees and migrants: National case-law

Indefinite detention has been the fate of tens of thousands of asylum-seekers and illegal migrants in a number of democracies, including the United States and Australia. Even though the numbers are staggering, the press has taken relatively little notice of the thousands of Haitians held by the United States in Guantánamo Bay in the 1990s, the more than 1,000 “Marielitos” (refugees from Cuba) who have been held in United States prisons for some twenty years, or the thousands of Afghan refugees intercepted on Australian waters and currently being held in Nauru under immigration custody without any realistic hope of release.

Although the 30,000 Haitians were repatriated to Haiti, there are still many Haitian boat people being held indefinitely in detention centres in Florida. On 26 April 2003 US Attorney General John Ashcroft ruled, in the case of a Haitian immigrant who had won the right to be released on bail while awaiting a decision on his asylum claim, that illegal immigrants who have no known links to terrorist groups can be detained indefinitely to address national security concerns. While the Attorney General did not claim that the man was a security threat, he argued that his release and that of others like him “would tend to encourage further surges of mass migration from Haiti by sea, with attendant strains on national security and homeland security resources.”⁴⁶ Mr Ashcroft held that his ruling was necessary to discourage mass migration.

42 *Ibid.*, Vol. I, p. 44, para. 10.

43 *Ibid.*, Vol. I, p. 91, para. 13.

44 *Ibid.*, Vol. I, p. 104, para. 20.

45 *Ibid.*, Vol. I, p. 107, paras. 9.2 and 15.

46 Rachel L. Swarns, “Illegal aliens can be held indefinitely, Ashcroft says”, *New York Times*, 26 April 2003.

Meanwhile the “Marielitos” have had their day in court. The case of Daniel Benítez,⁴⁷ a Cuban refugee from the 1980 refugee transport to the United States from the port city of Mariel in Cuba,⁴⁸ was argued before the Supreme Court on 13 October 2004. The judgment of the Supreme Court has just been rendered public on 12 January 2005. It reaffirms the ruling in the landmark immigration case decided by the United States Supreme Court in 2001, holding that the detention of immigrants should be limited to a “reasonable period.” The 2001 ruling covered the detention period required while the United States endeavours to find a third country prepared to accept an alien subject to deportation. In *Zadvydas v. Davis*, 533 US 678 (2001), the Supreme Court decided that a non-citizen who was already admitted to the United States as a lawful permanent resident and could not be deported should not be held in indefinite detention. Justice Stephen Breyer’s five to four majority opinion noted that indefinite detention would pose a “serious constitutional threat” and that a reasonable time-limit of six months should be interpreted into the law.⁴⁹ The Supreme Court judgment in the cases of *Clark, Field Office Director, Seattle, Immigration and Customs Enforcement, et. al. v. Martínez*, certiorari to the United States Court of Appeals for the Ninth Circuit, and *Daniel Benítez v. Michael Rozos, Field Office Director, Miami, Florida Immigration and Customs Enforcement*, on writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, held that:

“Since the Government has suggested no reason why the period of time reasonably necessary to effect removal is longer for an inadmissible alien, the six-month presumptive detention period we prescribed in *Zadvydas* applies.⁵⁰ Both *Martínez* and *Benítez* were detained well beyond six months after their removal orders became final. The Government having brought forward nothing to indicate that a substantial likelihood of removal subsists despite the passage of six months (indeed, it concedes that it is no longer even involved in repatriation negotiations with Cuba); and the district Court in each case having determined that removal to Cuba is not reasonably foreseeable, the petitions of *habeas corpus* should have been granted. Accordingly, we affirm the judgment of the Ninth Circuit, reverse the judgment of the Eleventh Circuit, and remand both cases for proceedings consistent with this opinion.”⁵¹

