

LAW AND JUSTICE: THE CASE FOR PARLIAMENTARY SCRUTINY

SEMINAR FOR MEMBERS OF
PARLIAMENTARY HUMAN RIGHTS
BODIES ORGANIZED JOINTLY BY
THE ASSOCIATION FOR THE
PREVENTION OF TORTURE, THE
INTER-PARLIAMENTARY UNION AND
THE INTERNATIONAL COMMISSION
OF JURISTS

GENEVA, IPU HEADQUARTERS, 25-27 SEPTEMBER 2006



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UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 5.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law...

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence...

FOREWORD

As part of its efforts to strengthen the capacity of parliaments to promote and protect human rights, since 2004 the Inter-Parliamentary Union has been organizing yearly seminars for members of parliamentary committees on human rights. While the first seminar addressed the functioning of human rights committees and their relationships with other national, regional and international human rights bodies, the second was dedicated to a fundamental right that is crucial for the exercise of the parliamentary mandate: freedom of expression. One of the issues raised during that seminar was the relationship between the judiciary and parliament, more specifically the extent to which the separation of powers and the independence of the judiciary allowed parliamentarians to criticize or comment on the conduct of judges or judgments. The debates clearly showed that the relationship between parliament and the judiciary and the role parliaments play in ensuring due administration of justice were critical issues which needed further discussion.

That theme was therefore chosen for the 2006 seminar. The administration of justice is a very broad area, covering the entire judicial process from arrest and detention to trial and serving of sentence. At each of these different stages, parliamentary action is crucial to ensuring respect for human rights, most importantly through legislation guaranteeing an independent judiciary.

In organizing this seminar, IPU collaborated with two expert organizations, the Association for the Prevention of Torture (APT) and the International Commission of Jurists (ICJ). IPU wishes to thank both for their cooperation, which was crucial to the success of the seminar.

IPU also wishes to thank the experts and resource persons for their contributions. Their interventions not only provided information about international and regional human rights standards in the field of administration of justice, but also raised current challenges facing a number of fundamental rights, and thus gave rise to a lively discussion.

The seminar would not have been possible without the generous support of the Swedish International Development Agency (SIDA), which provided funding under the SIDA-IPU Agreement on Core Support during the period 1994-2008. On behalf of APT, ICJ and IPU, I would like to thank SIDA for its support in that event.

The brochure contains a summary record of the contributions of the resource persons and extracts of the debates as well as the summary and recommendations presented by the Rapporteur of the Seminar. It reflects the variety of issues debated and questions raised. We hope that participants will draw inspiration from that event for their future parliamentary work.



Anders B. Johnsson
Secretary General

TABLE OF CONTENTS

7

FOREWORD	5
PROGRAMME OF THE SEMINAR	9
INAUGURAL SESSION	13
SUMMARY AND RECOMMENDATIONS PRESENTED BY THE RAPPORTEUR OF THE SEMINAR	17
EXPERTS' CONTRIBUTIONS AND EXTRACTS OF THE DEBATE	21
KEYNOTE PRESENTATION: LAW AND JUSTICE: THE CASE FOR PARLIAMENTARY SCRUTINY	23
DEPRIVATION OF LIBERTY: LAW AND PRACTICE	27
Arrest and detention	28
The prohibition of (and challenges to) torture and other ill-treatment under international law	35
The responsibility of parliaments and their members to prevent torture and ensure human conditions of detention: legislative and oversight measures	40
ENSURING THE FAIR COURSE OF JUSTICE	47
The right to a fair trial: legal overview	48
The presumption of innocence, equality of arms and the right to be tried without undue delay: What parliaments can do to guarantee these essential ingredients of the right to a fair trial	51
How to ensure an independent and impartial judiciary, a pillar of democracy	56
SECURITY AND JUSTICE	63
The use of military tribunals	64
Administrative detention on security grounds	66
INTERACTIVE SESSION WITH THE PRESIDENT OF THE UNITED NATIONS HUMAN RIGHTS COUNCIL, H. E. MR. LUIS ALFONSO DE ALBA, ON THE WORK OF THE NEWLY ESTABLISHED COUNCIL	73
THE FIGHT AGAINST IMPUNITY: THE INTERNATIONAL CRIMINAL COURT AND TRANSNATIONAL JUSTICE	79
EXECUTION OF SENTENCE	85
The purpose and forms of punishment	86
The privatization of prisons and its impact on the human rights of detainees	90
VULNERABLE GROUPS	101
The detention of asylum seekers, immigrants and mentally disabled persons	102
Juvenile Justice	107
LIST OF PARTICIPANTS	115

PROGRAMME OF THE SEMINAR

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PROGRAMME OF THE SEMINAR

MONDAY, 25 SEPTEMBER

8 a.m. – 9.30 a.m.	Registration of participants and distribution of documents
9.30 a.m. – 10.15 a.m.	Inaugural session: <ul style="list-style-type: none">– Welcome address by Mr. Anders B. Johnsson, Secretary General of the Inter-Parliamentary Union– Address by Mrs. Louise Arbour, United Nations High Commissioner for Human Rights– Opening statements by Ms. Martine Brunschwig Graf, President of the Association for the Prevention of Torture and member of the Swiss Parliament, and Mr. Nicholas Howen, Secretary General of the International Commission of Jurists– Election of the President and Rapporteur of the seminar
10.15 a.m. – 11 a.m.	Keynote presentation: Law and justice: the case for parliamentary scrutiny <ul style="list-style-type: none">– <i>Mr. Khemais Chamhari, former Member of the Parliament of Tunisia, human rights expert, laureate of the 1997 International Human Rights Prize of the City of Nuremberg</i>
11 a.m. – 1 p.m.	Deprivation of liberty: Law and practice <ul style="list-style-type: none">– Arrest and detention<ul style="list-style-type: none"><i>Ms. Susan McCrory, Research Director of the International Council on Human Rights Policy</i>– The prohibition of (and challenges to) torture and other ill-treatment under international law<ul style="list-style-type: none"><i>Mr. Manfred Nowak, United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment</i>
2.30 p.m. – 4 p.m.	
4 p.m. – 4.15 p.m.	Coffee break
4.15 p.m. – 6 p.m.	<ul style="list-style-type: none">– The responsibility of parliaments and their members to prevent torture and ensure human conditions of detention: legislative and oversight measures<ul style="list-style-type: none"><i>Ms. Loretta Rosales, member of the House of Representatives of the Philippines, and Ms. Ana Maria Mendoza de Acha, member of the Senate of Paraguay</i>
6 p.m.	Reception (IPU Headquarters)

TUESDAY, 26 SEPTEMBER

9.30 a.m. – 11.15 a.m.	Ensuring the fair course of justice <ul style="list-style-type: none">– The right to a fair trial: Legal overview<ul style="list-style-type: none"><i>Mr. Nicholas Howen, Secretary General of the International Commission of Justice</i>– The presumption of innocence, equality of arms and the right to be tried without undue delay: what parliaments can do to guarantee these essential ingredients of the right to a fair trial<ul style="list-style-type: none"><i>Mr. Leandro Despouy, United Nations Special Rapporteur on the Independence of Judges and Lawyers</i>
11.15 a.m. – 11.30 a.m.	Coffee break

11.30 a.m. — 1 p.m.	<ul style="list-style-type: none"> — How to ensure an independent and impartial judiciary, a pillar of democracy <i>Mr. Leandro Despouy and Ms. Eva Joly, former Judge and currently Special Advisor at the Norwegian Agency for Development Cooperation</i>
2.30 p.m. — 4 p.m.	<p>Security and Justice</p> <ul style="list-style-type: none"> — The use of military tribunals <i>Mr. Federico Andreu—Guzman, Deputy Secretary General, International Commission of Jurists</i> — Administrative detention on security grounds <i>Ms. Leila Zerrougui, Chairperson of the United Nations Working Group on Arbitrary Detention</i>
4 p.m. — 5 p.m.	<p>Interactive session with the President of the United Nations Human Rights Council, H.E. Mr. Luis Alfonso de Alba, on the work of the newly established Council</p>
5 p.m. — 6.30 p.m.	<p>The fight against impunity: the International Criminal Court and transnational justice</p> <p><i>Mr. Roberto Garretón, human rights defense attorney (Chile) and former United Nations Special Rapporteur on the situation of human rights in the Democratic Republic of Congo</i></p>

WEDNESDAY, 27 SEPTEMBER

9.30 a.m. — 11 a.m.	<p>Execution of sentence</p> <ul style="list-style-type: none"> — The purpose and forms of punishment <i>Justice Sanji Monageng, Commissioner, African Commission on Human and Peoples' Rights</i> — The privatization of prisons and its impact on the human rights of detainees <i>Mr. Ira Robbins, Professor of Law, American University, Washington, USA</i>
11 a.m. — 11.15 a.m.	Coffee break
11.15 a.m. — 1 p.m.	<p>Vulnerable groups</p> <ul style="list-style-type: none"> — The detention of asylum seekers, immigrants and mentally disabled persons <i>Ms. Leila Zerrougui, Chairperson of the United Nations Working Group on Arbitrary Detention</i> — Juvenile justice <i>Mr. Vtit Muntarbhorn, Professor of Law, Chulalongkorn University, Bangkok Thailand, United Nations Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, former United Nations Special Rapporteur on the sale of children, child prostitution and child pornography</i>
2.30 p.m. — 3.45 p.m.	Coffee break
3.45 p.m. — 4 p.m.	
4 p.m. — 6 p.m.	<ul style="list-style-type: none"> — Evaluation by participants <p>Conclusion</p>

INAUGURAL SESSION

Mr. A. B. JOHNSSON (Secretary General of the Inter-Parliamentary Union): Thirty years ago, the IPU established a Committee on the Human Rights of Parliamentarians, which investigates violations of the human rights of parliamentarians, of which the most frequently occurring is the violation of the right to freedom of speech. Freedom of speech is fundamental to exercising the parliamentary mandate. In cases where the human rights of parliamentarians are violated, there are invariably also problems relating to the functioning of the justice system. The cases that the Committee deals with often involve fictitious charges against a member of the parliamentary opposition, and are testament to the malfunctioning of the justice system. When asked to address the situation of the independence of the judiciary, parliaments often reply that such action is not within their purview. The Committee disagrees with this stance, and considers that parliaments have a fundamental role to play in the functioning of the justice system, and that if justice systems are ineffective, parliaments have a responsibility to raise questions before the government, and ensure that the judiciary has sufficient resources to carry out its functions appropriately. Some cases attract media attention and become the subject of public discussion. In such cases, parliamentarians should refrain from making public comments on the proceedings under discussion, since that could affect the impartiality of those judging the case. At the same time, a single case can prompt questions about the functioning of the justice system. In such cases, parliamentarians have an obligation to comment on the subject. How are parliamentarians to distinguish between cases in which they should and should not take action in respect of legal proceedings? I am sure that this is one of the questions that will be addressed during the seminar.

Ms. L. ARBOUR (United Nations High Commissioner for Human Rights): Enjoyment of the participatory rights to vote and elect, participate in the conduct of public affairs and have access to public service and justice is a fundamental aspect of the democratic process. A parliament's legitimacy derives from the diversity of its constituencies, and the variety of interests that it represents; the fairness, transparency and accountability of its legislative action; and the efficacy of the checks and balances a legislature can provide in overseeing other branches of government. It is also crucially linked to cooperation with other institutions to ensure fair treatment and proper access to justice for all. When abuses occur, parliaments should be empowered to provide corrective measures, and a legal framework granting recourse, reparation and remedy for victims. Thus, the free expression and independence of members of parliament are indispensable preconditions for any effective and just form of government. It follows that their privilege to seek, receive and impart information without fear of reprisal must be jealously protected, since parliamentarians directly hold in trust the right of a society to demand accountability from those who govern it. Parliamentary authority and credibility, however, continue to be undermined by both internal and external factors. Parliamentarians must be willing to hold their ground by fulfilling their institutional responsibility and performing the checks and balances that their mandates require.

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rests on the responsible exercise of power by an
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vested in them.*

Ms. L. ARBOUR (United Nations High Commissioner for Human Rights)

In many countries, parliaments are still relegated to the marginal role of rubber stamping the will of an autocratic executive, which almost invariably tramples on human rights and fundamental freedoms, ostensibly in the name of preserving stability. In mature democracies, parliaments have shown that they are not immune

to the risk of embracing an illusory trade-off between security and human rights. The response to threats, such as terrorism, has, at times, witnessed an unquestioning bowing of the legislative branch to executive fiat that were often enveloped in calculated obscurity to minimize public scrutiny. This kind of abdication of parliamentary responsibility in the face of threats to public security may result in an unsustainable and indefensible loss of equilibrium between security concerns and the protection of other rights. The increasing challenge to the absolute prohibition of torture, which has emerged in the context of counter-terrorism activities, is cause for particular concern. International law requires active measures to ensure the prohibition of torture, and States have a positive obligation not only to not engage in torture themselves, but also to protect individuals from exposure to torture.

Parliaments must exercise maximum vigilance, particularly in times of crisis, by preventing, as well as demanding accountability for potential abuses of power. They should help to shape responses to a threat that are proportional, indiscriminate, anchored in law, and transparent. Checks and balances provide the self-correcting mechanism that democracies alone employ to prevent and redress deviations from legality, fairness and justice. Effective democratic governance therefore rests on the responsible exercise of power by an executive that respects the prerogatives of other branches of governance, as well as a parliament and an independent judiciary that are vigilant and assertive in protecting the constitutional powers vested in them. Such complex and interactive oversight can be enhanced by tapping into the resources of different agencies to ensure regularity in processes and outcomes.

In order to maintain the vitality of the cardinal principle of the separation of powers, parliament should not only take pride in prerogatives and rights, but should also make them a living reality for all constituents. Human rights are shaped in practice at the national level, and can only be enjoyed through a robust domestic protection system that places individuals as rights holders at its centre, and prescribes the obligations of duty bearers.

Ms. L. ARBOUR (United Nations High Commissioner for Human Rights)

In order to maintain the vitality of the cardinal principle of the separation of powers, parliament should not only take pride in prerogatives and rights, but should also make them a living reality for all constituents. Human rights are shaped in practice at the national level, and can only be enjoyed through a robust domestic protection system that places individuals as rights holders at its centre, and prescribes the obligations of duty bearers. In that regard, the ratification of international human rights treaties, the withdrawal of reservations to those treaties, and the reform of domestic legal frameworks to ensure compliance with international obligations are essential. Such measures will, however, remain pure manifestations of intent in the absence of either the capacity or genuine commitment to implement them. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has sought to increase parliamentary ability to enhance domestic protection systems, and has worked to broaden the knowledge-base of individual legislators, in order to allow them to fulfil their human rights responsibilities.

