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IACL WORKING GROUP ON CONSTITUTIONAL RESPONSES TO TERRORISM SECRECY, NATIONAL SECURITY, AND THE VINDICATION OF CONSTITUTIONAL LAW BOCCONI UNIVERSITY | MILAN, ITALY | DECEMBER 2011

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Summary of Proceedings

The IACL Working Group on Constitutional Responses to Terrorism held its 2011 Workshop in Università Bocconi in Milan, Italy on 1-2 December of last year. The Workshop addressed the topic of 'Secrecy, National Security, and the Vindication of Constitutional Law' and featured over twenty papers as well as opening and closing addresses from members of the judiciary. The Workshop began with welcoming addresses from Martin Scheinin (European University Institute, President of the International Association of Constitutional Law) and Arianna Vidaschi (Università Bocconi). The floor was then given over to David Cole (Georgetown University) who introduced the opening keynote speaker, Sir Stephen Sedley (Lord Justice of England & Wales, retired).

Opening Session – Sir Stephen Sedley (Lord Justice of England and

Wales)

Lord Justice Sedley took as his subject the development of counter-terrorism legislation in the United Kingdom in the aftermath of the September 11 2001 attacks. He noted that UN Security Council resolution 1373 has been described as a 'tyrant's dream' as it permitted repressive regimes to oppress internal dissent in the name of combating terrorism. However, Lord Justice Sedley noted the success of judiciaries in the EU and UK in pushing back against the more repressive measures in those jurisdictions, stating that there are 'no black holes' in UK law. On the topic of secret evidence Lord Justice Sedley noted the great importance of subjecting all evidence to cross-examination – for one never knows what may be revealed by a thorough interrogation by opposing counsel. Lord Justice Sedley concluded by warning against the UK government's attempt to 'institutionalise secret evidence' in its recently-published *Security and Justice* green paper, noting that the proposals carry 'sinister baggage'. The discussion that followed the address focused on the systems for secret evidence in both the UK and certain Commonwealth systems such as Australia.

Panel I: 'Secrecy and Courts'

The first panel of speakers was chaired by David Cole and took as their subject *Secrecy and Courts*. The three papers which opened the conference thus established some themes and debates that were returned to over the course of the two days.

Sudha Setty (Western New England College) assessed the development of state secrets privilege in the United States in order to analyse the transnational repercussions that these could have in other common law jurisdictions such as the UK, Israel and India. Using the example of the Binyam Mohammed case, Setty demonstrated the potential scope of influence of the US administration that threatened to discontinue intelligence sharing with the UK. The case was highly politicised with many inside and outside the UK pushing for non-disclosure of the evidence of Mohammed's torture prior to the Court of Appeal's ruling. Despite the

new policy undertaken by the Obama administration on the possible reliance on the state secrecy privilege Setty stated that Congress still needs to step in in order to provide a external check on executive action.

Mindia Vashakmadze (Univeristy of Gottingen) examined the approach of the German Federal Constitutional Court in matters of secrecy and openness as a response to the terrorism threat. Unlike in other legal systems, the German Constitutional Court, in its jurisprudence, even after September 11 2001, has increased the level of transparency and upheld human rights over claims for secrecy by upholding the separation of powers. Allowing parliament to retain an adequate level of oversight over the executive ensured democratic accountability. In the same constitutionalist vein, the Court has also defended the protection of informational self-determination and the right to privacy against government intrusion as these are considered, Vashakmadze points out, fundamental rights by the Court.

Stephen Schulhofer's (New York University) presentation noted that there are four elements or kinds of secrecy – with differences between partial and complete secrecy (ie who sees the secret evidence) and macro and micro secrecy. This has the effect of leading to an overwhelming number of documents being classified on a daily basis. Schulhlofer questions which institutions should be making the decisions when balancing the interests of transparency against security. Despite the preeminence of the executive in this area, it is the courts that have primacy to decide. He argued that the discussion over the most competent authority to decide on secrecy needs to take into account the requirement of objectivity when deciding on what should and what should not remain classified. Schulhofer calls for a stronger role for the judiciary due to its independence and expertise. This coupled with a more robust role for Congress would increase oversight of executive action while ensuring more transparency and accountability.

Panel II: 'Secrecy and Legislature'

The second panel was chaired by Arianna Vidaschi (Università Bocconi, Milan) and switched focus from the courts to the legislature. One of the original speakers, Murray Hunt, of the UK Parliament's Joint Committee of Human Rights, was unable to attend and so his place was taken by Adam Tomkins of the University of Glasgow.