47 *Benítez v. Rozos*, No. 03-7434, and *Clark v. Martínez*, No. 03-8978, were argued before the Supreme Court on 13 October 2004. See Stanley Mailman and Stephen Yale-Loehr, *New York Law Journal*, 25 October 2004. See also Charles Gordon, Stanley Mailman and Stephen Yale-Loehr, *Immigration Law and Procedure* §62.01 (rev. ed. 2004); Stephen Henderson, “Justices question indefinite detention of Cubans due deportation”, *The Advocate*, Baton Rouge, Louisiana, 14 October 2004, p. 10; Steve Lash, “Court mulls Cubans’ indefinite detention”, *Chicago Daily Law Bulletin*, 14 October 2004, p. 2. See also Amicus Brief of the Florida Immigrant Advocacy Centre and the American Civil Liberties Union on behalf of Mr Benítez: <<http://www.aclu.org/Files/OpenFile.cfm?id=16647>> (last visited 17 January 2005).

48 Some 125,000 Cubans came to the United States in 1980 when Fidel Castro allowed them to leave. About 1,000 of them came into conflict with US law enforcement, served their sentences and have been languishing in immigration custody pending deportation.

49 533 U.S. 678 (2001) at 701.

50 *Ibid.*, at 699.

51 543 U.S. (2005).

In her concurring opinion, Justice Sandra Day O'Connor indicated, however, that the US government still has other statutory means for detaining aliens whose removal is not foreseeable and whose presence poses security risks. Justice Antonin Scalia observed that Congress could amend the immigration statutes governing detention. The implication is that international law concerns are essentially irrelevant, and that whatever the US Congress does, even if in violation of the International Covenant on Civil and Political Rights, is the law. Whether and when Mr Benítez and the other "Marielitos" will be released from indefinite detention remains a matter of speculation.

Moreover, it is important to note that, although the *Martínez* and *Benítez* cases had nothing to do with the war on terrorism and their detention well predates 11 September 2001, the Bush Administration is borrowing national security arguments in order to limit immigration. Solicitor General Theodore Olson warned the Supreme Court that a ban on indefinite detention would risk creating a "back door into the United States" for dangerous aliens, and that requiring the release of these detainees would create "an obvious gap in border security that could be exploited by hostile governments or organizations that seek to place persons in the United States for their own purposes."⁵² And, indeed, the Eleventh US Circuit Court of Appeals in the *Benitez* case had ruled that the courts should not interfere with the power of the other political branches to imprison dangerous illegal immigrants.

In Australia, under the mandatory detention regime, the Migration Act requires unlawful non-citizens to be detained until they have either obtained a visa, are deported or are removed from Australia. On 6 August 2004 the High Court of Australia, by a vote of four to three, upheld the Australian government practice to detain failed asylum-seekers indefinitely pursuant to the Migration Act 1958, overruling an earlier Federal Court decision that such persons should not be detained indefinitely even if no country could be found willing to take them. The High Court ruling concerned two asylum-seekers, stateless Palestinian Ahmed al-Kateb, and Iraqi Abbas al Khafaji, who had failed to be granted visas but were unable to be returned home or to any other country. The ruling also affects 13 other asylum-seekers who had been released pending the decision.

On 7 October 2004 the High Court of Australia again ruled that indefinite detention was lawful under Australian law, notwithstanding the fact that it may be incompatible with Australia's international human rights obligations. *Woolley (Manager of the Baxter Immigration Detention Centre); Ex parte Applicants M276/2003 by their Next Friend GS* concerned four children of Afghan origin who have been detained for more than three years in immigration custody. In dismissing their application for release Justice McHugh observed:

"The decisions of the United Nations Human Rights Committee in *A v Australia*,⁵³ *C v Australia*⁵⁴ and *Bakhtiyari v Australia*, the deliberations of

52 See <<http://www.twmlaw.com/resources/defalien.html>> (last visited 17 January 2005). See also "Supreme Court agrees to consider immigrant detention case", 16 January 2004, available at <<http://www.cnn.com/2004/LAW/01/16/scotus.immigrants.ap/>> (last visited 17 January 2005).