In 2005, in cooperation with the IPU, my Office drafted a handbook for parliamentarians, which serves as a training tool on human rights principles, standards and institutions, for legislators to use as a practical guide in their daily activities. The handbook has been widely distributed and successfully used. In August

2006 a training workshop for parliamentarians was held in Geneva, in cooperation with the IPU and the United Nations Assistance Mission for Iraq (UNAMI). A total of 13 members of the Iraqi Council of Representatives attended the workshop, including 12 members of the newly established Iraqi national Human Rights Committee.

The OHCHR has identified the following essential elements of democracy: respect for human rights and fundamental freedoms; access to power and its exercise in accordance with the rule of law; holding of free and fair elections; a pluralistic system of political parties and organizations; the separation of power; the independence of the judiciary; transparency and accountability in public administration; and press freedom. These are all vital for the achievement of the “larger freedom” of the Charter of the United Nations, and envisaged by the United Nations Secretary-General. Such freedom should be based on human rights, security and development. The three branches of governance share the responsibility to establish and maintain an environment in which human rights are protected and fostered, and in that regard, the commitment of parliamentarians is essential. Exchanges of ideas and experiences at events like this seminar will enable participants to compare notes and draw on best practices that can be adapted to national contexts for the daily work of parliamentarians.

Ms. M. BRUNSCHWIG GRAF (President of the Association for the Prevention of Torture, and member of the Parliament of Switzerland): I commend the choice of subject for discussion at this seminar. Although the role of parliaments in monitoring the administration of justice is often talked about in parliaments, in national and international media, and in the United Nations Human Rights Council, on a national level, State governing bodies do not always demonstrate recognition of their responsibilities. Although in democratic countries there may not be obvious large-scale violations of justice, violations of human rights occur in many forms. Parliaments have a special role to play, since they are responsible for making laws and establishing security for citizens. In some cases, compromises are made that restrict the enjoyment of human rights, such as the imbalances that have occurred between freedom and security. Neither of these rights should be transgressed, and they must be strictly protected in legislation. Although parliaments should be the guardians of legislation, parliamentarians do not always take full account of this. The decisions that they make in respect to legislation are fundamentally important.

Parliamentarians have other obligations, such as promoting the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Parliaments must ensure that States have a national institution for the prevention of torture, and a national institution to monitor respect for human rights. They can also play a role in the prevention of torture by monitoring the judiciary. Parliamentarians can conduct prison visits to ensure that detention conditions are appropriate. Parliaments have a role to play in monitoring the application of the prerogative of mercy, and ensuring the right to petition, under which all citizens could contact the parliament to express their views on decisions of the executive or on the administration of justice. In this way, parliaments can discharge their duty as the mouthpiece for all members of society. Maximum efforts should be made to ensure that governmental preferences are not shown in the appointment and dismissal of judges. Many countries do not have an appropriate range of power, and parliaments do not operate as they should. Action to promote parliamentary activity is synonymous with action to promote the interests of all citizens.

Mr. N. HOWEN (Secretary General of the International Commission of Jurists): The International Commission of Jurists is a global network of judges and lawyers who are at the heart of the administration of justice. For over 50 years, it has worked to separate the judiciary from parliaments. The core of the Commission’s work is to guarantee the independence of judges and all those working for the justice system. One of the greatest threats to the administration of justice is over-zealous parliaments that overstep the mark and interfere in the space that the judiciary needs to conduct its work independently and effectively.

That notwithstanding, it is equally ineffective to have a passive parliament. Parliaments must be vigilant and assertive in order to protect constitutional rights, including human rights and the effective administration of justice.

One of the greatest threats to the administration of justice is over-zealous parliaments that overstep the mark and interfere in the space that the judiciary needs to conduct its work independently and effectively. That notwithstanding, it is equally ineffective to have a passive parliament. Parliaments must be vigilant and assertive in order to protect constitutional rights, including human rights and the effective administration of justice.

Mr. N. HOWEN (Secretary General of the International Commission of Jurists)

The task of this seminar is particularly difficult, since it requires a balance to be struck between guaranteeing the impartiality of the judiciary and being active to rectify problems in the administration of justice. It is particularly difficult to ensure that parliaments can root out corruption in national justice systems without asserting a role of interference in and dominance over the administration of justice. The key to striking such a balance is found in the body of international laws and standards on human rights, democracy and the independence of judges and lawyers, since these are based on centuries of experience in ensuring that the executive, legislative and judiciary are separate, yet interconnected pillars of the same system of the State. This is a common factor in all of the subjects on the agenda for discussion during this seminar.

SUMMARY AND RECOMMEN- DATIONS

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GENEVA, IPU HEADQUARTERS, 25-27 SEPTEMBER 2006

SUMMARY AND RECOMMENDATIONS PRESENTED BY THE RAPPORTEUR OF THE SEMINAR

MS. LORETTA ANN P. ROSALES, MEMBER OF THE HOUSE OF REPRESENTATIVES (PHILIPPINES)

We have met here at the invitation of the Inter-Parliamentary Union, the Association for the Prevention of Torture (APT) and the International Commission of Jurists (ICJ). Our topic was law and justice, a subject that is central to democracy. It has often been said that the separation of powers prohibits parliaments and their members from intervening in cases of abuse of due process of law. The seminar gave us the opportunity to explore this issue and see to what extent we, as parliamentarians, do in fact have a role to play to ensure due administration of justice, and - most importantly - the independence and impartiality of the judiciary.

Over the past three days we have joined with experts to measure the scope of fundamental rights such as the right to liberty and freedom from arbitrary detention, the prohibition of torture, and the right to a fair trial before an independent and impartial tribunal. These are all enshrined in the Universal Declaration of Human Rights and the major international and regional human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights, the American and the European Conventions on Human Rights and a number of United Nations declarations and principles.

Torture, one of the most serious human rights violations, has figured prominently in our discussions. As we all know, the absolute nature of the prohibition of torture has been increasingly called into question in the aftermath of 11 September 2001. Today's challenges include outsourcing of torture, rendition flights, secret detention centres, and the violation of the principle of non-refoulement. They include the practice of seeking diplomatic assurances that a person will not be tortured if sent back to a country where torture prevails, and the suggestion

that some measure of torture should be allowed for security reasons. We firmly state that such practices are unacceptable. If we are to protect democracy in our countries, we need to guarantee respect for certain principles which are non-negotiable, and the prohibition of torture is one of them. We state that torture is unacceptable under any circumstances and in any situation. As parliamentarians, we must ensure that the necessary procedural safeguards are put in place to prevent torture at all times. We pledge to do everything within our power to ensure that our parliaments, if they have not yet done so, ratify the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol which provides for visiting mechanisms to prisons and detention centers. We must also adopt the necessary implementing laws. We must ensure that torture is defined as a crime in our criminal codes, that the appropriate punishment is meted out to torturers and that testimony obtained under duress cannot be used as evidence in court.

We have drawn inspiration from the practice of some of our colleagues who make regular visits to prisons and detention centers. These visits are instrumental in ensuring that both conditions of detention and procedural safeguards are such as to prevent torture and other forms of cruel, inhuman and degrading treatment from occurring. More generally, visits help ensure that detainees are held in decent conditions. We also believe that a well-trained police force is unlikely to resort to torture and more prepared to use legal means to obtain information. Our parliaments should ensure that resources are provided for such purposes.

We have heard much about fair trial guarantees, enshrined in Article 14 of the ICCPR. Some of the relevant principles have been eroded since

11 September 2001, becoming subject to a trade-off with security issues. Basic fair trial guarantees must be maintained even in states of emergency, and rights such as habeas corpus cannot be derogated from under any circumstances. Only very limited exceptions are permitted to the right to a public hearing. Defendants and their counsel must be treated on an equal footing with the prosecution; they must be entitled to question the source and the significance of evidence held against them. The right to equal access to courts must be guaranteed at all times.

Only an independent and impartial judiciary will ensure that justice is done and seen to be done. Too often the judiciary is subservient to the executive branch and corruption in the judiciary is a widespread phenomenon occurring in countries throughout the world. We have noted the harmful role that private business sometimes plays. The reasons for the corruption of judges and prosecutors are manifold. Inadequate training, poor salaries and the fear of the executive are some of them.

The judiciary can and must be organized in a way that ensures the independence of judges. The executive must not be involved in their election or appointment. Only an independent body set up by the judiciary itself should be entitled to remove them from office. Judges must be properly trained and able to resist pressure whatever its source.

We also discussed military tribunals which, in some countries, are hearing cases which should not fall under their competence. Under international law, military tribunals are competent only to hear cases concerning military personnel and offences strictly related to military matters. Their procedures must respect the fair trial guarantees contained in Article 14 of the ICCPR. Military tribunals should never judge civilians or hear cases of human rights violations.

We have also debated the specific requirements of juvenile justice. Child offenders should be treated as the victims that they are. Their incarceration only compounds the problems. Prevention, protection and participation of children are the key words in this field. Rehabilitation, conducted by multi-disciplinary teams, working on the social, psychological and health

aspects of the problem is crucial. Questions were also raised about the age of criminal responsibility. The age for which most States had opted was 14 or 15, and a lower age should be considered inappropriate.

Impunity is a problem in many of our countries, especially those with a history of civil conflict and war. In recent years, the fight against impunity has made major strides. As one of the participants said, only 20 years ago it was inconceivable that human rights violators - even heads of State - could be brought to justice. Today, the worst human rights violations - genocide, war crimes, crimes against humanity - are outlawed. Some States apply universal jurisdiction for such crimes and they are being tried by international courts, most importantly the International Criminal Court (ICC). We urge all parliaments that have not yet done so to ratify the Rome Statute of the ICC and to adopt the necessary implementing legislation. It is our duty to fight impunity in all its forms at the national level, in its judicial, political, moral and historical dimensions. We firmly believe that nothing of value can be built if the past is ignored and forgotten.

The forms and purposes of punishment and the execution of sentences also figured in our debates. Prisoners continue to have human rights while in prison, apart from the right to liberty, and must be treated humanely. We consider that the purpose of punishment, apart from reflecting social disapproval and serving as a deterrent, must be to rehabilitate convicts and to integrate them back into society. One means to this end is community work and such forms of punishment are applied, for example, in Cyprus, Botswana and South Africa for certain types of offences.

Our prisons must provide humane conditions of detention. This is essential if prisoners are to be rehabilitated. Debate on this issue suggested that the great majority of our countries do not meet this criterion. Almost all our countries suffer from prison overcrowding which in some cases is severe. To address this problem, some countries have resorted to privatization of prisons. The majority of participants argued that prisons are an integral part of the criminal justice system and that it is therefore the sole responsibility of the State to enforce prison sentences,

a responsibility which cannot be outsourced to private companies. This does not mean that some prison services, like catering, medical care or vocational training cannot be supplied by private companies. More generally, the reasons for overcrowding in prisons merit further investigation as they may be symptoms of deeper problems in society.

We heard the plea of a panellist for us, as legislators, not to impose mandatory minimum sentences. Such sentences detract from the discretionary powers which judges require to award sentences tailored to each individual case.

We oppose the death penalty as the ultimate cruel and inhuman punishment and call on all States that have not yet done so to abolish it or, at least, to adopt a moratorium on the execution of sentences.

We also raised problems related to administrative detention. More particularly, we discussed the detention of mentally ill persons, and of asylum seekers and migrants. Receiving countries increasingly tend to consider asylum seekers and migrants, especially when they come from certain countries, as criminals or potential criminals and treat them accordingly. While countries must of course determine their own immigration policies, they are also bound to comply with fundamental human rights norms. Our panellist on the subject referred in this regard to the Handbook for parliamentarians on international refugee law, published by the IPU and the UNHCHR in 2001, which contains those norms and provides recommendations. We note with concern that the current immigration policies of receiving countries too often result in those who are most needy and vulnerable being the ones who are the least assisted. We consider the situation to be grave enough to recommend that the IPU organize a seminar on this particular topic.

Without an effective justice system, human rights cannot be guaranteed. Not infrequently, the executive branch imposes itself not only on the judiciary but also on our parliaments, sometimes to the detriment of the basic interests of the people we represent. We strongly affirm that as parliamentarians, we have the responsibility to ensure that there is an independent judiciary and that fair trial guarantees are respected. We have the constitutional powers to do so. As legislators, we must build the required legal framework rooted in international and regional human rights standards. We recommend particularly that the guarantees enshrined in Article 14 of the ICCPR be incorporated in our criminal procedure law. However, laws alone do not suffice. The best law is worth no more than the paper it is written on if it is not implemented. Our oversight function allows us to ensure that laws are enforced and that our justice systems put the relevant international and regional human rights standards in the field of justice into practical effect. We have the power to set up commissions of inquiry to look into systemic failures in the justice systems. We have the power to publicly question the executive and administrative authorities if we fear that there is abuse of due process of law in a particular case. The principle of the separation of powers is a system of checks and balances, and our duty is to ensure that the laws which we adopt meet the requirements of international human rights law and that they are properly implemented.

Lastly, we thank the President of the United Nations Human Rights Council, Mr. Luis Alfonso de Alba, for the time he took to inform us of the work that is at present under way to make the successor of the former Commission on Human Rights a truly effective human rights body, and to answer our questions in this respect. We urge the Inter-Parliamentary Union to explore ways in which way parliaments and their members can best be associated with and contribute to the Council's work.

EXPERTS' CONTRIBUTIONS AND EXTRACTS OF THE DEBATE

LAW AND JUSTICE: THE CASE FOR PARLIAMENTARY SCRUTINY

SEMINAR FOR MEMBERS OF PARLIAMENTARY HUMAN RIGHTS BODIES ORGANIZED
JOINTLY BY THE ASSOCIATION FOR THE PREVENTION OF TORTURE, THE
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KEYNOTE PRESENTATION: LAW AND JUSTICE: THE CASE FOR PARLIAMENTARY SCRUTINY

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Mr. K. CHAMMARI (former member of the Parliament of Tunisia, human rights expert, laureate of the 1997 International Human Rights Prize of the City of Nuremberg): The choice of the topic of law and justice for this seminar is particularly pertinent, since parliamentary action must be based on the primacy of law. Parliamentarians must not remain indifferent to issues of human rights and the administration of justice, and it is therefore vital that parliamentarians can refer specifically to international standards of justice. The seminar aims to set out a view on the role of parliamentarians in establishing the judicial system as an instrument that guarantees the rights of individual citizens and gives judges the power to exercise a monitoring role when a country fails to meet its obligations. This approach requires the ratification of international human rights treaties and the incorporation of their provisions into domestic legislation.

