1st Geneva Forum of Judges and Lawyers:

Accountable national security policies – the role of judges and legal practitioners

Centre for the Independence of Judges and Lawyers (CIJL)

Opening address

A few comments on the new Role of Judges as transnational actors

Justice Michèle Rivet
First President of the Quebec Human Rights Tribunal
ICJ Commissioner and member of the ICJ Executive Committee

October 25, 2010

Since the attacks of September 2001, decisions being taken at both national and international levels have been touching all regions of the world. Many States or governments have adopted measures: pre-emptive detention without charge, long periods of pre-trial detention, restriction to the access to legal counsel, expulsion of foreigners without due consideration to the *non refoulement* principle, and finally, establishment of special courts that do not meet the minimum requirement of independence and impartiality.

Some governments have carried out activities shrouded in secrecy, and introduced measures that deny individuals the right to test or to challenge the legality of the actions taken against them or the lawfulness of their detention.

Many detainees have been summarily taken or expelled without due process in violation of usual extradition procedures to a country where they can be tortured with impunity. We have seen basic fair trial guarantees ignored, rights of defence cut down, and rights of appeal removed.

1. Attacks on the judiciary and legal community

During these periods of crisis, judicial review of actions by the Executive Power is weakened by measures oriented to undermine the independence of the Judiciary and therefore constitute a threat to the rule of law and the separation of powers.

Some judges, some lawyers, on basis of national security are deprived of liberty contrary to all fundamental principles of international law.

Just a few examples:

Justice Maria Lourdes Afiuni Mora, has been imprisoned for having applied a recommendation of the United Nations Working Group on Arbitrary Detention and ordered the release on bail of a person. She has being placed in a women's prison together with prisoners she had condemned. She remains awaiting trial since December 2009 and has already suffered two attempts against her life. She continues to be abused, humiliated and threatened.

Justice Garzon in Spain is indicted for "prevaricaciòn" for assuming competence to investigate serious human rights violations committed during the civil war. The CIJL provided press comments on the case at the time of the decision to proceed with the indictment. It also briefed the UN Special Rapporteur on the Independence of Judges and Lawyers, the Special Rapporteur on Arbitrary and Summary Execution, the Special Rapporteur on Torture and the Chair of the Working Group on Enforced Disappearances on the case and discussed possible interventions to be taken by the above UN mechanisms.

On, 23 June 2010, Muhannad Al-Hasani was sentenced to three years imprisonment by the criminal court of Damascus for "weakening national sentiments and encouraging racist and sectarian feelings", and "transferring false and exaggerated news that weaken national sentiments" under the Penal Code. The reported ground for his arrest was that he had allegedly reported on and published the trial observations that he carried out before the State Security Court.

The trial of Al-Hasani was a summary trial which failed to meet international standards of due process namely presenting a defence and having access to a lawyer. In addition, the Damascus Section of the Syrian Bar Association decided on 19 November 2009 to prohibit him from practicing law for the rest of his life. Among the grounds upon which the

disbarment was ordered was that Al-Hasani is the President of an unauthorised organisation (the Syrian Organization for Human Rights).

2. International basic norms

In fact global counter-terrorism measures have often stretched to the limit and broken the most basic principle of the rule of law and international human rights in violation of international provisions, as those mentioned in Article 9(4) of the International Covenant on Civil and Political Rights, which states:

"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

And of the same Covenant, Article 14(1), which states:

"*… everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."*

Policy makers maintain that human rights principles are unrealistic in the face of today's perceived threats. Moreover, some countries have exploited the sense of fear and insecurity to reject the usual scrutiny by the legislature and the court. During crisis periods judicial review of actions taken by the executive is weakened by measures oriented to undermine the independence of the judiciary.

But at the same time, in the last few years, there has been a growing number of complaints on legislations adopted to fight terrorism as well as on legislation on national security. This shows at least that the public believes that it should be up to courts and tribunals to determine the legality or lawfulness of any detention, as well as the conformity of national security laws with international human rights norms.

Pre-emptive detention for public security reason may be in exceptional circumstances, and be proportionate with the right to liberty, provided that the detention has clear and accessible basis in the law, the reason for detention has been given, and detention is subject to judicial review.

3. Internal dialogue: the Canadian experience

In Canada there have been many cases in which the Supreme Court of Canada had to review legislation and executive action with respect to counter-terrorism and security law provisions. One of the most important cases concerning such judicial review is the Supreme Court's decision in *Charkaoui v. Canada (Citizenship and Immigration)*, in which the Court reviewed the validity of security certificates. In 2007 the Supreme Court came to the conclusion that, while the protection of secrets was an important objective, the absence of adversarial challenge to the secret information used by government to justify detention and deportation of non-citizen was an unjustified violation of the right to life, liberty and security of the person, as provided by the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada ruled that the detention of foreign nationals without warrant does not infringe the guarantee against arbitrary detention. However, the lack of review of the detention of foreign nationals until 120 days after the reasonableness of the certificate does infringe the guarantee against arbitrary detention. This violation could not be justified given that permanent residents were not subject to such treatment.