53 Case No 560/1993, Views adopted on 3 April 1997, UN Doc. A/52/40, Vol. II, Annex VI Sec. L.

54 Case No. 900/1999, *C. v. Australia*, Views adopted 28 October 2002. UN Doc. A/58/40, Vol., II, Annex VI R.

the United Nations Working Group on Arbitrary Detention⁵⁵ and the detention regimes in the United States, Canada, the United Kingdom and New Zealand indicate that a regime which authorises the mandatory detention of unlawful non-citizens may be arbitrary notwithstanding that the regime may allow for the detainee to request removal at any time. They suggest that something more is required if the regime is not to be found to breach the Refugees Convention, the ICCPR or the Convention on the Rights of the Child, or to be otherwise contrary to international law. Something more may include periodic judicial review of the need for detention, some kind of defined period of detention and the absence of less restrictive means of achieving the purpose served by detention of unlawful non-citizens.

“However, the issue in this Court is not whether the detention of the present applicants is arbitrary according to international jurisprudence, whether it constitutes a breach of various Conventions to which Australia is a party or whether it is contrary to the practice of other States. It is whether Parliament has the purpose of punishing children who are detainees so that, for the purpose of the Constitution, the Parliament has exercised or authorised the Executive to exercise the judicial power of the Commonwealth. On that very different issue, the international jurisprudence and the practice of other States do not assist. That is because the purpose of ss 189 and 196 is a protective purpose — to prevent unlawful non-citizens, including children, from entering the Australian community until one of the conditions in s 196(1) is satisfied. (...) Whether or not Australia may be in breach of its international obligations cannot affect that constitutional question. For the reasons that I have given, ss 189 and 196 are valid enactments and apply to children who are unlawful non-citizens.”⁵⁶

Accordingly, the four children remain in indefinite immigration custody.

Immigration detention: International jurisprudence

As shown above, it has been the role of the United Nations Human Rights Committee to establish important international jurisprudence against the practice of indefinite detention of migrants. This jurisprudence clarifies the constitutive elements of an illegal detention. Thus it is not merely the time element that leads to the conclusion that detention is illegal, but the combination of factors attending the deprivation of liberty, the possibility of periodic review and the principle of proportionality.

In a recent decision under Article 9 of the ICCPR concerning the detention of an Afghan family, the Committee held that:

55 United Nations Economic and Social Council, Commission on Human Rights, Civil and Political Rights, including Questions of: Torture and Detention, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2000/4, (1999) Annex 2. In its Deliberation No 5, the Working Group proposes a number of principles concerning the detention of asylum-seekers, including Principle 7, which requires that detention should be for a defined period “set by law” and “may in no case be unlimited or of excessive length”: Annex 2, p. 30.

56 Woolley (*Manager of the Baxter Immigration Detention Centre*); *Ex parte, Applicants M276/2003 by their Next Friend GS*, paras. 114-116.

“Concerning Mrs Bakhtiyari and her children, the Committee observes that Mrs Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State Party has not, in the Committee’s view, demonstrated that their detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, the State Party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State Party’s immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family’s particular circumstances. As a result, the continuation of immigration detention for Mrs Bakhtiyari and her children for the length of time described above, without appropriate justification, was arbitrary and contrary to Article 9, paragraph 1, of the Covenant.”⁵⁷

In another case concerning Australia, the individual kept in indefinite immigration custody suffered psychological trauma because of the prolonged detention. The Committee determined that not only had Article 9 of the ICCPR been breached, but also that a violation of Article 7 had occurred. In its views the Committee observed:

“As to the author’s allegations that his first period of detention amounted to a breach of Article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State Party’s courts and tribunals, was essentially unanimous that the author’s psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State Party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author’s continued detention and his sanity. Despite increasingly serious assessments of the author’s conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author’s illness had reached such a level of severity that irreversible consequences were to follow. In the Committee’s view, the continued detention of the author when the State Party was aware of the author’s mental condition and failed to take the steps necessary to ameliorate the author’s mental deterioration constituted a violation of his rights under Article 7 of the Covenant.”⁵⁸

57 On 29 October 2003 the Human Rights Committee adopted Views on communication No. 1069/2002, submitted by Mr Ali Acsar Bakhtiyari and Mrs Roquahia Bakhtiyari, UN Doc. A/59/40, Vol. II, Annex IX DD, para. 9.3.