Although there is no international standard of justice that has been codified by United Nations bodies, there are a number of international legal sources, from which a corpus of rules can be derived, on the proper conduct of judicial proceedings. Internationally accepted procedural law comprises international human rights treaties, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, as well as regional treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the standards of the Council of Europe on the independence, impartiality and competence of judges, the recommendation of the Council of Europe on the independence, efficiency and role of judges, the African Charter of Human Rights, *inter alia*. Texts have also been adopted, which, while not legally binding, are an attempt to define the principles of the administration of good justice, such as the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, the Guiding Principles on the role of Public Prosecution in the Justice System, *inter alia*. International legal standards are defined in publications by Amnesty International, the Legal Action Group of FIDH, and the International Association of Prosecutors. The jurisprudence of United Nations bodies, such as the General Comments issued by the Human Rights Committee, the jurisprudence of the Committee against Torture in dealing with communications and the work of the United Nations Working Groups and Special Rapporteurs all contribute to the framework for ensuring the independence of the judiciary and guaranteeing the right to a fair trial.

International standards have also been established in respect of arbitrary detention, the right to access to a lawyer, the right to silence, extraction of confessions under duress, time-frames for procedures, states of emergency and exemptions, all of which form a basis upon which parliamentarians must build in order to improve and consolidate an appropriate legal environment in which rights can be protected.

Although parliamentarians pass laws that are relevant to their domestic situations, in doing so they refer to international standards that the executive branches of power have ratified. Parliamentarians should promote debate on the possible objections formulated by governments in respect of international standards and treaties. In 90 per cent of cases, parliaments do not debate the legitimacy of reservations submitted to international treaties. This situation should be rectified. After the ratification of international instruments, parliaments must ensure that domestic legislation is brought into line with these instruments. National judges

should be held accountable in the administration of justice, and should refer to universal standards in respect of the protection of human and citizens' rights.

In 2001, Morocco became one of only two Arab States to ratify the Rome Statute of the International Criminal Court, and in doing so has committed itself to a truth and reconciliation effort. Morocco has therefore taken a positive step towards combating impunity. In Senegal, in response to the Hissene Habre case, the African Union established a high-level committee of jurists to issue recommendations on the fate of the former president of Chad. Referring to the jurisprudence of the United Nations Committee against Torture, this committee of jurists recommended that the Senegalese authorities prosecute or extradite any person residing on Senegalese territory, who is accused of committing acts of torture. In July 2006, the African Union decided that Hissene Habre should be tried in Senegal. Although since 2000, the case has been subject to universal competence in Belgium, it was decided that Senegal did not have the competent jurisdiction to try Hissene Habre. Universal jurisdiction should not be limited to European countries. At the same time, Senegal, having ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has failed to incorporate a definition of the crime of torture in line with that contained in the Convention into its domestic legislation.

France has ratified the Rome Statute of the International Criminal Court, and has made a declaration under article 124, which prevents the International Criminal Court from considering crimes committed by French nationals or on French territory. This demonstrates France's reluctance to acknowledge the atrocities it committed during the Algerian war of independence, and peace-keeping operations in Africa and Asia. The adaptation of the law in France has been the subject of considerable criticism. On 26 July 2006, a bill was submitted to the French Council of Ministers on the adaptation of the law on the International Criminal Court, which would be debated over the coming weeks. According to the French Coalition for the ICC, the bill, if adopted, could open up spaces of immunity that would go against the objectives of the international community. The French Parliament's decision in respect of this bill could therefore have potentially serious repercussions on law and justice.

Prior to the events of 11 September 2001, the United States was one of few countries that had legislation on war crimes, which allowed international judges to sanction any violation of the Geneva Conventions of 1949 on humanitarian protection during times of war. Following the disclosure of degrading treatment committed in the Abu Ghraib prison in Iraq, the secret prisons of the CIA in Europe and the lawless zone in Guantanamo Bay, the recent American debate on interrogation of prisoners has been a very serious slippage. A discussion began in June 2006, regarding the case of Salim Ahmed Hamdan, the former driver of Osama bin Laden, during which the American Supreme Court issued a decision on the need to respect the protection afforded to unlawful combatants under the Fourth Geneva Convention. In spite of this, the United States President has decided to maintain his secret programme for counter-terrorism, and has chosen to legislate to invalidate article 3 of the Fourth Geneva Convention by a vote of Congress. If this is agreed, it will leave vast grey areas in legislation and leave the way open for arbitrary abuses.

Although the Supreme Court of Israel has condemned the use of "moderate physical pressure", this continues to be used by the Government, with the tacit agreement of the Parliament. The establishment of the African Court on Human and People's Rights is particularly important, and illustrates the need for African Parliaments to harmonize their legislation.

Parliamentarians and parliaments have a vital role to play in the consolidation of laws and justice through parliamentary inquiry commissions. Parliamentarians should have the means at their disposal to monitor the judiciary, including recourse to written questions, oral questions, the right to petition and the right to appeal for parliamentary inquiry. This should not, however, affect the independence of the judiciary and the balance between the three branches of power.

DEPRIVATION OF LIBERTY: LAW AND PRACTICE

ARREST AND DETENTION

THE PROHIBITION OF (AND CHALLENGES TO) TORTURE AND OTHER ILL-TREATMENT UNDER INTERNATIONAL LAW

THE RESPONSIBILITY OF PARLIAMENTS AND THEIR MEMBERS TO PREVENT TORTURE AND ENSURE HUMAN CONDITIONS OF DETENTION: LEGISLATIVE AND OVERSIGHT MEASURES

DEPRIVATION OF LIBERTY: LAW AND PRACTICE

ARREST AND DETENTION

Ms. S. MCCRORY (Research Director of the International Council on Human Rights Policy): The International Council on Human Rights Policy has issued a publication on the results of research on crime, public order and human rights. One of the final comments in the book is a recommendation to groups engaged in collaborative efforts with public authorities to hold parliamentary workshops on international and national human rights standards, and law-making. The publication analyses the situation of law and order in five transition States: Ukraine, Argentina, Brazil, Nigeria and South Africa, comparing their policy responses, the way in which security fears permeate through a society, and the role of the media in documenting and sensationalizing such issues. The Council is currently preparing a study on detention on an administrative basis, which would consider a range of non-criminal situations in which individuals are deprived of their liberty, such as for psychiatric treatment, drug rehabilitation, persons living with HIV/AIDS, refugees and migrants.

National law and policy must be consistent with the international standards to which a State has acceded. Parliamentarians have a role to play in ensuring that consistency and advocating accession to new standards. Parliaments should actively monitor the compliance of the State with those standards, through looking at the reports of civil rights groups, national human rights institutions, ombudsmen, and the reporting that the State itself engages in. Specialist parliamentary human rights committees and oversight groups should also be established.

Parliamentarians have a responsibility to oversee government practices and the extent to which the Government ensures that law enforcement officials receive appropriate training. Although in many countries appropriate laws are adopted, lack of awareness of these laws at all levels often results in their lack of application.

Ms. S. MCCRORY (Research Director of the International Council on Human Rights Policy)

Arrest is the first stage in the process of deprivation of liberty. It is addressed in the Universal Declaration of Human Rights, in articles 3, 5 and 9. In many situations arrest occurs as a result of a criminal matter, and it may be possible to conduct an arrest without a warrant or official judicial authority. Powers of arrest should be laid down clearly in law, and persons under arrest should be granted all their rights immediately upon the moment of arrest. The provisions contained in the International Covenant on Civil and Political Rights, in particular in its article 9, reiterate those of the Universal Declaration of Human Rights, and develop upon them. Since law enforcement officials are most frequently responsible for carrying out arrests, they must have a thorough awareness of their responsibilities and duties, particularly in respect to the use of firearms and the use of force. In that regard, the United Nations Code of Conduct for Law Enforcement Officials and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials are particularly relevant. Pursuant to these instruments, law enforcement officials are permitted to use force only when strictly necessary and to the extent required by their duties. There should be no supposition by law

enforcement officials that they should necessarily use a weapon or threaten to use a weapon when carrying out their duties. Firearms should not be used unless when arresting a person who poses a grave threat to life and who is resisting authority and only when less extreme means have proven inefficient. Law enforcement officials include all those authorized to carry out police powers, but may also include State security officers and military officials. Parliamentarians have a responsibility to oversee government practices and the extent to which the Government ensures that law enforcement officials receive appropriate training. Although in many countries appropriate laws are adopted, lack of awareness of these laws at all levels often results in their lack of application.

*Persons deprived of their liberty should not be
deprived of their other human rights.*

Ms. S. MCCRORY (Research Director of the International Council on Human Rights Policy)

Arrest is usually rapidly followed by detention, which can occur anywhere. Persons who have not been involved in criminal activity can also be held in detention, in order to prevent harm to society or to protect the individuals themselves. Examples of this are treatment centres for drug addicts or closed psychiatric treatment centres, where persons may enter either voluntarily or involuntarily, but may not be permitted to leave. This constitutes a form of detention. Detainees of all types have rights and guarantees, which should be assured to them under international human rights law standards, such as article 9 (1) of the International Covenant on Civil and Political Rights, pursuant to which detention procedures should be established in law. It is therefore the duty of those in a position to influence the Government to ensure that those procedures are put into place, and when their absence becomes apparent, to lobby and advocate for the adoption of appropriate legal measures and practical procedures. Article 10 of the Covenant stipulates that detainees should be treated with humanity and respect for the inherent dignity of the human person. Persons deprived of their liberty should not be deprived of their other human rights. Accused persons should be separated from those who are convicted. Furthermore, accused juveniles should be separated from adults. The provisions on detention of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, are further developed in the United Nations Body of Principles on the Protection of All Persons under Any Form of Detention and Imprisonment, which enumerates 39 principles and one general clause, and the distinction between persons who have been detained without a conviction for an offence and persons who are imprisoned. There are very few provisions however, which relate to different types of detention. These principles serve as a complement to the International Covenant on Civil and Political Rights. They contain provisions on humane treatment, access to legal counsel, provision of medical treatment, the provision of a free interpreter and access to consular representation in the case of foreigners in detention. In many cases, these principles are not respected in the day to day operation of detention.

Particular risks arise in the situation of administrative detention, since some of the guarantees in place under the criminal justice system may be absent from the administrative system. This is particularly true of situations in which persons are held in detention in institutions other than prisons, such as safe-houses. One particular risk with administrative detention is that owing to a lack of process and procedure, the duration of detention may be indefinite. Grounds for the detention are not always explained, and there is often a total lack of judicial supervision, and a lack of review procedure, since administrative detention takes such a wide variety of forms. Particular attention in this regard should be paid to detention for security reasons, which often takes place within a legal vacuum. The very conditions in which a person is held in detention may constitute torture, or inhuman and degrading treatment, and in the worst cases, enforced disappearance may occur.

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance are both relevant to arrest and detention. Parliamentarians should advocate the ratification of both instruments. The Optional Protocol serves to establish an international visiting mechanism to monitor places of detention. The mechanism, which comprises members from the ratifying States, will begin its visits in the near future. Places of detention for the purposes of the Optional Protocol are not limited to prisons or places of incarceration for criminal offence, and it is likely that the mechanism will have a broad remit for visiting. The mechanism is the first of its kind to be established, and it will conduct its visits to ensure the prevention of torture, and should therefore not only be considered necessary in places where there is a specific concern about torture, since torture takes many forms, which are not necessarily brought about through deliberate will. The Optional Protocol also provides for the establishment at the national level of bodies for visiting all places of detention. These bodies are most likely to interact with parliamentarians, human rights bodies and civil society, and will monitor the situation day to day.

Although at first sight enforced disappearance may not seem relevant in many countries, there are thousands of unsolved cases of enforced disappearance in many countries. The International Convention for the Protection of All Persons from Enforced Disappearance was adopted at the first session of the United Nations Human Rights Council in June 2006, and is currently before the United Nations General Assembly for adoption. It is an important instrument in respect of its potential impact on detention and on the improvement of record keeping and the general administration of justice in relation to detention. It provides for jurisdiction arrangements and extradition provisions, which are relevant to all countries, including those where enforced disappearance is not a common occurrence. The Convention prohibits secret detention, requires that laws provide for conditions under which deprivation of liberty can be ordered and which bodies have the authority to order it, provides that detention can only occur in officially recognized and supervised places, and that detainees should be able to communicate with their families and legal counsel, guarantees access to competent authorities such as inspection bodies and visiting mechanisms, allows detainees or their counsel to ask a court to decide on the lawfulness of the detention, and requires detailed records of all aspects of the detention. The Convention establishes a requirement to prohibit and punish the crime of enforced disappearance in national law, and sets forth the right not to be subjected to enforced disappearance. It requires investigation and prosecution where the crime is thought to have occurred, and has implications in all States parties for all official practice with regard to all forms of detention.

Numerous international human rights standards exist that protect the rights of persons held in detention. It is imperative that national law and policy reflect international standards. Parliamentarians can help ensure this by monitoring national law and policy and advocating compliance with existing standards, and through their awareness of developments in the United Nations and other bodies they can form a proactive force for encouraging adherence to new standards. Parliamentarians can act for their constituents when they take up individual allegations of allegations, and they can engage with civil society, ombudsmen, and human rights institutions, and can promote the benefits of the international cooperation that stems from accession to treaties. Parliaments can show a willingness to establish a climate in which rights are respected and guarantees are upheld.

DEBATE

Ms. A. OSMAN (Egypt): Arrest is not part of the investigation process, whereas provisional detention is, and the legislator must intervene to specify the conditions of such cases. Arrest cannot give rise to any violation of human rights, since its aim is to recognize an individual, and that person is presumed innocent until proven guilty, from which point, legal proceedings are established. Provisional detention and detention can be subject to legal investigations and the conditions must be specified.

Administrative detention represents a violation of human rights. The conditions for the use of administrative detention in cases of threats of terrorism should be clearly set down in law, including a definition of the bodies authorized to carry out administrative detention and the guarantee of human rights during such detention. Cooperation between parliaments and judicial authorities is particularly important and requires a delicate balance between the independence of the judiciary and parliamentary oversight of the administration of justice. Although preventive detention in Egypt is governed by very strict laws, Parliament is present to prevent excesses. The Egyptian Parliament has set itself the task of establishing limits on the duration of preventive detention and has stipulated the conditions under which that type of detention is permitted.

Administrative detention outside prisons, such as in psychiatric institutions should only be carried out pursuant to a judicial decree, unless the person concerned has entered the psychiatric institution of their own free will, in which case the authority in charge of the institution is held responsible in the event of any violations of human rights. These cases can appear to be types of punishment, but they are not considered to be so in Egypt.

Mr. S. GINTING (Indonesia): In the Indonesian legal system, the process of arrest and detention begins with police investigations, with those arrested being brought before the public prosecutor and finally before the court. The police and public prosecutors are under the authority of the executive, whereas the courts are independent. It is important for parliaments to protect human rights without interfering with judicial processes. This can be achieved through monitoring law and policy, and advocating compliance with existing standards and adherence to new standards.