Kathleen Clark (Washington University in St Louis) displayed a letter from Senator Rockefeller to the (then) Vice President Dick Cheney expressing concerns about the lack of oversight of counter-terrorism and the manner in which the system of classified briefings was being used to limit the effectiveness of the Senate Select Committee on Intelligence. The system appeared to prevent scrutiny by giving the appearance of Congressional oversight, for instance through limiting the notification procedure to a few members of Congress, thus inoculating the executive from criticism. Clark's presentation highlighted the potential for a gap between apparent accountability and actual accountability in national security law and the difficult position that the legislature can be left in when the executive seeks to act in this field. In her paper, co-authored with Nino Lomjaria, Clark discusses legislative access to intelligence information in depth in both the US and the Canadian systems.

Adam Tomkins (University of Glasgow) offered his paper from both academic and practical perspectives as he acts as a legal advisor to the House of Lords' Constitutional Affairs Committee. He examined the UK Parliament's role in oversight of intelligence in two ways. First, he gave a critical overview of the rather limited role Parliament plays in oversight of the intelligence and security services. In this field the UK lags far behind the US in relation to democratic scrutiny of intelligence activities. Second, and in contrast, Tomkins demonstrated the increasing role that Parliament, and the House of Lords in particular, is playing in ensuring

that the executive does not force excessive legislation through Parliament. Over the course of the ten years since September 11 Parliament has been more and more stringent in its scrutiny of government counter-terrorism legislation. Tomkins' paper sparked some debate over whether or not the UK Parliament had evolved its approach or whether its recent resistance was more reflective of the waning strength of the Labour governments.

Graziella Romeo (Università Bocconi, Milan) examined the relationship between immigration law, secrecy, and issues of justiciability. The bond of citizenship leads to a duty of transparency on the part of the public authorities. However, this duty is often not performed in respect of those who are not members of the political community - especially in matters of counter-terrorism. By looking at relevant legislation in Italy, Spain and France, Romeo suggested that there is a link between the status of foreign national and the use of state secrecy. The use of generic expressions, a "secrecy code" that leaves broad discretion to the authorities in cases of detention or deportation, alongside the *de facto* non-compliance with the ECHR (which requires judicial review before the expulsion of a lawfully resident foreign national in fast-track procedures) exemplifies the harmful effects of the interaction between immigration law and counter-terrorism policy. Romeo ended her talk by noting that there is evidence of a more cosmopolitan attitude in relation to counter-terrorism but a more nationalistic one when it comes to protecting human rights.

Panel III: 'Secrecy and Detention Part I'

The third panel was chaired by Judge Lech Garlicki of the European Court of Human Rights. It was the first of two sessions on secrecy and detention and brought the discussion around to Guantanamo Bay, preventive detention, and the role of secret evidence in *habeas corpus* proceedings.

Daphna Barak-Erez (Tel-Aviv University) offered the first paper of the panel, written with Matthew C. Waxman (Columbia University), and

addressed the key question directly: how can a state have a system of detention that is fair without disclosing secret evidence? Barak-Erez referred to the disclosure of a 'gist' - a summary of the evidence - that is already a core minimum in several jurisdictions. She then discussed two contrasting approaches. These are the judicial management model (used in Israel), in which intelligence information is disclosed in secret proceedings under the control of the judiciary; and the special advocate model (used in Canada & the UK), in which there is full disclosure to someone acting on behalf of the target of the proceedings. Ultimately, Barak-Erez concluded that the effectiveness of the model depends on the system in which it operates. This perhaps suggests that there is no universal model that would suit all legal systems, even if there is some convergence between models and some common characteristics. According to Barak-Erez this is because the very idea of 'fundamental fairness' or 'due process' has different meanings in different common law countries.

Shiri Krebs' (Stanford University) presentation took a novel form - as she was unable to attend the Workshop in person Krebs presented her paper by a video recording sent from Stanford. The presentation reported on an ambitious empirical research project examining 322 cases before the Israeli Supreme Court over the past decade. Krebs interviewed those involved in the administration of justice as well as those subject to the system. Her presentation concluded with some interesting revelations on the outcomes of cases - in the decade under examination no single detainee was released. This might be considered to raise some questions on the efficacy of the Israeli model of judicial management for achieving justice for detainees.

Kent Roach (University of Toronto) began by reminding the Workshop that many of the legal and institutional frameworks governing secrecy and national security have been carried over from the Cold War. He spoke of a need for security services to change from a Cold War mentality to one

more suited to the post September 11 world where there is a growing need to prosecute and consequently, a need for greater disclosure of evidence. This would require security services to gather intelligence in accordance to evidentiary standards and to leave behind the fear of the mosaic effect, whilst moving towards more information sharing. It would also be salient if secrecy claims based on the third party rule were more often disputed and if requests for anonymity were reduced. The first steps against the over reliance on secrecy have already been taken in the judicial system where a number of alternatives have been devised, such through the development of the special advocate system in Canada after the *Charkaoui* judgment.