The Supreme Court of Canada ruled that the judicial confirmation process of security certificates was declared incompatible with the Canadian Charter. The court ruled that the secrecy required by the process makes it unfair because it denies the named person to know what he is charged of, and therefore to challenge the government's case. Moreover, undermines the judges' ability to make a decision based on all relevant facts and laws. Although the Court ruled that it did not constitute a breach to the independence of the judiciary *per se*, the Court mentioned however that the judges do not possess the full and independent powers to gather evidence that exist in an inquisitorial process.

The Supreme Court mentioned the use of a Special Counsel to objectively review the matter to protect the interest of the person nominated, namely, as they said, as it is currently done in the United Kingdom.

The Supreme Court of Canada stressed that a permanent resident detained is entitled to an automatic review of his detention within 48 hours. Therefore, the long time elapsed before the review of the detention of a non-citizen was not justified. As a remedy, the Supreme Court stated that the approval process for certificates and detentions review was inoperative. Consistent with the theory of the dialogue between courts and legislative branch, the Court allowed the Parliament to choose a specific means to increase the adversarial challenge to security certificates. As such, it suspended the effective date of its statement for a period of one year to give Parliament time to amend the act.

Also, as a remedy, the Supreme Court invalidated the conflicting provisions of the act, and amended the provisions in question so that foreigners as well as permanent residents have the right to have a review of detention during the first 48 hours, and subsequently at intervals of 6 months.

A year after the decision of the Supreme Court of Canada, in February 2008, the entry into force of a bill transformed the system of security certificates: it provided for the appointment of Special Counsels and established a limited right of appeal. It ensures equal treatment of permanent residents and foreign nationals in decision related to detention, and requires periodic inspections and interventions. Regarding the role of Special Counsels in the proceedings related to security certificates, it is to defend the interests of the person named in the certificate when information or other evidences are not disclosed to him. In addition, the judge now controls the detention of a person detained under a security certificate within 48 hours after the start of the detention.

On the substantive merits, the legislative's response to the Supreme Court has been criticised for selecting the least robust form of adversarial challenge outlined by the Court, namely the fact that the special advocates will not be able to counsel the detainee or other persons after they have seen the secret evidence, demand authorisation from the government or call their own witnesses without prior judicial approval. This dialogue between the judiciary and the legislative branch provides only partial responses to many questions raised by security certificates and secrecy, such as long detention and the risk of deportation where torture is likely to occur. Although this dialogue provides some improvements, I think it could be said that much works remains to be done.

For the purpose of our discussion I will mention another judgment of the Supreme Court of Canada, who has shown another way to promote the dialogue between the courts and the legislator in Canada, and I will now refer to the case of Omar Khadr. In that decision, the Supreme Court of Canada concluded that the rights of Omar Khadr, a young detainee in Guantanamo Bay, since he was 15 years old, were infringed when Canada actively participated in a process contrary to international human rights.

The Supreme Court established that the interrogation of Khadr as a youth without access to counsel, the elicited statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation - and knowing that the fruit of the interrogation would be shared with US prosecutors - offends the most basic Canadian standards about the treatment of detained youth suspects.

As for remedy, the Supreme Court of Canada was of the view that the appropriate remedy in this case was to declare that Omar Khadr's Charter rights were violated, leaving it to the government to decide how best to respond, in the light of current information, on its responsibility over foreign affairs. It appears clearly that the Court did not want to order the government the repatriation of Khadr as a remedy, as Khadr requested in the court. It seems that the impact of the declaration of incompatibility has been to reinforce the dialogue and the relation between the court and the executive, while at the same time maintaining a balance between their respective roles. The government of Canada, in response to the decision of the Supreme Court, delivered a diplomatic note to the government of the United States. The statement suggests that the Government sees this diplomatic request as fulfilling its legal duty according to the Supreme Court's ruling.

4. Transnational dialogue: the internationalisation of law

These examples tell us about the respective roles and capacities of courts and legislator in reviewing anti-terrorism laws.

The independent courts have obligations to review anti-terrorism laws, to ensure that they comply with rights. However, the extent of the judicial role, as we can see, will depend on how well parliament discharges its own role. Both courts and legislator have a vital and complementary role to play in reviewing anti-terrorism laws. A poor performance by the parliament will likely intensify or make more difficult the role of the courts when they review these anti-terrorism laws.