Indonesia is preparing to ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in 2008. Visits to detention centres are an effective means of preventing torture in places of detention and should be conducted by national and international independent experts alike. Secret places of detention, such as Guantanamo Bay raise considerable questions of human rights. An international caucus should be established to supervise the detention of those captured in conflict areas.

It is particularly important to prevent arbitrary arrest and detention through improving the professionalism of the police and preventing military intervention in political and legal processes.

Mr. S. GINTING (Indonesia)

In Indonesia until 1998, the military, as well as the police, had authority over judicial proceedings. It is particularly important to prevent arbitrary arrest and detention through improving the professionalism of the police and preventing military intervention in political and legal processes.

Ms. A. M. MENDOZA DE ACHA (Paraguay): Paraguay has good legislation, but there is little awareness of it, and this, combined with a corrupt judiciary, leads to disregard for the laws in place. Parliamentarians have a responsibility to ensure true justice.

Mr. F. SOPHOCLES (Cyprus): When the law on detention conditions was being enacted, a discussion took place in the Cypriot Parliament on the reasonable time between an arrest taking place and a lawyer being called, and the relatives of the arrested person being informed of his or her arrest. The police considered

8 hours to be a reasonable time, the parliamentary Standing Committee on Human Rights considered a reasonable time to be 4 hours, and a compromise of 6 hours was therefore eventually decided. Extending the timeframe for informing a lawyer and the next of kin of the arrested person could result in witnesses being corrupted or partners in the crime escaping justice, and could thus impede the work of the police. What is generally considered a reasonable time period between a person being taken into custody and being granted access to a lawyer?

Mr. M. BOUDIAR (Algeria): Is the relationship between judicial and legislative authorities one of complementarity or consultation, and under what circumstances does the legislative authority have the right to intervene in the work of the judiciary? Legislative authorities should not interfere in the administration of justice. The Algerian parliamentary Committee on Juridical and Administrative Affairs and Human Rights is involved in the revision of criminal procedural law in respect of human rights, and making that law known. The Committee visits Algerian prisons to ascertain whether the rights approved by the Parliament are truly respected in relation to all prisons, and whether conditions in detention facilities are humane. The visits show that legislation is being adequately implemented. Parliament is therefore able to monitor the implementation of laws on human rights in detention facilities.

Ms. H.-S. KIM (Republic of Korea): I was arrested, detained and tortured in the 1980s. Although the Republic of Korea has not signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment it is considering ratifying the Optional Protocol to the Convention. An international monitoring mechanism for detention institutions would be an effective way of ensuring respect for the human rights of detainees. I therefore urge the Korean Government to accede to the Optional Protocol as soon as possible.

Ms. M. F. PONCE BROCKE (Guatemala): Parliamentarians represent the voice of the people and must play an active, monitoring role to ensure the independence of the judiciary. Respect for constitutional rights must be guaranteed. Although the Guatemalan Parliament has approved domestic legislation that is adapted to meet international standards, much remains to be done in practice to ensure that the rights and freedoms of the people of Guatemala are not violated. Parliamentarians have the mechanisms necessary to fight for a broad and effective justice system, and have the possibility to call the work of government officials into question if necessary. Law enforcement officials reported to have violated human rights should be held accountable for their actions. The work of the International Commission of Jurists is particularly commendable, since it encourages greater cooperation between all actors to ensure that the rights of individuals and of society at large are fully guaranteed.

Ms. C. MAZARIEGOS TOBIAS (Guatemala): Corruption and threats related to drug trafficking and crime in general often result in the improper implementation of legislation in Guatemala. Parliamentarians have both an obligation and a responsibility to ensure that human rights are protected. This would not be so if judges were adequately prepared for dealing with cases, and if they respected the Constitution.

Mr. J. POCONGO (Angola): Angola is in the process of drafting a new Criminal Code. The Angolan Parliament is currently debating the minimum age at which detention could be applied as a sanction for criminal offences. The minimum age of criminal responsibility under the present law, which dates back to the nineteenth century, is 16 years. Criminals often use minors who cannot be prosecuted to perpetrate crimes. The Parliament is therefore discussing whether to lower the minimum age of criminal responsibility to 14 years, or whether to raise it to the age of majority: 18 years.

Mr. B. I. NA'ALLAH (Nigeria): Throughout the world the power to arrest and detain is a statutory power granted by parliament. International principles for interview and interrogation have been established, and

violations of human rights can occur if these principles are not applied. At the beginning of an investigation the accused must be questioned. If there are reasonable grounds to suspect the accused, he or she is then detained and interrogated, after which he or she is brought before a court. This procedure must be adhered to strictly in order to prevent abuses of human rights.

The only type of administrative detention provided for by law is to give protective custody. No other administrative detention procedures are recognized by law and are therefore antithetical to democracy and human rights.

Ms. D. DRETCANU (Romania): The subject of this seminar is particularly relevant to the Parliament of Romania, taking into account its efforts to meet European Union standards in justice and internal affairs. The European Commission is due to report to the European Parliament on Romania's progress towards meeting these standards, and in particular on its measures to reform the judiciary. In June and July 2006, the Romanian Parliament adopted a series of amendments to the Criminal Code and a new act on the enforcement of penalties. The reformed penalty enforcement system focuses on an educational approach, rather than the use of repressive measures. The new law specifically recognizes the rights of convicted persons and establishes guarantees for the free exercise of these rights, correlating them with the obligations incumbent on the administration of the place of detention.

Four detention regimes are recognized in Romania: maximum security, closed, semi-open and open. Detainees may be moved from one regime to another, depending on their behaviour during detention. Detainees have the right to engage in remunerated work, should they so wish, but this is not an obligation. The terms of suspension of penalty enforcement have been revised, and suspension is no longer dependent on the nature of the offence committed, but rather on the detainee's behaviour during detention, the seriousness of the crime committed and the circumstances of the crime.

The Romanian National Human Rights Commission organizes missions to penitentiary institutions as a response to complaints from detainees on the conditions of detention and medical services provided. The Commission's findings and recommendations are transmitted to the relevant government authorities. Parliament also works closely with the Office of the Ombudsman, which monitors enjoyment of human rights and receives and investigates complaints of violations.

Ms. S. MONAGENG (Commissioner, African Commission on Human and People's Rights): It is particularly important to incorporate international instruments into domestic law from the point of view of the judiciary. The reliance, by many countries on the progressiveness of their judicial officers is insufficient, and account must be taken of treaty application law, which obliges States to domesticate the provisions of international legislation.

The African experience of prison visiting is that international committees are granted access to places of detention, whereas local committees established by parliaments are not. National human rights institutions in Africa are often undermined by the government, under-experienced, under-resourced and are therefore unable to discharge their mandates. African governments fulfil their reporting obligations to international bodies, but fail to report to regional bodies, and efforts must therefore be made to take domestic organizations as seriously as international ones.

Ms. H. J. PEREZ REYES (Guatemala): I witnessed a case in which 31 detainees were being held in prolonged pre-trial detention and were being tortured. Although in this particular case it was the Office of the Ombudsman that investigated the case, parliaments have a responsibility to ensure that detainees' rights are properly protected.

Mr. E. KALISA (Rwanda): After the genocide in Rwanda in 1994, in which over a million people died, the State took measures to ensure the future respect of human rights. Human rights are respected through laws, which must be implemented. Rwanda has established a national commission for human rights, an Ombudsman, and a number of other mechanisms. The protection of human rights is specifically set forth in the Criminal Code. Parliamentarians receive the reports of human rights institutions, such as the Human Rights Commission, which visits places of detention, and together with these institutions, parliamentarians can ensure that the Government is involved in overseeing and ensuring respect for human rights. New legislation has been passed on the administration of prisons, which provides for the separation of prisoners according to their age and gender. Efforts to ensure the protection of human rights in Rwanda are ongoing.

What measures are being taken to address the issue of abuses of the human rights of asylum seekers in detention? What laws exist to prevent such abuses, and are those laws respected?

Mr. P. TREMBLAY (OPCAT Campaign Coordinator, Association for the Prevention of Torture): My organization spearheaded the idea of an Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Upon ratification of the Optional Protocol, countries have one year to establish a national monitoring mechanism for places of detention. The way in which this mechanism should function is not set out in the Optional Protocol, since it is considered more appropriate for States to decide for themselves, according to their specific needs and their political, legal and economic situations. Two different approaches are being used by the States that have ratified the Optional Protocol: some countries, such as Argentina, have adopted laws on the establishment of a national commission for the prevention of torture, which will be responsible for visiting places of detention. Others, such as Denmark, have given the role of monitoring and prison visits to an existing institution, such as the Office of the Ombudsman. Although Switzerland has not ratified the Optional Protocol, it has decided to establish a national commission for detention centres. Paraguay's inter-institutional commission, which visits detention centres, has been in operation for a number of years and has expertise in prison-monitoring, which should be used as an example for other countries. In the coming months, a forum will be held in Paraguay, in which national institutions and international partners will participate. The Republic of Korea has a national commission for human rights, which will be appointed as the national mechanism for visiting detention institutions.

Parliamentarians have an important role to play to ensure the ratification of the Optional Protocol, and the adaptation of national laws to ensure its effective implementation. Parliaments must ensure that a monitoring mechanism is established in accordance with the provisions of the Optional Protocol, and must ensure that the mechanism has sufficient financial resources to enable it to fulfil its mandate. Once the mechanism is operational, parliaments must oversee its work to ensure it is effectively fulfilling its role. Dialogue must be established between the parliament and the mechanism, to discuss the practical recommendations made. My organization is encouraged by the number of States that have expressed an interest in ratifying the Optional Protocol.

Ms. S. MCCRORY (Research Director of the International Council on Human Rights Policy): I welcome the personal testimonies given and observations made on the relevance of an effective and proactive approach to oversight and scrutiny, since good legislation and institutions are insufficient if they are ineffective, under-funded and not given mandates strong enough to achieve the necessary goals. Parliaments must have due regard for the administration of justice, but must not interfere.

Although arrest in general does not constitute a violation of human rights, it can give rise to violations if the arrest is arbitrary, the reason for the arrest is withheld, or access to legal counsel is denied. Age of criminal responsibility should be distinguished from the age at which a person can be detained. In many countries, the

age of criminal responsibility is as low as 9 years. There must be an understanding that juvenile justice must be administered differently according to the age of the offender. Cases in which children are recruited by adults to commit crimes in order to avoid prosecution should also be addressed differently. The reasonable period of time in which a person can be held in detention before his or her next of kin and legal counsel are informed is not set out in international instrument. However monitoring bodies have stressed that all persons arrested must have immediate access to counsel. Moreover, relevant standards such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment stipulate that detainees are entitled to promptly inform their families of their arrest or require the authorities to do so.

My organization has conducted a study, available to all of you, on how to measure the effectiveness of national human rights institutions and how to set standards for their establishment, including a strong mandate, a legally-established role, funding and impartiality in staffing.

THE PROHIBITION OF (AND CHALLENGES TO) TORTURE AND OTHER ILL-TREATMENT UNDER INTERNATIONAL LAW

Mr. M. NOWAK (United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment): Torture is one of the most serious violations of human rights, since it is a direct attack against human dignity and the integrity of the person. The prohibition on torture was made absolute as a result of events that took place under the system of national socialism. The prohibition of torture is non-derogable: there are no situations whatsoever in which the use of torture may be justified, even during states of emergency.

Torture, as defined in article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has four characteristics: the infliction of severe physical or mental pain or suffering, committed by, or with the acquiescence of a State official; it is intentional, and must be for a certain purpose, which is usually to extract a confession or intelligence information. A fifth element of torture is that the victim is always powerless. Torture usually takes place against persons in detention, or in situations where the victim is unable to defend him or herself.

States do not, however, have the right to define torture in a narrower manner than international law prescribes. Cruel, inhuman and degrading treatment and punishment are also absolutely prohibited under international law.

Mr. M. NOWAK (United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment)

There are a number of challenges to the prohibition of torture, the first being that certain governments, especially in the context of the fight against terrorism, accept that torture is absolutely prohibited, but define torture in a much narrower manner, and justify harsh interrogation methods amounting to cruel, inhuman or degrading treatment by stating that they should be balanced against the threat of terrorism. States do not, however, have the right to define torture in a narrower manner than international law prescribes. Cruel, inhuman and degrading treatment and punishment are also absolutely prohibited under international law.

If the police arrest a person suspected of committing a crime, and that person resists, force may be used. If a violent demonstration takes place, the police may need to use force. In such cases proportionality must be applied, and only excessive, disproportionate use of force constitutes cruel, inhuman or degrading treatment. As soon as suspects are brought under police control, they lose their power and any use of force therefore constitutes cruel, inhuman or degrading treatment.

Another typical challenge to the prohibition of torture, which has begun to arise since the events of 11 September 2001, is that a number of government officials and academics say that the threat of terrorism is now so great that the absolute prohibition of torture should be brought into question, since there should be a balance between saving the lives of hundreds of people, and torturing one individual for information on a potential terrorist attack. International law, however, does not allow for any such balancing. If torture were no longer absolutely prohibited it would need to be codified in criminal procedural law. Regulations would need to be set to establish which types of torture were acceptable for which crimes and which types of suspect, and judges would become involved in the authorization of torture.

The third challenge involves the “outsourcing” of torture to places of detention outside the territory of the State. One particular example of this is the United States use of the Guantanamo Bay naval base in Cuba. The United States Government argues that the guarantees of international law do not apply to non-United States citizens detained outside United States territory. The Bush administration maintains that argument, despite all international human rights monitoring bodies saying that the practice is unacceptable. The avoidance of the prohibition of torture, arbitrary detention and cruel, inhuman or degrading treatment through the establishment of detention facilities outside State territory, and thus circumventing the law is a particularly dangerous practice. The outsourcing of torture to private security companies employed to interrogate also raises a number of legal questions, since it is particularly difficult to hold those companies accountable under international human rights law.

Rendition flights are used by, among others, the United States to transfer prisoners to a country where there is systematic torture in order to obtain better intelligence information. The practice of using secret places of detention was proven before it was acknowledged by President Bush. Secret detention is synonymous with enforced disappearance. According to the jurisprudence of the United Nations Human Rights Committee, enforced disappearance for a prolonged period amounts to torture, since the detainee is being held incommunicado, without access to a lawyer, his or her family, or visits from the International Committee of the Red Cross. The detainees are thus interrogated in a situation where they are totally powerless.

The principle of non-refoulement: the prohibition of sending a person to a country where he or she will be at serious risk of torture is absolute, pursuant to article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This principle is increasingly circumvented, however, by States resorting to diplomatic assurances. If a person is present on the territory of a State, and is considered dangerous, the State may wish to extradite that person. If the person’s country of origin is a State in which torture is known to be systematic, he or she cannot be extradited. Although in respect of the death penalty diplomatic assurances are effective, in the case of torture, they are useless. Even monitoring of returnees is ineffective, since victims are always accompanied by prison staff and even if questioned by a third party, will not admit to having been tortured. Torture is always denied and takes place in secret, and is therefore extremely difficult to monitor.

Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits the use in legal procedures of any information extracted by torture. This should prevent the police from committing acts of tortures, since even a full confession, if extracted using torture, cannot be

used in court. However, in counter-terrorism cases governments have submitted secret intelligence, which cannot be properly investigated. Suspects have been sentenced on the basis of such evidence, which is likely to have been extracted through torture. Measures are required to shift the burden of proof, and ensure that governments providing such evidence are able to demonstrate that it has not been obtained using torture.

DEBATE

Mr. K. CHAMMARI (former Member of the Parliament of Tunisia, human rights expert): Although the definition of torture laid down in Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is clear, in Muslim countries problems are caused by the belief that corporal punishment should be used as codified in the sacred texts. What measures can parliaments and other bodies, including the United Nations Committee against Torture, take to address this lacuna? I am a victim of torture, and while being tortured I was shocked to be told that the beating I was receiving was intended to correct my behaviour, in the same way as children are beaten in punishment.

Parliaments are challenged by the issue of non-refoulement. There have recently been six cases of refoulement to Tunisia, in which the returnees were tortured, despite the United Nations Committee against Torture having urged the extraditing country not to return the individuals in question. The Parliament should have questioned the Government on this issue. Clandestine detention centres are not only a tragedy for the detainees, but also for the local communities, who are obliged to live with the centres and keep them secret. These communities lose their infrastructure and deserve compensation. The Government of Morocco is currently in the process of compensating people from the communities that housed clandestine detention centres, all of which have been closed and turned into memorial sites.

Mr. M. GOWEILY (Egypt): Parliamentarians are elected to represent the people and must therefore ensure that the wellbeing of the people is protected. They should therefore be opposed to all forms of torture. In the past, torture had been addressed in a politicized manner, rather than on a human level. The IPU should adopt a declaration prohibiting torture in occupied territories, since the whole world can see how the innocent and vulnerable are being tortured in Afghanistan, Palestine and Iraq. Further efforts are needed to find a way of bringing the perpetrators of such atrocities to justice.

Ms. A. M. MENDOZA DE ACHA (Paraguay): The issue of torture is particularly difficult in the context of the contemporary problem of terrorism. In the 1960s in South America many people disappeared, and the governments concerned used the situation to oppress others. Torture should not be used to extract a confession, even when that confession could save hundreds of lives, but what measures could be used to encourage the individual concerned to make that confession?

Mr. O. MAGARA (Kenya): Parliaments represent the people, pass laws to protect the people, and monitor the implementation of those laws. How can parliamentarians ensure that sufficient funds are available for the bodies enacting those laws? Corruption that denies the population the services it deserves constitutes a grave violation of human rights, and parliamentarians have a responsibility to make recommendations on how to rectify the problem. Corruption at the government level leads to lack of services for the public, which leads, *inter alia* to women and children dropping out of education and turning to prostitution in order to make a living. Such a life is wholly undignified, and must be prevented.

Mr. S. L. FOMBO (Togo): In many West African countries, violent practices take place that are attributed to traditions and customs, such as male and female circumcision. Are such practices considered to constitute torture, and why are greater measures not being taken at the international level? Awareness-raising measures should be taken to encourage international bodies to take action to combat these practices.

Ms. M. F. PONCE BROCKE (Guatemala): Guatemala has witnessed many years of armed conflict. What can be done to ensure that the forces of order involved in that conflict adopt a culture of greater respect for human rights? The forces of order in Guatemala carry out very cruel practices, and a recently published report states that women have been held in pre-trial detention for up to six months. Although the Guatemalan Government is considering ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it should go further than that and take concrete measures to ensure the eradication of cruel, inhuman and degrading treatment.

Mr. M. BOUDIAR (Algeria): While most national legislation contains provisions to prevent torture and arbitrary detention of individuals, the phenomenon of organized torture at the international level remains unaddressed. The world is aware of the problem of secret prisons, but appears only to be able to look on in silence. Such practices should be condemned very forcefully.

Lord F. JUDD (United Kingdom): The Joint Select Committee for Human Rights is currently grappling with the problem of preserving respect for human rights in new legislation adopted following the terrorist acts in the United States and the United Kingdom.

It is important to bear in mind that seeking diplomatic assurances from a government that systematically uses torture is tantamount to condoning that government's regime of torture.

Lord F. JUDD (United Kingdom)

It is important to bear in mind that seeking diplomatic assurances from a government that systematically uses torture is tantamount to condoning that government's regime of torture. This undermines the international stand against torture. This argument against the request for diplomatic assurances is not taken seriously enough. Anti-terrorism legislation is introduced to preserve a decent society and uphold the way of life in a State. It would seem that if that State is directly or indirectly associated with the practice of torture, it is not winning the battle for hearts and minds. The only way to reduce terrorism is to reduce the number of recruits to terrorist organizations by winning hearts and minds. Every time torture or brutality is committed, this plays into the hands of extremists and terrorists, and provides potential new recruits among those who are angry and exasperated by the situation.

If decency and the essence of free, democratic society are to be preserved, there must be certain absolute principles which are non-negotiable. One of these is that torture must not be practised anywhere.

Lord F. JUDD (United Kingdom)

Owing to the seriousness and complexity of the situation of human rights and security, certain Ministers feel that there is a need for a trade-off between human rights and security measures. This is an alarming situation. If decency and the essence of free, democratic society are to be preserved, there must be certain absolute principles which are non-negotiable. One of these is that torture must not be practised anywhere. The representative of Egypt is right to call on the IPU to reassert this principle.

This seminar must be used to give a clear message to the world, that torture is not acceptable under any circumstances.

Mr. M. NOWAK (United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment): The issue of traditional corporal punishment raises the question of the universality of human rights in comparison with cultural differences. In many countries, corporal punishment is still practised in school and in the home. The European Court of Human Rights ruled that corporal punishment was unacceptable in the administration of juvenile justice at a time when corporal punishment was common in schools in Europe. The United Nations Human Rights Committee has recently stated, in decisions on cases against a number of Caribbean States, that light forms of corporal punishment used as disciplinary measures against prisoners are absolutely prohibited. The Human Rights Committee comprises 18 members of a wide range of nationalities and cultures, and they were unanimous in their decisions. The general acceptance of what constitutes inhuman and degrading treatment is constantly evolving, and although corporal punishment takes many forms, it should be hoped that corporal punishment as a whole, in all its forms, would be prohibited.

There is a striking lack of awareness in many countries among parliamentarians and law enforcement officers, of how serious torture is, which leads to a culture of impunity. Impunity leads to systematic torture. In Jordan, minor disciplinary action is taken to sanction torture committed by law enforcement officials, such as the punitive deduction of earnings. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment obliges States parties to include torture as an offence under their domestic criminal law, and provide for appropriate penalties, taking account of the serious nature of torture. The Committee against Torture has stated that torture is so serious that the penalty incurred should be a minimum of 10 years' deprivation of liberty. The crime of torture can be committed without physical injury. Methods exist for causing serious physical and mental pain without leaving any physical trace on the body of the victim. This is not taken into account. Many countries have not brought their Criminal Codes into line with the Convention by including a definition of the crime of torture and laying down the sanctions for perpetrators. In Austria, torture is not defined in criminal legislation, and the offence of ill-treatment of detainees is punished by 2 years' deprivation of liberty or 3 years' deprivation of liberty if serious harm is caused to the victim.

The punishment of the perpetrators of torture is a very important deterrent, as is the requirement that the perpetrator should pay compensation as well as the rehabilitation treatment required by the victim.

Mr. M. NOWAK (United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment)

Parliamentarians should enact stronger laws to enable them to have a greater influence over deportation decisions that may result in a violation of the principle of non-refoulement. The punishment of the perpetrators of torture is a very important deterrent, as is the requirement that the perpetrator should pay compensation as well as the rehabilitation treatment required by the victim. In the event that the extraction of a confession could save many innocent people's lives, a well-educated police force should be able to obtain a confession without the use of torture. If a suspect is very determined not to confess or give the necessary information, he or she will not do so under torture. In a case in Germany, a boy was abducted and the perpetrator refused to disclose his whereabouts. The Deputy Chief of Police ordered the use of force in questioning the perpetrator in order to compel him to reveal the child's whereabouts quickly, in the hope that the child's life could be saved. The Deputy Chief of Police was later brought before the courts and sentenced, although he was granted mitigating circumstances, since he had been motivated by the will to save the child's life.

There is a vast difference between male circumcision and female genital mutilation, which constitutes one of the most serious violations of the human rights of women. Female genital mutilation is usually practised by private actors, so cannot be considered torture in the legal sense, unless the State fails to take any action to prevent it, in which case the State becomes implicated. The United Nations Committee on the Elimination of Discrimination against Women is raising considerable awareness on this issue, and urging governments to take legal action. The United Nations has issued a declaration on violence against women and appointed a Special Rapporteur on violence against women who is working on this issue. Although progress has been made to raise awareness of female genital mutilation, much remains to be done. Female genital mutilation represents the physical undermining of women in a male-dominated society.

Although between 70 per cent and 80 per cent of the Communications dealt with by the Committee against Torture refer to northern countries, a balanced view of the situation must be borne in mind. These communications are mostly regarding violations of the principle of non-refoulement. States that commit systematic torture fail to recognize the communications system, and communications against them therefore cannot be considered.

Parliaments must combat corruption by ensuring that law enforcement officials receive sufficient training and an adequate salary. Corruption leads to torture and fosters a culture of impunity.

Mr. M. THOMSON (Secretary General of the Association for the Prevention of Torture): The Association for the Prevention of Torture (APT) does not condemn individual cases of torture, take up country situations or address rehabilitation or redress for victims, since these issues are dealt with by other bodies. The APT focuses on the prevention of torture, which is a strategic position that allows the Association to work with authorities that are committed to preventing torture and ill-treatment. The Association only works in countries whose authorities wish to collaborate with it. It gives views on what steps should be taken to prevent torture in certain countries. In future, the APT will comment on the national preventive mechanisms established pursuant to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. When these mechanisms are established, parliamentarians must engage with them to ensure that they are effective, have a body of competent staff and have adequate financial resources. The Association will carefully monitor their effectiveness and their compliance with the provisions of the Optional Protocol. The APT will therefore be increasing its engagement with parliamentarians to ensure that progress is made in developing measures and mechanisms for the prevention of torture. Countries must be willing to admit their problems and be committed to solving them before genuine progress could be made.

THE RESPONSIBILITY OF PARLIAMENTS AND THEIR MEMBERS TO PREVENT TORTURE AND ENSURE HUMAN CONDITIONS OF DETENTION: LEGISLATIVE AND OVERSIGHT MEASURES

Ms. L. ROSALES (Philippines): The end of martial law in the Philippines over three decades ago brought the Philippines to the forefront of the Asian countries that acceded to international human rights treaties. The Philippines is eager to stand alongside democratic countries that respect human rights and international justice. A number of measures have been taken in respect of the prevention of torture: the Philippines has acceded to the International Covenant on Civil and Political Rights and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and included provisions

against torture in the Charter of the post-Marcos Government, which accepts international law as part of the law of the land, prohibits torture, force, violence, threats, intimidations, secret places of detention, solitary confinement and incommunicado detention, states that any confession or admission obtained in violation of these prohibitions shall be deemed inadmissible, and provides that the employment of physically or psychologically degrading punishment against any prisoner or detainee or the use of inadequate penal facilities under sub-human conditions shall be dealt with by law.

A publication on the recognition, documentation and reporting of torture has been compiled by the national Human Rights Commission and the Medical Action Group, with assistance from the British Embassy of the Philippines, which states that between 1986 and 1992 there were 102 cases of torture against political dissenters documented in the Philippines, between 1992 and 1998 there were 179 such cases, between 1998 and 2001 there were 53 cases, and between 2001 and 2004 there were 63 cases affecting 146 victims. Between 1988 and 1998 there were 15,556 cases of documented human rights violations, the majority of which were classified as torture. These violations were committed against political dissenters, and the statistics do not take account of suspected criminals tortured for confessions.

Despite international standards and the Charter of the Philippines, the Government has not submitted regular periodic reports to the relevant international bodies to evaluate the progress of the implementation of international provisions at the national level. An initial report was submitted to the United Nations Committee against Torture, which was never followed up, and after a delay of 14 years, a report was finally sent to the United Nations Human Rights Committee following considerable pressure from NGOs. Since the ratification of these human rights instruments, nothing has been done by the post-Marcos governments to translate their provisions into domestic legislation and rectify 14 years of the erosion of democratic institutions. Instead of galvanizing the collective will to use human rights as a framework for policy making, governance and judicial action, the 347 presidential decrees of the Marcos administration that eroded the human rights of the citizens and distorted democratic institutions are still in place. The executive branches of subsequent administrations have found it convenient to retain Marcos's amplified powers and have refused to abolish or amend the decrees. The same applies to certain Supreme Court rulings on allowing warrantless arrests and indefinite detention. This is why extrajudicial killings, enforced disappearances and torture of arrested suspects, both criminal and political continue in the Philippines.

Efforts are needed to re-educate the people and reorient the education system to bring about change in citizens' political values. The repeated use of fascistic language has resulted in the public becoming accustomed to certain situations. An example of this is the term "salvage" which in the Philippines means to be summarily executed. The thought behind this is that summary execution is used to remove enemies of the State and thus save the country. The repeated use of such terms makes the process seem normal.

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Efforts are needed to re-educate the people and reorient the education system to bring about change in citizens' political values. The repeated use of fascistic language has resulted in the public becoming accustomed to certain situations. An example of this is the term "salvage" which in the Philippines means

to be summarily executed. The thought behind this is that summary execution is used to remove enemies of the State and thus save the country. The repeated use of such terms makes the process seem normal. I myself was subjected to torture in a “safe-house” under the Marcos regime, which was in fact a secret place of detention and torture. Young people’s consciousness must be changed to prevent them from becoming indifferent to fascistic practices.

In June 2005, the United Nations Committee on the Rights of the Child said that torture, inhuman and degrading treatment of children continued to exist in the Philippines, and recommended the establishment of a mechanism for magistrates to visit places of detention and conduct regular monitoring activities. The Committee also recommended the establishment of an inter-ministerial working group on human rights issues, which should continue to monitor the situation and take all the necessary steps for the prevention of torture.