Panel IV: 'Secrecy and Detention Part II'

The fourth panel, and the second on detention, was comprised of two joint presentations and a paper from Gitanjali Gutierrez that drew on her experience as part of the 'detainees bar' at Guantánamo Bay.

Gitanjali Gutierrez (Centre for Constitutional Rights) focused on security-cleared counsel in military commissions but specifically in civil *habeas corpus* proceedings at Guantánamo Bay. She noted that the mechanism available for access to confidential information is not sufficient to enable an adequate challenge to detention. There is still no access to full classified information and the process is more arduous in cases where the information has been classified as "TS/SCI" (Top Secret/Sensitive Compartmentalized Information). There are also practical problems: the information is restricted to a secure facility without any research facilities and the use of expert witnesses requires government consent and security clearance. Despite this, striving for more access has resulted in challenges to the government's evidence, which alongside pressure from the international community and other interest groups, has led to a more effective advocacy.

Stephen Vladek (American University Washington) & David Cole (Georgetown University) offered a comparative examination of the role of cleared counsel and use of secret evidence in the legal systems of the US, the UK and Canada. Their presentation was prompted by the judgment of the Canadian Supreme Court in *Charkaoui v Canada* in which the Court engaged in comparative constitutionalism. The presentation explored the strengths and weaknesses of the systems in the three common law jurisdictions and offered some preliminary thoughts on how each system could move closer to a form of best practice in the use of secret evidence. However, Vladek and Cole also questioned the reliance on systems of exception and the claim of necessity of the use of secret evidence in counter-terrorism proceedings.

Andrew Lynch, Tamara Tulich & Rebecca Welsh (University of New South Wales) of Sydney examined the migration of constitutional solutions from the UK to Australia - in particular in the case of control orders. Although control orders have been borrowed from UK law there remain significant differences between the two systems. Lynch explained that the debate on secrecy and counter-terrorism in Australia takes place against a constitutional backdrop that does not have a higher law such as the ECHR (as incorporated into UK law by the Human Rights Act). This has contributed to the limitation of the judiciary's role in controlling the executive, the police and security forces in counter-terrorism. Despite this, the 'gisting' requirement does form part of Australian law. Further development of safeguards in Australia may require constitutional values to be more clearly expressed by the polity as reliance on the judiciary is reaching its limits.

Panel V: 'Secrecy and Criminal Trials'

Panel V was one member short due to the unfortunate withdrawal of Clive Walker (University of Leeds). Kent Roach chaired what was a vibrant

discussion on the role of secrecy in criminal trials with the discussion varying from doctrinal analysis of law to a Foucauldian critique of detention practices, and their coverage by the media in the US.

Jason Mazzone's (Brooklyn Law School) presentation compared a number of legal systems of both adversarial and inquisitorial forms to consider the issues surrounding the use of anonymous testimony. He examined the significance of witnesses' testimony and whether the normalisation of anonymity deals better with defendant's rights. Mazzone compared the UK and New Zealand, where anonymity is available as a routine matter, to the US, where anonymity is reserved for terrorism and military tribunals. Whilst there are some strong justifications for anonymity to remain exceptional, Mazzone pointed out that by normalising the process a number of safeguards are developed that counteract the seemingly lack of transparency.

Ori Aronson's (Bar-Ilan University) paper and presentation took a critical turn and examined the use of preventive detention in Guantanamo through a Foucauldian lens. The presentation considered the liberal critique of military tribunals as a form of lawfare and in particular the criticism that such tribunals involve forms of secrecy that are contrary to the rule of law. Aronson considered the military courtroom as a Foucaultian heterotopia: an 'other place' that society establishes to distinguish between justice in an emergency and ordinary criminal justice. He argued that, perhaps counter-intuitively, the existence of these 'other' proceedings serves to increase visibility of the state's extraordinary measures and therefore acts to combat secrecy and extra-legality. The key question which the paper poses is what these 'other' places can tell us about ordinary courts and criminal proceedings.

Susana Sánchez Ferro (Universidad Autónoma de Madrid) offered an examination of the oversight of the use of classified evidence in Italy and Spain by the constitutional courts, specifically by looking at the judge's

access to classified information. Of the two, it is the Spanish court that has engaged in more thorough review, balancing national security claims made by the state against the need to ensure due process in criminal trials. The Italian court feels that it not sufficiently equipped and that it is not its role to assess whether a specific piece of information should remain secret. Sánchez Ferro argued that while there is clearly a role for parliaments in checking the executive, it is necessary for the courts to be vigilant as in parliamentary democracies the majority in parliament tends to be supportive of the government. Therefore it may fall to courts to protect unpopular defendants and assert the reasonableness of the government's decision.