58 *C. v. Australia*, *op. cit.* (note 54). UN Doc. A/58/40, *op. cit.* (note 54), para. 8.4.

Redress mechanisms

Individual complaint procedures

Individuals have no standing before the International Court of Justice at The Hague and therefore cannot directly submit their cases for determination by the ICJ. However, the World Court can examine a violation of the human rights of individuals if a State with standing before the ICJ were to submit a contentious case for adjudication, or if the General Assembly or Security Council, pursuant to Article 96 of the UN Charter, were to submit a legal question concerning individual rights to the ICJ for its advisory opinion. This occurs rarely; the most recent instance was in the context of the Advisory Opinion of 9 July 2004 concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Other than the ICJ, the principal universal organs that can examine petitions from individuals are the Human Rights Committee, under the Optional Protocol to the International Covenant on Civil and Political Rights, and the Committee against Torture, pursuant to Article 22 of the Convention against Torture.

Neither of these procedures is available for persons detained by the United States or the United Kingdom, because these countries have not recognized the respective individual complaints procedures. Australia, however, has accepted both, and individual complaints in relation to indefinite detention have been successfully examined.

Individuals wishing to avail themselves of the Optional Protocol procedure must exhaust domestic remedies to the extent that these are available. The Committee may, however, examine cases even when such remedies have not been exhausted if the legislation and case-law of a State Party render them futile. This was the situation in *Omar Sharif Baban v. Australia*, in which the Committee ruled on admissibility and merits on 6 August 2003:

"As to the author's claims under Article 9, the Committee notes that the State Party's highest court has determined that mandatory detention provisions are constitutional. The Committee observes, with reference to its earlier jurisprudence, that (...) the only result of *habeas corpus* proceedings in the High Court or any other court would be to confirm that the mandatory detention provisions applied to the author as an unauthorized arrival. Accordingly, no effective remedies remain available to the author to challenge his detention in terms of Article 9, and these claims are accordingly admissible."⁵⁹

The Committee went on to find violations of Article 9, and observed:

"As to the claims under Article 9, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State Party can provide appropriate justification.⁶⁰ In the present case, the author's detention as a non-citizen

⁵⁹ UN Doc. A/58/40, Vol. II, Annex VI CC, para. 6.6.

⁶⁰ *A. v. Australia*, Case No 560/1993, Views adopted on 3 April 1997, UN Doc. A/52/40, Annex VI Sec. L.

without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State Party advances particular reasons to justify the individual detention (para. 4.15 ff.), the Committee observes that the State Party has failed to demonstrate that those reasons justified the author's continued detention in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention for his son or the fact that during the period under review the State Party apparently did not remove Iraqis from Australia (para. 4.12). In particular, the State Party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State Party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions. The Committee also notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under Article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of Article 9, paragraph 1. In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the rights of both the author and his son under Article 9, paragraphs 1 and 4, of the Covenant were violated."⁶¹

Besides the quasi-judicial petitions procedures of the Human Rights Committee and of the Committee against Torture, there also exist non-binding redress mechanisms such as the intercession of the United Nations Working Group on Arbitrary Detention, which, for instance, in its report to the 59th session of the United Nations Commission on Human Rights (2003) condemned the indefinite detention of Afghan and other persons in Guantánamo Bay,⁶² and the "1503 Procedure" of the Sub-Commission on Promotion and Protection of Human Rights, which for several years confidentially examined the situation of the indefinite detention of the "Marielitos", without, however, persuading the United States to terminate this abuse.⁶³

61 *Ibid.*, para. 7.2.