In the Philippines Congress measures are being taken: a bill against torture is pending adoption, having been approved by the Committee on Justice, and it is hoped that the bill will be adopted by May 2007. A comprehensive juvenile justice law has also been approved, which is being enforced by local government units at the provincial level. The adoption of this law had caused considerable debate. Governors are now trying to translate the law into local legislation, down to the level of provincial and municipal governments. A human rights compensation bill, which provides for the granting of compensation to approximately 10,000 victims of torture, summary execution and enforced disappearance under the Marcos regime has been approved by both houses and is ready for bicameral deliberations. A number of parliamentarians have argued that compensation can only be granted through claims that undergo judicial process. On the other hand, they were blocking a United States court order to compensate the victims by arguing that claims for compensation must be legislated by the Philippines Government. It would seem that the Government simply does not see the need to compensate the victims of human rights violations. An anti-enforced disappearance act is currently pending before Congress and a bill on the rights of the accused has been drafted to try and improve conditions for arrested persons. Although the law on the death penalty has recently been repealed, which is a positive step, killings are still taking place before arrests.

In order to facilitate the process of raising awareness of human rights issues, a bill has been passed on the establishment of human rights resource centres in all provincial government units, police academies and military schools. A human rights resource centre has been established in the House of Representatives to conduct research, policy studies, education seminars and networking with local government units. Although the fight for human rights in the Philippines is an uphill struggle, efforts must continue, and with the help of the IPU, Parliamentarians for Global Action and other bodies, real progress can be made.

Ms. A.M. MENDOZA DE ACHA (Paraguay): An Inter-Institutional Commission for prison visits has been established in Paraguay and began work in October 2004. The Commission was established in response to disappointment in the continued lack of change in the political system. The Commission comprises representatives from the Ministry of Justice and Work, the Supreme Court, the Office of the Public Prosecutor, the Ministry of Public Defence, the Office of the Ombudsman, three NGOs, and the National Union of Prison Officers. Since prisoners do not vote, they are of no interest to politicians and are left languishing in detention. None of their rights are respected, and they are deprived of health, privacy, education and dignity. This constitutes a threat to the security of the country, since young offenders are imprisoned for crimes such as theft and become professional offenders while in prison. Prisons in Paraguay are to a certain extent factories of crime. The Inter-Institutional Commission has therefore been established to gather data on detention. It conducted visits to the 16 prisons in Paraguay, and compiled data questionnaires to fill in while holding private interviews with inmates, without the presence of prison guards. The Commission then compiled a report containing recommendations and suggestions, which was submitted to the President of

the Republic in 2005. Although the implementation of the recommendations was not provided for in the State budget, the Commission considered that improvements could still be made through sheer political will. A list of changes that were required in each prison was submitted to the Government: one prison had a lot of parking space but lacked space for inmates. The Commission therefore recommended that the parking space should be turned into an exercise yard for the prisoners.

In its first round of visits, the Commission saw that it was possible to reduce overcrowding in prisons. One particular prison, with capacity for 1,800 prisoners was holding over 3000 inmates when the commission visited. Around 260 young prisoners were being held there despite the recent legal change which had increased the age of criminal majority to 20 years. The young offenders who remained imprisoned with adults were in a dangerous situation and needed to be moved. The Commission found that the most common problems in prisons were overcrowding, the imprisonment of detainees who had not been sentenced, bad medical and dental facilities, and lack of medication, poor nutrition, and a lack of public lawyers. There was a lack of education, leisure and labour activities for detainees, so they remained idle for many hours. There was a lack of training for prison officers, a shortage of vehicles to transport accused persons to the courts, and no effective identification mechanism, which resulted in suspects giving false names, which were then used throughout the duration of the investigation and the trial, and in the sentence. Inmates said that they had no contact with a lawyer and did not know what stage their prosecution had reached. In response to this problem, the Commission established a computerized network to connect the judicial branch of the Government and the cases being tried in the capital, thus making it possible for the accused to have access to information on their cases through the computer. This is a pilot project, which if successful, will be used routinely in the future for all 16 prisons.

Based on its findings, the Commission recommended that adolescent detainees should be separated from adults and male and female inmates should be separated, those in pre-trial detention should be held separately from convicted criminals, and the problems of nutrition, hygiene and medical care should be addressed. In its first report, the Commission noted the following indicators for assessment: ratio of pre-trial to convicted inmates; ratio of inmates to infrastructure; modalities for taking inmates into detention; opportunities to receive legal aid; internal regulations of detention institutions; time delay between the end of a sentence and the release of the prisoner; the number of times inmates are sent to solitary confinement; the minimum standards of solitary confinement cells in respect of toilets, ventilation and light.

The Commission assessed the number of cases of violence in each prison in the three months prior to its visit, and the number of people stabbed or wounded in each prison during that time. There is a great deal of violence between inmates as a result of overcrowding. One particular prison was so overcrowded that it had “corridor” inmates, who did not have cells and slept on the floor in the corridors. They often resorted to violence to fight for space to lie down and sleep. The Commission studies the types of illness suffered by inmates, the number of doctors and dentists on hand in relation to the number of prisoners, the number of meals a day provided for inmates, the number of detainees per square metre of construction, the number of bathrooms, the number of prison officers per shift and the number of shift changes, and the training programmes provided for prison staff.

The Commission’s investigation showed that greater consideration should be given to the legal, religious, recreational, labour and health aspects of detainees’ lives, in order to prepare them for reintegration into society. The Commission found that although literacy programmes were available in some prisons, very few prisoners participated in them, since they were not encouraged or motivated to do so. The Commission also looked at the number of female detainees who attended sexual health education programmes, the percentage of prisoners kept in single cells and the number of prisoners able to obtain a reduction in their sentence.

The Commission conducted a second set of visits to the 16 prisons in 2006, to monitor the implementation of its recommendations and follow-up on its previous work. Some positive results could be seen, such as the building of a new prison for young offenders, to replace an institution where the conditions were particularly poor. In one prison, a young woman showed the Commission her bruises from ill-treatment in the presence of the prison director. The director was told that the woman's situation would be monitored very closely. It is particularly important that parliamentarians themselves conduct such visits, since they are the link with the Government, and can lobby ministers to take action. The Commission recommended that a team should be set up to monitor the computer network, prison guards should be redistributed across the penitentiary system, and a human rights body should be established to monitor the implementation of the Commission's recommendations. A bill has been presented on the establishment of the position of a representative for penal institutions, to ensure that prisons work towards the reintegration of prisoners into society.

DEBATE

Ms. M. F. PONCE BROCKE (Guatemala): Guatemala is in a similar situation to the Philippines in respect of the continuation of extrajudicial killings despite having appropriate domestic legislation and being party to a number of international human rights instruments. Such killings are affecting the structures of the country. Although Congress has done all it can to ensure that torture is absolutely prohibited in legislation, there is no mechanism in place to monitor the implementation of this legislation. Parliamentarians must meet their responsibilities in this regard. Torture should never be justified under any circumstances. Between 2000 and 2006, over 1,500 women have been killed with extreme brutality in Guatemala, but the Government has not responded, and the culture of impunity lives on.

Mr. M. NOWAK (United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment): Although the new law of the Philippines to punish torture is commendable, it only provides for the punishment of types of torture that leave signs of physical injury. Measures must be taken to ensure that other types of torture, which do not necessarily leave any physical marks on the body of the victim, are also punished.

The work of the Inter-Institutional Commission in Paraguay is to be commended. Does it conduct unplanned prison visits and make spot checks? Does it visit other detention centres, such as institutions for those in pre-trial detention and prisons for convicted criminals?

Parliamentarians have a duty to educate their communities to raise awareness and acceptance of alternative sanctions, and change the attitude that the only way of correcting a person's behaviour is to imprison them.

Ms. E. NGALEKA (South Africa)

Ms. A. OSMAN (Egypt): Torture should be criminalized through specific legislation containing precise definitions of torture and other types of ill-treatment, and sanctions for torture and ill-treatment should also be clearly defined, particularly with respect to the use of confessions obtained through torture. Legislators must state which bodies are responsible and have the authority to detain people. Detention in centres not officially recognized by law should be fiercely condemned. All detention centres should be open to monitoring. Young offenders should be separated from adult inmates, women and men should be detained separately, and inmates should be separated according to the gravity of the crime they have committed. Legislation on

the penitentiary system should take account of new types of sanction that reduce detention periods. Judges should monitor the implementation of sentences and should oversee the activities of detention institutions. National human rights commission should have ongoing contact with all NGOs and other bodies that have an interest in the promotion and protection of human rights.

Ms. E. NGALEKA (South Africa): Civil society has a role to play in assisting parliamentarians in the fight against human rights abuses. In South Africa there are three services in the penal system: the safety and security service, which is responsible for conducting arrests; the justice service, which is responsible for sentencing; and the correctional service, which receives convicts. However, inadequacies in the work of the safety and security and justice services are resulting in overcrowding in correctional service institutions. Since the majority of people in South Africa cannot afford to pay bail, the majority of suspects are remanded in custody pending their trial, whether detention is truly necessary or not, which results in overcrowding in detention institutions. Many people are held in detention for petty crimes, when detention is not absolutely necessary. Efforts are needed to increase the focus on alternative sentencing. Parliamentarians have a duty to educate their communities to raise awareness and acceptance of alternative sanctions, and change the attitude that the only way of correcting a person's behaviour is to imprison them. In some cases, fines or other sentences that allow the offender to remain in the community are effective. Prisons have the potential to become criminal education centres, and hives of gang behaviour. It is therefore preferable to sanction offenders in society where possible. Positive changes have occurred in cooperation between the three elements of the penal system, since the Government has instituted a cluster system, whereby inter-related services work together. This has led to greater collaboration and communication between the three services. Measures are being taken to conduct investigations before arrests are carried out, to avoid suspects being imprisoned for the duration of a police investigation before they are brought before the courts. Overcrowding leads to human rights abuses, and maximum efforts should therefore be made to rectify the situation.

Female genital mutilation is torture, not a tradition or custom.

Ms. S. MONAGENG (Commissioner, African Commission on Human and People's Rights)

Ms. S. MONAGENG (Commissioner, African Commission on Human and People's Rights): Through the African Commission on Human and People's Rights, African governments have decided to criminalize torture. Proper structures must be established to educate potential offenders and society at large. Female genital mutilation is torture, not a tradition or custom. A protocol to the African Charter on the Rights of Women has been adopted, which outlaws female genital mutilation. Efforts should be made to implement such instruments.

A hotline direct to the African Commission is being established for prisoners' complaints in order to give them and the public direct access to assistance from the Commission. The Commission has a working group on the implementation of the Robben Island Guidelines, which has drafted a set of recommendations that will be published and disseminated in the near future.

Mr. D. TUNGA (Angola): The Angolan National Commission on Human Rights receives petitions and complaints, and visits prisons throughout Angola, as well as visiting Angolan inmates in prisons in Portugal, Brazil and South Africa. Following a period of 30 years of war, the situation in Angola is improving. Pressure put on the Government by Parliament and NGOs has resulted in improvements to the prison regime, and a number of police officials have been dismissed for mistreating suspects. I would like to ask the representative of Paraguay whether the redistribution of prison guards that she mentioned is at the provincial or national

level. Is there a training centre for prison guards in the Philippines? Angola has a training centre for prison guards. The National Commission on Human Rights sets a programme which is submitted to the Government for approval, in order to plan human rights activities. NGOs are a very useful source of information and play an active role in human rights protection in Angola.

Angolan courts do not have financial autonomy, which has a negative effect on the administration of justice. The Parliament is encouraging the Government to rectify this situation, and hopes that with the stabilization of the economy this problem will be overcome.

Ms. L. ROSALES (Philippines): The Philippines bill on the punishment of torture included the definition of torture as set forth in the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. The bill states that the right not to be subject to torture is non-derogable, and defines perpetrators and conspirators in torture. Although prison guards receive training in the Philippines, greater attention to human rights education is required. People on death row have usually been tortured, and are too poor to pay for competent legal counsel. Legislation has been drafted on the protection of the rights of detainees and accused persons.

Ms. A. M. MENDOZA DE ACHA (Paraguay): Paraguay has signed and ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and it is in this context that the national Inter-Institutional Commission is conducting prison visits. The Commission had been unable to make unannounced visits thus far. The next round of visits will be unannounced. The Commission has visited juvenile detention centres. In many prisons, pre-trial detainees and convicted prisoners are detained together.

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themselves.*

Ms. A. M. MENDOZA DE ACHA (Paraguay)

As in South Africa, many poor people in Paraguay are imprisoned because they cannot afford to pay bail. This problem must be rectified, and greater efforts are required to educate people in respect of values and to combat poverty. Parliaments must play an oversight role to ensure the prevention of torture, and must ensure that legislation is enacted. The redistribution of prison officers takes place within prisons. New legislation has been enacted to provide human rights training for prison officers. Although information from NGOs is important, parliamentarians must conduct visits to detention institutions, to see the conditions for themselves.

ENSURING THE FAIR COURSE OF JUSTICE

THE RIGHT TO A FAIR TRIAL: LEGAL OVERVIEW

**THE PRESUMPTION OF INNOCENCE,
EQUALITY OF ARMS AND THE RIGHT
TO BE TRIED WITHOUT UNDUE DELAY:
WHAT PARLIAMENTS CAN DO TO
GUARANTEE THESE ESSENTIAL
INGREDIENTS OF THE RIGHT TO A
FAIR TRIAL**

**HOW TO ENSURE AN INDEPENDENT
AND IMPARTIAL JUDICIARY, A PILLAR
OF DEMOCRACY**

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THE RIGHT TO A FAIR TRIAL: LEGAL OVERVIEW

Mr. N. HOWEN (Secretary-General of the International Commission of Jurists): There is an increasing connection between international law and justice. In guaranteeing the right to a fair trial, national practices are converging with international standards. Over the years, court decisions taken all over the world have served as examples which have led to the development of a set of international laws and standards on fair trial. Parliamentarians should seek to understand and apply these standards, and incorporate them into national legislation.

The right to a fair trial begins from the very moment a person is suspected of having committed a criminal offence, and continues until that person's conviction or acquittal on appeal. At every stage in the legal process the rights of the defendant are important and whether or not they are respected could affect the eventual trial. The right to a fair trial in fact combines a number of inter-related rights, which show whether a defendant has been treated fairly under international laws and standards. Rights relating to fair trial are described in international and regional instruments. Article 14 of the International Covenant on Civil and Political Rights sets out the rights of persons accused of having committed a criminal offence. These rights are set out in similar terms in regional human rights treaties in the Americas, Africa and Europe. Over time a convergence has occurred in practices relating to criminal trials and the international standards, and with the examples of the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, practices from common law and civil law countries are coming together, to form a common set of rights relating to fair trial.

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Mr. N. HOWEN (Secretary-General of the International Commission of Jurists)

The key features of the right to a fair trial include equality. Judges and the law must treat all people equally, and must not discriminate on grounds of race, political beliefs, religion or gender. Equal access to the courts must be guaranteed for all. Fair trial cannot exist unless all courts and judges are independent and impartial, and are granted their jurisdiction by the law. This separation of power is at the heart of the principle of a fair trial. There must also be equality of arms: equality between the prosecution and the defence, in accordance with which both must have equal and reasonable opportunity to present their case, equal access to court documents and equal treatment by the judge.