To this end, it is important that the judicial power should not be displaced; measures should be put in place to reinforce the principle of the separation of powers, and to guarantee institutional and individual independence of the judiciary. Similarly, judges must be equipped to deal with such sensitive issues as countering terrorism by having a sound basis, not only in domestic law, but also in human rights law and international humanitarian law.

To achieve that new transnational dialogue and the internationalisation of law, an important role has to be played by organisations such as CIJL in supporting States, judges and lawyers.

The ICJ has long been one of the most active organisations, having organised many conferences, worked on and cooperated, especially, with the United Nations to the establishment of international standards in the area of judicial independence. For example, in 1978, even before the adoption of the various declarations concerning judicial independence, ICJ established the Centre for the Independence of Judges and Lawyers.

Subsequently, ICJ and CIJL have supported and participated in the development and the adoption of a series of texts used to specify the principles by defining more explicitly the right to an independent and impartial tribunal, and the meaning to give to equality of all before the law. In re-establishing the CIJL, the ICJ wanted to respond to the need to enforce international standards internationally through the different legal systems of the States, but at the same time transcending this difference by promoting universal respect.

The ICJ recently continued the work, as it was mentioned, by adopting the Declaration of Berlin, in 2004, and Geneva, in 2008, which reflect and embody the importance of the evolving and dynamic concept of the rule of law and the independence of the judiciary and the legal profession.

These statements indicate, perhaps, a second generation of principles, by taking into account a new globalised context, a new paradigm, transcended by foreign elements which represent a new kind of obstacle to respect of human rights.

However, it seems that the conditions in which these statements were likely to be listed for permanent context in which the judiciary and the justice system most operate now. In that sense, the importance of re-installing a central dimension to CIJL takes, I would suggest, even a more important role.

We are now facing a permanent globalised context where judicial legitimacy is evolving, as reflected in academic and doctrinal and judicial discussions, from a constitutional dialogue among the three branches of government, what is called in the doctrine "internal dialogue", meaning between the executive, the legislative and the judiciary, as well as now entrenched judicial transnational dialogue involving judges and other actors belonging to non-governmental organisations or different states, and in the doctrine it has developed under the concept of "external dialogue".

The internationalisation of norms becomes now a new paradigm; the eminent French professor Mireille Delmas-Marty, member of the College de France, has proposed a definition of this new phenomenon, and I will translate:

"The definition of internationalisation of law does not imply an organised judicial category as the domestic or the international law, but a process of opening of the justice system which attenuates the frontiers between the internal and the external. In this sense, it could be seen as a disruptive phenomenon, whereas the traditional vision of justice system close on itself."

It means also that the national court is an anchor between the national and the international community. The judge must realise that he is a legitimate agents of international laws and he can open the dialogue with his colleagues of other States dealing with the same questions. Professor René Provost addressed this dimension in this way:
"It calls upon judges to reconceptualize themselves as one of the elements of the State in international law, capable not only of entering into autonomous exchanges with other foreign or international institutions, but also as one of the points that tie the State to the international community."

That theory of trans-judicial dialogue and internationalisation of law implies that other evolutionary sources of law could be considered as being part of international law. The use of these sources, such as general comments, concluding observations, commentaries on declarations - capable to translate the evolutionary nature of provisions crystallised into international treaties or declarations, leave the judges better equipped to more convincing judgments for the respect of human rights norms.

We then understand that important institutions, such as ICJ and CIJL, help national judges driven by globalisation and the erosion of borders to appropriate the principles set out in the Berlin and Geneva Declarations, and to endorse them in their reasoning. These two Declarations and their commentaries are an illustration that the texts related to the guarantees of judicial independence are living instruments: they must be adjusted according to changes in society.

Beyond the arguments in the texts, these sources contribute to the development of law, without which both international and national law would be doomed to inertia. It is to this dynamic movements that Mireille Delmas-Marty calls, and I quote, *"a movement that transforms one in another, one by the other, creating a sort of tension between the relative and the universal"*.

Assessing the respective roles of courts and parliaments with respect to the review of anti-terrorism laws is quite a challenge. Although the courts and legislators have not always discharged their different duties with distinction since 9/11, both roles remain critical to the development of effective anti-terrorism laws in the respect of rule of law and human rights.

And finally, as it was said by Louise Arbour, former High Commissioner of Human Rights,

"Judicial power should not transfer to the hands of the executive its long-term analysis of problems for extraordinary reasons based on information that cannot be disclosed to obtain results that cannot be measured".

Je vous remercie.