62 Report of the Working Group on Arbitrary Detention, UN ESC HCHROR, 59th Session, UN. Doc. E/CN.4/2003/8.

63 The impasse results from the fact that the United States wants to deport Mr Benítez and some 1,000 other "Marielitos" back to Cuba, but Cuba refuses to accept them. Thus, they remain in indefinite detention in the United States. As the lawyer of Mr Benítez, John Mills of Jacksonville, Florida, noted, they "face the very real possibility of spending the rest of their lives incarcerated, not because of any crimes they may have committed, but because their countries will not take them back!" See <<http://www.aclu.org/court/court.cfm?ID=15151&c=261>> (last visited 17 January 2005).

In the European regional system, all persons under the jurisdiction of member States of the Council of Europe may submit individual complaints to the European Court of Human Rights at Strasbourg. In the American regional system, all persons under the jurisdiction of member States of the Organization of American States may submit cases to the Inter-American Commission on Human Rights in Washington DC. In the African regional system, all persons under the jurisdiction of States party to the African Charter may submit individual complaints to the African Commission on Human and Peoples' Rights at Banjul, the Gambia.

Interim measures of protection

All individual complaints procedures also include the possibility of requesting interim measures of protection, e.g. under Rule 86 of the rules of procedure of the Human Rights Committee and under Rule 108 of the rules of procedure of the Committee against Torture. In both cases the test is that of "irreparable harm" to the victim, which the Committees enjoin the States Parties to prevent.

Inter-State complaints procedures

Bearing in mind that human rights treaties create *erga omnes* obligations, any State may potentially bring a case before an international tribunal or expert committee, provided that certain admissibility criteria are satisfied. Indefinite detention is *ratione materiae* a legitimate subject for an inter-State complaint, since every gross violation of human rights is a matter of concern to every State and to the international community as a whole.

Under Article 36 of its Statute, the International Court of Justice accepts cases referred to it by States seeking adjudication of a particular dispute; the Court does so also on the basis of a general declaration of recognition of its jurisdiction, and when States accept the Court's jurisdiction in the text of a specific treaty. Some States, however, do not accept the compulsory *ipso facto* jurisdiction of the International Court of Justice, including the United States of America. When the latter appears before the ICJ, it is usually by virtue of a treaty provision requiring the settlement of disputes by the ICJ, such as the Vienna Convention on Consular Relations, to which the United States is a party. This was the case in the 31 March 2004 judgment in *Mexico v. United States*, with respect to Mr Avena and 50 other Mexican nationals, in which the ICJ found that the United States had violated the said Vienna Convention.

Under Article 41 of the International Covenant on Civil and Political Rights, a State that has declared its recognition of the competence, in respect of itself, of the Human Rights Committee to investigate and adjudicate may bring a case against another State that has also recognized the Committee's competence. Since the United States has made that declaration, any other State that has likewise done so may submit an inter-State complaint of a violation of Article 9 of

the Covenant with regard to the persons being detained in Guantánamo or the indefinite detention of the “Marielitos”. It is not necessary for the State lodging the complaint to be the State of nationality of the person or persons concerned, since a violation of Article 9 of the Covenant is *erga omnes* and thus constitutes a genuine interest giving standing to other States party to the ICCPR. Australia and the United Kingdom have similarly made the said declaration under Article 41.

Under Article 21 of the Convention against Torture, a State that has declared its acceptance, in regard to itself, of investigation and adjudication by the Committee against Torture may bring a case against another State that has also made that declaration. Considering that indefinite detention constitutes inhuman treatment in violation of Article 16 of the Convention and is arguably also a violation of other of its provisions, an inter-State complaint would be admissible *ratione materiae*. Australia, the United States and the United Kingdom have made the said declaration recognizing the Committee’s competence.

In the European, American and African systems inter-State complaints are also possible and could be effective in pressuring States to abandon the practice of indefinite detention.

States may also request the relevant tribunal to call for interim measures of protection to be taken, e.g. pursuant to Article 41 of the Statute of the International Court of Justice or the relevant inter-State complaints procedures.

Remedies available to the victims

The most important remedy for victims of indefinite detention is immediate release. This principle is enshrined in universal and regional human rights conventions.