The right to a public hearing is a fundamental fair trial right, which is frequently violated. Consistently fair trials will not take place unless hearings are held in public, since this allows parliamentarians to scrutinize the way in which justice is administered. Closed trials are usually held to hide injustice. The public nature of trials is a fundamental principle of international law. Information must be given about the time, date and location of the trial in good time, in order to allow the presence of the public and the press in significant number, and the judgments of the trial must be made public. There are a small number of cases in which

the non-application of this rule is permissible: if there are problems of public order in the court-room, if the private lives of the parties must be protected, or if the closure of the trial is in the interests of public security. This is the most greatly abused exception to public hearing, which is used to perpetuate impunity if officials are being tried, or to hide the fact that trials are unfair. The decision to close a trial in the interests of public security can only be taken on a case by case basis. Parliamentarians should be the guardians of the right to public trial.

The presumption of innocence is a fundamental right, according to which the prosecution must prove beyond reasonable doubt that the crime has been committed by the accused. The right not to be compelled to testify or confess guilt stems from the presumption of innocence. This is a vital right, since in many countries, convictions are made on the grounds of confessions, which are often extracted through torture or other forms of coercion. This right, which is linked to the prohibition of the use of information in court that has been extracted by torture, is currently being weakened and eroded.

The prohibition of the retroactive application of criminal law does not prohibit conviction for acts which in the country in question are not crimes under national law, but are crimes under international law, such as genocide, other crimes against humanity and war crimes. The rule against double jeopardy is linked to the prohibition of the retroactive application of criminal law, and protects individuals from going through the ordeal of being tried twice. The exception to this rule is that if the purpose of the trial was to shield the defendant from criminal responsibility, or if the proceedings were not conducted in an independent court, or were conducted in a manner inconsistent with bringing that person to justice, the case can be re-opened.

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The right to be tried without undue delay is a particularly complex right, since the question of how to define “undue delay” varies from case to case: in one case before the European courts in which 36 defendants were on trial for over 8 years, the court ruled that the delay was not undue given the complexity of the case. On the other hand, under some circumstances, 2 years is considered excessive for the completion of a trial. The right to defence, the right to legal counsel, the right to be present in court and the right to free legal assistance if the interests of justice so require, is also central to a fair trial. Parliamentarians have an important role to play in this regard, since under international law, there is no absolute requirement to provide the accused with a lawyer free of charge if he or she does not have the means to pay. The European Court of Justice has stated that if a person is not given access to a lawyer when facing charges for minor driving offences, this does not constitute a violation. However, a defendant who is accused of a serious crime and risks execution must be granted access to a lawyer, irrespective of whether he or she is in a position to pay for legal services.

The defendant must have the right to question the witnesses testifying against him or her. If the witness’s identity is not disclosed, this constitutes a violation of the right to a fair trial. In some cases, it is held that the anonymity of the witness is permissible, if there is a real fear that the accused could organize reprisals against the life of that witness. For over 50 years, the International Commission of Jurists has been studying

situations in which fair trial rights are most at risk. In 1983, the Commission conducted a review of the laws and practices of states of emergency, since some rights can be suspended at such times, while others must always be guaranteed. Governments may only declare a state of emergency in accordance with the conditions set out in article 4 of the International Covenant on Civil and Political Rights. All too often, governments declare states of emergency in conditions that are not covered under that article. Any measure to suspend rights during a state of emergency must be temporary, must be a last resort, must be necessary and must not discriminate against people on illegitimate grounds. Some rights may not be suspended under any circumstances. Unfortunately, fair trial rights are too often weakened during states of emergency. Although these rights are not expressly listed as being non-derogable during a state of emergency, the United Nations Human Rights Committee has stated that any rights required to protect non-derogable rights cannot themselves be suspended, such as the right to habeas corpus, which provides protection against disappearance, torture and arbitrary execution. The United Nations Human Rights Committee has also stated that since international humanitarian law does not allow the weakening of the right to a fair trial during wartime, that right equally cannot be weakened during peacetime. It should therefore not be suspended during a state of emergency. The jurisprudence of courts and the United Nations Human Rights Committee has provided a clear set of standards on the protection of fair trial rights during states of emergency.

Over the past five years it has become clear that in the context of counter-terrorism, which is seen as a form of emergency in some countries, laws are applied that exclude the jurisdiction of courts to oversee counter-terrorism measures, including the restriction of the right to habeas corpus. There has also been an increase in the use of exceptional or military courts to try terrorism suspects, and attempts have been made to allow information extracted under torture to be used as evidence in court. It is particularly shocking that torture is beginning to be considered acceptable in certain circumstances, with the use of certain judicial safeguards. Attempts have also been made to allow the use of hearsay evidence, which cannot be challenged by the accused.

If parliamentarians wish to ensure that fair trial rights are enshrined in law and practice, efforts must be made to establish courts and appoint judges that are independent, competent and impartial, incorporate fair trial rights into national constitutions and codes of criminal procedure, establish independent State institutions to monitor the independence and functioning of the justice system, and defend fair trial rights in legislation that regulates states of emergency and counter-terrorism measures. Parliamentarians must be vigilant in respect of laws that exclude these rights in times of crisis. If fair trial rights can be defended in times of conflict, they can also be defended in peacetime.

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I refer to a statement made by the United Nations High Commissioner for Human Rights Louise Arbour in 2004: if parliamentarians wish to ensure that fair trial rights are enshrined in law and practice, efforts must be made to establish courts and appoint judges that are independent, competent and impartial, incorporate

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THE PRESUMPTION OF INNOCENCE, EQUALITY OF ARMS AND THE RIGHT TO BE TRIED WITHOUT UNDUE DELAY: WHAT PARLIAMENTS CAN DO TO GUARANTEE THESE ESSENTIAL INGREDIENTS OF THE RIGHT TO A FAIR TRIAL

Mr. L. DESPOUY (United Nations Special Rapporteur on the independence of judges and lawyers): In the past 30 years, the number of international human rights laws in place has increased greatly, and considerable efforts have been made to consecrate the rights of those in detention and on trial. International criminal law permits the judgement of serious crimes perpetrated by the State. In such trials however, some principles do not apply, such as the statute of limitations in respect of certain acts.

The presumption of innocence and the right to be tried in public are universal principles, which apply in all countries and under all circumstances. The IPU has a mechanism which provides for the protection of parliamentarians who have been victims of human rights violations. The jurisprudence of the IPU Committee on the Human Rights of Parliamentarians is particularly important in respect of the right to a fair trial. In 1993, the IPU published a Manual which deals specifically with the defence of the human rights of parliamentarians. It contains an important chapter on the right to fair trial.

The right to the presumption of innocence must be considered in conjunction with other rights, such as the right to equality of arms. A person cannot be sentenced unless evidence is produced that he or she has committed the crime. Under procedural law, this evidence must not be obtained illegally. This structure is in place to protect the moral, physical and intellectual integrity of the accused person. This right is connected to all other fair trial rights. In respect of equality of arms, an accused person has the right to prove his or her innocence and should have access to assistance, in order to refute evidence, if necessary. In some States, judges have a passive role during trials: the prosecutor plays a decisive role and the defence has a secondary role. This poses a threat to equality of arms.

According to international standards, trials must take place without undue delay. When considering situations of prolonged periods of remand in custody before a conviction, account must be taken not only of the length of time the trial is taking, but also of the length of time the accused was held in detention before the trial began. In some regions, there is a tendency to hold accused persons in pre-trial detention for longer than the maximum possible period of detention for the offence they are accused of having committed. The IPU Committee on the Human Rights of Parliamentarians has dealt with many cases where parliamentarians have been detained for prolonged periods before being brought to trial. Measures should be taken to intervene in such cases.

The function of the Special Rapporteur on the independence of judges and lawyers is to address the issue of the work of judges and lawyers at the international level, and carry out ongoing monitoring activities

in situations where judges face threats or attacks, or when justice is undermined and its independence jeopardised. The greatest difficulties for judicial systems occur during times of crisis and emergency situations in which States have recourse to the declaration of a state of emergency. During a state of emergency, judicial principles must be respected. Judges should ensure that these principles are upheld in respect of detainees and the establishment of extraordinary tribunals. In the event that a State wishes to declare a state of emergency, it must make its decision known at the international level, and declare which rights have been suspended, and how long the state of emergency is expected to last. Parliamentarians must approve or reject the declaration of the state of emergency, and have an important role as a protective mechanism for human rights. Many rights are affected by the establishment of extraordinary tribunals and the use of military courts during states of emergency. Under international law, the military cannot judge civilians or cases of serious human rights violations. This principle is often disregarded during states of emergency.

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Mr. L. DESPOUY (United Nations Special Rapporteur on the independence of judges and lawyers)

Following the events of 11 September 2001, many countries decided to strengthen national legislation in order to combat terrorism. Although terrorism must be condemned, measures to combat it must fall within the legal arms of democratic States and the rule of law. Human rights protection standards must be applied during counter-terrorism activities. Unfortunately in many cases, these standards are not being respected, and efforts must be made to regain true democracy. A number of Special Rapporteurs of the United Nations have published a report on the situation in Guantanamo Bay. Their report states that the detainees are suffering from the disrespect for their basic human rights: the rights to defence, equality of arms, the presumption of innocence and to be judged by an impartial, competent and independent court. The erosion of respect for human rights behind the fight against terrorism is particularly preoccupying, not only from a procedural point of view, since cases are being moved from civilian to military courts, but also in respect of the violation of the rights to freedom of expression and association.

Basic fair trial rights are set out very clearly in the International Covenant on Civil and Political Rights and in regional instruments. Parliamentarians have an important role to play in encouraging States to ratify these instruments and ensure that national legislation is in line with them, and as guardians of human rights during states of emergency.

DEBATE

Mr. A. B. JOHNSSON (Secretary General of the Inter-Parliamentary Union): Both of you have spoken about the role of parliaments being a legislative function, but you did not mention the oversight function, and thus imply that oversight should be left to independent bodies. The IPU Committee on the Human Rights of Parliamentarians believes strongly that parliaments have a vital role to play in monitoring the functioning of the judiciary. Although parliaments should not enter into discussions about whether a parliamentarian is guilty of committing a crime, they should intervene in the event that a parliamentarian is a victim of malfunctions in the judicial system. Unfortunately, many parliaments refuse to intervene in

such circumstances, on the grounds that the separation of powers means that monitoring of the judiciary is outside the parliamentary mandate. A number of such cases have come before the IPU Committee on the Human Rights of Parliamentarians, such as the case of one parliamentarian who was tortured in detention. The Committee requested a thorough parliamentary investigation into ill-treatment in detention institutions in the country concerned, which the parliament refused to conduct on the grounds of separation of powers. Similarly, one particular parliamentarian was convicted of a crime three years ago, and immediately launched an appeal. He has already served three years of a seven-year prison sentence, and the appeal hearing has not yet begun. The parliament should raise this issue with the judicial authorities and find out when the appeal hearing is due to take place, and whether such delays are common. It should take measures to rectify the situation and ensure that the judicial authorities have the means to address an appeal in the time in which it is useful to do so. The parliament in question has refused to take action on the grounds of separation of powers. In cases in which a parliamentarian is convicted and immediately launches an appeal, the right to presumption of innocence should prevail throughout the whole case, and not stop at conviction at the first instance. The parliamentarian should be able to continue his or her parliamentary activities until the appeal process is complete.

In trials connected with the fight against terrorism, there are an increasing number of cases of people being convicted on the basis of “secret” evidence, which is linked to security concerns. The defence does not have access to secret evidence, and can only be granted access if the State deems it useful. The time period between arrests and the accused being granted access to a lawyer is being prolonged in anti-terrorism cases, and security concerns are being used as an excuse to hold suspects incommunicado for longer than the acceptable period.

Ms. G. A. DE LEON RUIZ (Guatemala): In Guatemala, the majority of cases that come before a judge have not been properly investigated. Only the poor are imprisoned, and the fact that there is corruption in the judiciary and that judges can be paid off, has led to a culture of injustice and impunity, public rebellion and the people taking the law into their own hands. The police are involved in extrajudicial killings. When a state of emergency was declared in the San Marcos region in August 2006 constitutional guarantees were removed without consulting Congress. A major military operation was carried out in a prison, resulting in the deaths of eight hostages. The constitutional rights of innocent people have been restricted. States of emergency should be limited in time, and the freedoms guaranteed in the Constitutions should not be abrogated. Pursuant to Guatemalan penitentiary legislation, the military is not permitted under any circumstances to penetrate places of detention. This regulation is being violated, and the army are searching prisons and private houses. Parliamentarians must fulfil their oversight role, and must not be paid off by the executive branch of the Government and by the judiciary. Parliamentarians have an obligation to monitor the activities of the other branches of Government.

Mr. M. GOWEILY (Egypt): Human rights must be respected at all times, regardless of the situation in a country, whether trials take place in ordinary courts or extraordinary tribunals, whether the country is in a conflict situation and in the context of the fight against terrorism. Although terrorism must be condemned, the human rights of suspects must not be violated. Parliamentarians must monitor the application of sentences, in order to ensure that violations are not committed. The right to a fair trial applies in all stages of a case, from the moment of arrest through the investigation to the trial and throughout the appeal. If certain human rights are to be curtailed during any of these stages, the specific circumstances must be codified, in order to regulate and limit rights restrictions. Legislators have a duty to provide for the protection of all rights, including the right to privacy.

The principle of the separation of powers is not absolute, and the various branches of government must cooperate. Parliaments must monitor and follow-up cases of human rights violations, and must analyse

weaknesses and failings in legislation, and rectify them. Parliaments must not, however, interfere in the work of the judiciary, since judicial independence and impartiality are of paramount importance. Exceptions to the principle of public hearings should only occur in specific cases, such as for the protection of minors. These situations must be clearly and specifically defined in legislation. Parliamentarians should analyse failings in the system and should amend legislation accordingly.

Mr. G. SILVA (Portugal): Where do the boundaries lie in the separation of powers, and who should decide at what point parliaments can intervene when judicial powers fail to respect the rules of fair trial and the rule of law?

Mr. A. LO (Senegal): What can be done to ensure that effective instruments are available to national and regional judicial authorities to ensure the protection of human rights? Do the IPU and the African Parliamentary Union Regional Parliamentary Association plan to take measures in this regard?

Mr. M. AHMED IDRIS (Ethiopia): What can be done to ensure the protection of witnesses of torture and corruption?

Ms. L. ROSALES (Philippines): The Philippines recognizes the separation of powers, but the executive branch of Government always seems to have the upper hand. The Parliament is relying on the court system to regulate the executive's restriction of the rights of parliamentarians. How have other countries managed to develop the separation of powers in order to enable the three branches of government to work harmoniously, and overcome the problems of a citizenry that is kept powerless for the advantage of the privileged few in power through restricted access to information, and a bureaucracy that serves the vested interests of those few?