Panel VI: 'Secrecy and Administrative Measures'

The final panel was chaired by the IACL-T Group coordinator, Federico Fabbrini (EUI Florence) and switched focus to administrative measures. The panel also switched geographical focus with most of the presentations examining either the European Union or its Member States.

Martin Scheinin (EUI Florence) presented a paper co-authored with Lisa Ginsborg, which focuses on the changes to the 1267 Al-Qaida sanctions regime and its implications for human rights, notably through the implementation of UN Security Council Resolution 1989 of 2011. This resolution improved the delisting process. The Ombudsperson can now recommend a delisting which takes effect unless the 1267/1989 Committee decides otherwise. If consensus in the 1267/1989 Committee is not forthcoming the matter can be referred to the Security Council itself which makes a final decision in accordance with its ordinary procedures. Despite the improvements, it was highlighted that process was still far from providing adequate and independent judicial review. The European Union General Court in *Kadi II* was of the same opinion, urging the disclosure of evidence to allow for the exercise of judicial review. Scheinin ended his presentation by noting that the UN could not disclose what it did not possess, but that the new delisting procedure coupled with a

political commitment from the EU States in the Security Council to push for the disclosure of information might be an important step in enhancing due process.

Cian Murphy (King's College London) highlighted the problematic of secrecy by using as an example the role of the special advocates in the UK. Special advocates constitute what Murphy termed legal 'grey holes' - a product of the erosion of the culture of legality. The use of special advocates in closed material proceedings seeks to counterbalance the lack of full disclosure of evidence to the suspect, however it remains controversial as a system due to the impossibility of providing the defendant with the accusations against him. The use of gisting in control order cases has been a small improvement to the communication between the special advocate and the controlee. The shortcomings of this system become even more worrisome when taking into account the standard-setting role that the UK play in counter-terrorism. The transfer of these 'grey holes' to the EU level might become a reality; this is exemplified by AG Sharpston's Opinion in *OMPI* which suggested the UK model might be used to deal with secret evidence at EU level.

Tuomas Ojanen (University of Helsinki) used the Finnish model to examine secrecy in administrative counter-terrorism procedures and how these impinge on the rights of individuals. First, when assessing the choice of administrative over criminal procedures, it becomes clear that the concept of evidence does not apply in administrative procedures, as there are no evidentiary standards. In addition, there is no fair balance between the parties (due to a lack of procedural equality), and judicial review is limited and often only feasible in the form of appeal. Second, the reliance on intelligence as the premise for the administrative measures raises questions of transparency and fairness, as information will very likely be withheld from the individual concerned, his counsel and even partially from the administrative court. The non-disclosure of information puts in question the veracity of the information as well as its legality. Ojanen

points out that a balancing exercise should be undertaken between the right to information and the need for secrecy, as not all categories of information need to remain secret.

Deirdre Curtin (University of Amsterdam) examined a trend for overclassification in the EU, a development that has been accompanied by a number of executive initiatives, or 'secrecy by stealth'. This culture of secrecy can be understood as a product of multiple classifications by different actors within the EU, the use of derivative classifications and the principle of originator control. The perils of EU secrecy are all the more blatant when taking into account Art. 4(2) TEU, which states that national security is a matter for Member States, as well as Art. 1 TEU, which requires that every decision should be taken as openly as possible. To emphasise the interest of the Council in preserving confidential information, a new and more comprehensive set of security rules was adopted in 2011, which will have a greater scope of application. Thus, the emergence of the EU as a security actor might be compared to US homeland security. One example of this is the US surveillance program Terrorist Finance Tracking Program and the introduction of a EU Terrorist Finance Tracking System. Curtin called for more mapping of secrecy and its regulation at legislative level, and that some light be shed regarding the role of private actors.

Closing Session: Judge Lech Garlicki (European Court of Human Rights)

The closing address of the Workshop was delivered by Judge Lech Garlicki, of the European Court of Human Rights, who had attended the proceedings over the previous day and a half. Judge Garlicki's presentation drew together the themes running through the debate and offered his own thoughts on the subject. He observed that the historical problem of secrecy of national security institutions has now become a global challenge. Nonetheless, such is the sophistication of constitutional law that the question of protecting individual rights is taken seriously.

Therefore we are in a better position today to vindicate constitutional law than we were during previous crises of national security. While it may be impossible to eliminate restrictions on rights the bottom line - in the case of secret evidence the provision of a 'gist' - is essential. Judge Garlicki noted the scope for institutional alliances between judicial and legislative branches to ensure that no black holes are considered acceptable in the legal order. However, he noted that at global level there was an imbalance in the separation of powers and a deficit of independent judicial review. Judge Garlicki examined the European Court of Human Rights' track record in this field and pointed out that decision such as *Belmarsh, Gillan & Quinton*, amongst others, demonstrated the Court's willingness to intervene to ensure that constitutional values are upheld.

Sofia Marques da Silva