Pursuant to the principle *ubi jus, ibi remedium*, compensation should also be granted, whether or not the universal and regional human rights conventions specifically envisage such compensation.

Article 9, paragraph 5, of the International Covenant on Civil and Political Rights stipulates: “Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.”

In the European regional system, Article 5, paragraph 5, of the European Convention stipulates: “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.” More generally, Article 50 of the Convention stipulates: “If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.”

The American regional system lacks a specific provision for compensation in case of arbitrary detention. Article 10 of the American Convention on Human Rights merely stipulates: "Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice."

It would seem logical that someone like Yaser Hamdi, who has always maintained his innocence and who was detained for nearly three years and then deported to Saudi Arabia without trial, should be entitled to compensation for arbitrary detention and for the inhuman conditions of said detention. However, it may have been part of the deal that release was granted on condition that he would not sue the US government for compensation. Or he may have been so traumatized and intimidated by his experience in US detention that he will only want to forget it.

Steven Watt, a British lawyer who represented released British Guantánamo detainees Shafiq Rasul and Asif Iqbal, stated that they would claim compensation. "They have spent two-and-a-half years languishing in that prison — it is a complete travesty of justice. I think they are owed something by the US Government, but whether they will ever be able to get it is another thing."⁶⁴

In relation to indefinite immigration detention, the Human Rights Committee has made concrete recommendations to States Parties. For example, in its Views in case No. 900/1999 *C. v. Australia*, the Committee recommended: "As to the violations of Articles 7 and 9 suffered by the author during the first period of detention, the State Party should pay the author appropriate compensation. As to the proposed deportation of the author, the State Party should refrain from deporting the author to Iran. The State Party is under an obligation to avoid similar violations in the future."⁶⁵

In its Views concerning *Bakhtiyari v. Australia*, the Committee observed:

"In accordance with Article 2, paragraph 3 (a), of the Covenant, the State Party is under an obligation to provide the authors with an effective remedy. As to the violation of Article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs Bakhtiyari, the State Party should release her and pay her appropriate compensation. So far as concerns the violations of Articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State Party is under an obligation to pay appropriate compensation to the children. The State Party should also refrain from deporting Mrs Bakhtiyari and her children while Mr Bakhtiyari is pursuing domestic proceedings, as any such action on the part of the State Party would result in violations of Articles 17, paragraph 1, and 23, paragraph 1, of the Covenant."⁶⁶

At the time of writing the present article, Australia has not complied with this recommendation.

64 BBC News, 11 March 2004, <<http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk/3500156.stm>> (last visited 17 January 2005).

65 UN Doc. A/58/40, Vol. II, Annex VI R, para. 10.

66 UN Doc. A/59/40, Vol. II, Annex IX DD, para. 11.

With regard to the even more serious case No. 900/1999 concerning Mr C., at the time of writing this article Australia has likewise not complied with the Committee's recommendation. It did furnish an interim response by *note verbale* of 10 February 2003 stating that every effort was being made to resolve the situation, but that given the complex nature of the issues, high-level consultation among government authorities was required. The lawyer of Mr C., however, informed the Committee that the State Party had taken no measures to give effect to its Views and that the author continued to be detained.⁶⁷

Conclusions and recommendations

Among the many legal questions that policy makers must pose and answer is that of the legitimate objectives of detention. If the purpose is national security, a balancing of rights must take place. It is more important to address the root causes of terrorism than to attempt to cure the symptoms one by one. Fundamental rights and freedoms must not be compromised in the effort to save them from terrorism. If the objective of detention is to discourage illegal immigration, other strategies must be found that do not deny the human dignity of would-be immigrants. In this sense, proportionate solutions must be devised that enhance rather than destroy human rights.

Bearing in mind that human rights obligations are *erga omnes*, it is important that the international community show solidarity in rejecting the indefinite detention of persons in whatever context, whether in connection with the war against terrorism or in the context of restrictive immigration policies. More concretely, the gap must be closed between international human rights standards and national law and constitutions that limp behind, as illustrated in the Australian *Woolley* judgment.⁶⁸ Civil society should demand that international human rights conventions be incorporated into national constitutions and legislation. In the event of conflict between international and national law, it is international law that should enjoy primacy. The French *Cour de Cassation* has just quashed a lower court decision denying jurisdiction in a claim of ex-Guantánamo detainees for illegal and arbitrary detention.⁶⁹ It is now for the French courts to examine how French international commitments under the Third Geneva Convention of 1949 and the International Covenant on Civil and Political Rights are to be applied by French judges in the context of detention.⁷⁰

67 UN Doc. A/58/40, Vol. I, para. 225. UN Doc A/59/40, Vol. I, para. 230.

68 See text accompanying note 56 above.

69 *Le Monde*, 4 January 2005, concerning two ex-Guantánamo detainees, Mourad Benchellali and Nizar Sassi. The judge in Lyon had refused to take jurisdiction arguing that "aucune convention internationale ne donne compétence aux juridictions françaises pour connaître la situation dont les parties civiles se plaignent, laquelle est le résultat, sous l'égide des Nations Unies, de ripostes à des actes terroristes et qui ne saurait dès lors être régie par le seul droit français."

70 *Ibid.* The lawyer of the two ex-Guantánamo detainees, Maître William Bourdon, commented: "C'est une décision de principe très importante parce que la Cour de cassation refuse l'idée que, s'agissant de la lutte contre le terrorisme, la fin justifie les moyens et que le droit international humanitaire et le droit français s'effacent devant les résolutions de l'ONU (...). Cela ouvre la voie à des poursuites pénales."

Both individuals and States should make better use of the human rights mechanisms established by the United Nations and by the regional human rights protection systems. For instance, individual petitions provide a useful way of giving visibility to grave human rights violations that frequently escape the attention of the media.

The inter-State complaints procedure remains highly under-utilized. It is high time for a group of States to coordinate inter-State complaints under Article 41 of the ICCPR and Article 21 of the CAT. An examination of the problem of indefinite detention by the Human Rights Committee and by the Committee against Torture may contribute to the formulation of more humane policies in those States responsible for the indefinite detention of both citizens and aliens.

The United Nations Human Rights Committee has established meaningful jurisprudence concerning incommunicado detention and indefinite detention. The same principles that have been applied to condemn such detention in countries throughout the world, particularly in the 1970s and 1980s, must also apply in the context of today's war against terrorism. While international human rights law is not mathematics, it does require consistency, and double standards must not be tolerated. Indefinite detention and torture in Guantánamo violate Articles 7 and 9 of the Covenant in the same way that similar practices violated the Covenant at the time of the military juntas of Argentina, Chile and Uruguay.

Both municipal and international law give justiciable rights to persons deprived of detention. These rights should be invoked by the victims and by civil society on their behalf. Indeed, it is the duty of every victim of a violation of law to denounce it and to demand reparation. Acquiescence in the practice of indefinite detention by the victims and/or by civil society is incompatible with the culture of human rights that has been gradually emerging through the efforts of the United Nations and other regional human rights tribunals.

Only an effective system of sanctions against perpetrators and appropriate reparation to victims will serve as a deterrent to future violations. Reparation and deterrence/prevention go hand in hand. Moreover, international solidarity requires special programmes for the rehabilitation of victims of indefinite detention, many of whom suffer traumata as a consequence of their detention and are in need of assistance in order to reconstruct their lives. This places an important responsibility on civil society.

It bears repeating that human rights and security are not in conflict with each other, but must mutually support each other. States would be ill-advised to seek greater security by limiting human rights. Conversely, if States observe human rights domestically and internationally, they will contribute to an international environment that will sustain peace and greater security for all.

Civil society must reject State terrorism and its dangerous totalitarian laws. In this sense it is appropriate to conclude with the words of Lord Leonard Hoffmann in the 16 December 2004 ruling in the Belmarsh prison case:

“The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.”⁷¹

71 Lord Leonard Hoffmann in the judgment of 16 December 2004, *op. cit.* (note 1), para. 97.