Mr. E. T. SERAJ (Sudan): The Sudanese National Human Rights Committee has conducted prison visits and has seen that the Sudanese judiciary is independent and that justice is handed down in a fair manner. The Committee has checked detention conditions, and witnessed cases in which confessions obtained under duress were rejected by the courts. The exceptions to this are rare. In one particular case, two parliamentarians were arrested in two provinces of Sudan, but were released as a result of parliamentary intervention. What can be done to protect the Palestinian parliamentarians arrested by Israeli authorities and deprived of their own defence counsel during trial?

Mr. F. SOPHOCLES (Cyprus): Does the International Commission of Jurists rely on judges and jurists to promote fair trial regulations, or can it take measures to promote the protection of fair trial rights?

Mr. M. BOUDIAR (Algeria): A number of rights should be guaranteed, including the right to a public trial and the right to direct contact between the judge and the accused. There is a tendency in Algeria to violate the right to equality of arms. The Public Prosecutor often abuses his authority and the trial becomes an interrogation of the accused. The judge should have a positive role and the accused should be allowed to submit his or her own evidence for consideration. The right of the accused to choose to remain silent should also be protected at all times.

Mr. P. NTAVYOHANYUMA (Burundi): Burundi has recently seen the end of 10 years of violence, which seriously damaged the justice system. Thousands of citizens were imprisoned without trial, and sentenced on the basis of mere accusations. Judges and defence lawyers were felt to be part of the political system, and the whole body of justice was discredited. The Ministry of Justice is now trying to remedy this situation, and is releasing thousands of prisoners. Efforts are being made to increase the credibility of the justice system and demonstrate that a system of impartial justice is achievable. Equity in the administration of justice is of

capital importance, and parliaments must make the necessary commitments to ensure that impartial justice systems are established and maintained, and that they are truly credible.

Ms. C. MAZARIEGOS TOBIAS (Guatemala): Since Guatemala is a developing country, its population is living in a situation of contrasts. Fraud has been occurring in the supreme electoral body for the past 20 years. All Guatemalan courts appear to be corrupt. The establishment of an international institution could help Guatemala achieve a situation in which the human rights of those coming before the courts can be protected.

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Mr. N. HOWEN (Secretary General of the International Commission of Jurists)

Mr. N. HOWEN (Secretary General of the International Commission of Jurists): Parliaments, as public bodies, play a vital role through holding hearings and investigations, and through the work of parliamentary committees in situations where there are systemic problems in relation to the independence of the judiciary, or where the elite have grasped control of the judicial system and are restricting access to justice for others. Parliaments provide a forum for public discussion of important issues. When parliamentarians are tortured in detention or held in detention for prolonged periods before an appeal hearing begins, although parliaments are in a position to request an investigation, the executive or the prosecutor handling the case for the Government is responsible for ensuring that the case comes before a judge. Parliaments cannot interfere in court decisions, but they have a role to play in drawing public attention to situations of concern and investigating the systemic problems.

The International Commission of Jurists has established an Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, which is travelling around the world conducting hearings on the issue of the use of secret evidence in counter-terrorism cases, in which evidence collected by intelligence agents is kept confidential in order to protect those agents. It is clear that in these cases, the pendulum has swung too far away from the interests of the defendant. In order for a trial to be fair, accused persons must be able to question the origins and weight of the evidence against them. New draft legislation in the United States of America still allows for secret evidence to be held back from the accused in counter-terrorism trials. This is a fundamental violation of the right to a fair trial. Although there are situations where secret evidence that has implications for national security can be seen by special advocates who have been appointed by the courts, this is also problematic.

All detainees must have immediate access to the outside world, in order to ensure that they are protected against torture, disappearance and extra-judicial execution. In accordance with the law, detainees must be brought promptly before a judge. It is generally considered that this should take place within 24 hours of arrest. Persons taken into custody must have access to the lawyers and doctors of their choice, and to their families. This should also be granted within 24 hours of detention. Although for reasons of national security this right can be curtailed for a matter of days, other safeguards must be in place: the detainee must be granted access to an independent physician, his or her family must be notified of the detention, and an independent lawyer appointed by the Bar Association must have access to the accused.

The independence of the judiciary in practice is not a question of financial resources, but rather of political will. However, the poor training of judges, low salaries resulting in judges accepting bribery, and the lack of a system to track cases as they go through the courts result from a lack of financial resources. The International Commission of Jurists tries to make these concerns known, and encourage organizations such as the United Nations to increase resource allocations, and to inform other States that they have a fundamental obligation to assist those with fewer resources. One positive development has been the increase of pressure on the United Nations Security Council and the United Nations in general to allocate increased resources over a long period to countries emerging from conflict situations. The United Nations Peacebuilding Commission has been established, the main purpose of which is to see how funds can be obtained from States that have financial resources, and distributed among those that do not.

In many countries the reality is that the State justice system does not function, and people turn to alternative forms of justice. This can be solved through institution-building, and through the incorporation of traditional forms of justice into the State justice system, such as the use of alternative systems of dispute resolution.

Fair trial rights must apply at all times, except in cases of clear exceptions, which are narrowly defined in legislation. Witness protection requires a well-developed judicial system with adequate financial resources, in order to change the identity of a person, provide police protection, or relocate a person within a country or to a foreign country if necessary. In countries where there is a lack of resources and State institutions are weak, it is very difficult to protect witnesses. Even in wealthy countries with sophisticated systems, and in international tribunals, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, there are considerable problems in guaranteeing effective witness protection. The Office of the United Nations High Commissioner for Human Rights has published a manual on witness protection.

The International Commission of Jurists has serious concerns about the arbitrary detention of Palestinian parliamentarians who are not combatants and are not involved in the conflict with Israel. The IPU has a vital role to play in such cases, as do the special procedures of the United Nations Human Rights Council, bodies such as the International Commission of Jurists and others. Israel is not, however, the only country where the arbitrary detention of foreign parliamentarians has taken place.

International assistance is necessary in Guatemala, but the Parliament and Executive have a considerable responsibility. The Guatemalan Parliament has recently passed a retrograde law that increases the jurisdiction of military tribunals, at a time when this should, in fact, be reduced. Although the International Commission of Jurists is in the process of establishing an office in Guatemala in order to assist, there are some fundamental issues which must be solved through political will to uphold certain standards. The issue of bureaucracy and the elite raised by the representative of the Philippines is particularly important, and recognition is required of where procedural fairness ends, and where substantive access to justice begins. International organizations have often placed too much emphasis on procedure.

HOW TO ENSURE AN INDEPENDENT AND IMPARTIAL JUDICIARY, A PILLAR OF DEMOCRACY

Ms. E. JOLY (former Judge, Special Advisor at the Norwegian Agency for Development Cooperation): I worked for 20 years as a judicial official in France. I spent 10 of those years working as an investigating

judge, conducting investigations and inquiries. I worked on the Elf corruption case, the largest corruption case in Europe, which finished in 2002, after which I began work for the Norwegian Government as an advisor on corruption and money laundering. In this context, I meet government representatives in countries with which Norway has bilateral agreements.

The democratic ideal of an independent, competent judiciary that is not corrupt and works alongside the legislative and executive branches of government does often not exist in reality. There are only a handful of countries in which the judiciary truly functions effectively, even in regions where there are well-established democracies the judiciary is often paid the least attention, since its development is not politically interesting. Many countries have not modernized their judiciary, and many courts do not operate to their full capacity. The temptation for political interference in the work of the judiciary is constant. These problems are even greater in developing countries. The interference of the Executive in the work of the judiciary in respect of major economic crimes is very tempting and very serious. In France, the newly appointed chief of public prosecution is the former personal counsellor of the President of the Republic. Nicholas Sarkozy has stated that there is a lack of respect for the independence of the judiciary in France, and that judges are responsible for some of the petty crime that occurs in France.

The recruitment of judges must be such that the most competent judges are appointed. Recruitment should take place through competitive examinations or through the open advertisement of posts in the press. The process of recruitment must be transparent and the public must have access to information regarding why a particular candidate was selected. In many countries this is not the case, and often in developing countries judges are not as competent or honest as they should be. Unfortunately there is no ideal solution to the problem. In Madagascar for example, it would be impossible to immediately find between 400 and 500 new judges to fill the posts that would become vacant if those guilty of corruption were removed from office. The leaders of developing countries should give a clear message that practices tolerated in the past are not tolerated any longer. Training sessions on rules and ethics must be held for judges. Judges in Madagascar have been found to be employing detainees to carry out some of their duties. This practice is unacceptable. As an advisor, I encourage the Malagasy authorities to train judges and to begin to bring proceedings against corrupt judges and lawyers. It should be made known that from a certain date the acceptance of bribes will not be tolerated.

In Indonesia, the highest judge of the Supreme Court has said that the problem of corruption continues to exist, since judges do not receive adequate remuneration. Greater efforts are required to change this situation. In Kenya, following the most recent elections, a number of judges were dismissed on charges of corruption. In the Baltic States the candidatures of all judges have been reassessed and only one third of serving judges have been allowed to continue their activities. The problem of where to find replacement judges remains serious.

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The only effective way to combat corruption is to set a date and state clearly that henceforth corruption will no longer be tolerated. A number of highly publicized court cases should be held to demonstrate the new zero-tolerance policy, and to ensure that the whole population understands the gravity of the situation. Efforts are required to make judges aware that they can be independent, and can resist authority and pressure brought to bear on them. While it is easy to have high principles when talking about the need to combat corruption, it is difficult to introduce anti-corruption measures in practice without guarantees that judges cannot be removed from office if they fail to comply with the wishes of government ministers. Judges must be given adequate remuneration and appropriate training, to ensure that they do not hand down sentences merely on the basis of instructions or bribes.

The judicial system is the most important institution for ensuring true enjoyment of human rights, and priority must therefore be given to the establishment of an honest, fair judiciary, and the bodies responsible for development across the world must take account of this.

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In the process of eliminating corruption, investigators face a number of problems. In Nigeria, during the investigations of a number of governors on charges of embezzlement of donor funds, members of the investigation team led by Nuhu Ribadu were assassinated. Threats, violence and terror are a reality in countries that have recently emerged from conflict. Debt-relief is being given to the Republic of the Congo while the President has tremendous hidden wealth. It is extremely difficult to investigate such corruption and establish an independent justice system. Efforts are required at the international level to bring an end to such impunity. In Nicaragua, although 100 million dollars have been seized from Arnoldo Aleman, who has been convicted on corruption charges, he remains at large and is preparing his candidature for the forthcoming presidential elections. In Bulgaria judges benefit from immunity, and therefore cannot be prosecuted, even if caught *in flagrante delicto*. Only the public prosecutor has the authority to lift the immunity, and rarely does so. The judicial system is the most important institution for ensuring true enjoyment of human rights, and priority must therefore be given to the establishment of an honest, fair judiciary, and the bodies responsible for development across the world must take account of this.

In Zambia the embezzlement of donor funds by former President Chiluba has been used for business purposes in Great Britain, and in South Africa, the French arms company Thomson CSF has been found to be involved in the corruption case against former deputy president Jacob Zuma. It is interesting that in this case, the legal proceedings have been instituted by South Africa, rather than by France. Many European and American companies obtain contracts on the basis of corruption. Action taken by developing countries that have established functioning judicial systems will therefore have a worldwide effect on corruption. Development aid should be used to create a law enforcement system and judicial system that correspond to the ideals of independency, competence and honesty. Much remains to be done in order to achieve this on a global level.

DEBATE

Mr. B. I. NA'ALLAH (Nigeria): In response to the earlier comment of the Secretary-General of the IPU, I wish to say that jurisprudentially the presumption of innocence ends with conviction at first instance. As concerns Ms. Joly's comments regarding the investigations conducted by Nuhu Ribadu, the Nigerian

Bar Association has called for Mr. Ribadu's resignation in order to put an end to his violating individual constitutionally-guaranteed rights, which must not continue, even under the guise of combating corruption. Africans should be encouraged to try to attain the civilized delivery of justice in order to make the world a safer place.

Mr. O. MAGARA (Kenya): Although the new Kenyan Government wishes to reform the judiciary, it has done so hastily and politically, dismissing over 200 magistrates and 20 judges. Those of certain ethnic groups have been removed from office and replaced by people from the ethnic groups represented in the Government. There is therefore a lot of discontent and nine judges have refused to resign. A tribunal has been established to investigate these judges, and in the meantime although they cannot be replaced since they are still considered to be on duty, they are not working and there is an increasing backlog of cases. The Government does not appear to have any evidence against the nine judges, and is seen to have wanted to punish certain communities. As a result of this, the opposition is gaining support for the forthcoming elections.

Ms. A. M. MENDOZA DE ACHA (Paraguay): If judges cannot be dismissed, as suggested by Ms. Joly, this would have disastrous consequences in Paraguay. Many judges in Paraguay are too involved with the political powers, if they could not be dismissed all hope of reforming the judiciary would be lost.

Mr. E. T. SERAJ (Sudan): For 30 years the primary concern in Sudan has been to try and ensure impartiality of judges and to guarantee that no exactions are made. Efforts have been made to ensure that legislation applies to all regions and ethnic groups, and the independence of the judiciary is particularly important in that regard. Independence is essential to allow judges to hand down sentences without being subject to any pressure. This is essential in Sudan's transition to democracy. An independent office responsible for the independence of the judiciary has therefore been established, which appoints judges and establishes the conditions of work within the judicial system.

Ms. H. J. PEREZ REYES (Guatemala): Lack of financial resources is a determining factor in the independence of the judiciary. When judicial bodies depend on budgetary allocations from the executive branch of government, their independence cannot be guaranteed, especially when allocations are only given in the short term. There are advantages and disadvantages to being able to remove judges from office, and specific grounds on which judges can be dismissed should be codified. These should be set for each country individually, in order to take full account of specific circumstances and country situations.

Ms. E. JOLY (former Judge, Special Advisor at the Norwegian Agency for Development Cooperation): Politicians sometimes remain in power despite their proven guilt, under the principle of presumption of innocence. This occurred in France, when Charles Pasqua was suspected of having committed serious crimes, but was not prevented from being involved in the legislative process. Such cases represent the misuse of an important principle.

Kenya's example of the difficulties in reforming judicial systems demonstrates that there is no quick fix solution to the problem of corruption. Creating an independent judiciary is an extraordinary task. In this regard, bilateral support for those trying to change the system from within is particularly important.

On the issue of removing judges from office, there must be a clear distinction between the correct dismissal of judges for misconduct, and the removal of judges from office simply because the Government wishes to get rid of them.

Mr. L. DESPOUY (United Nations Special Rapporteur on the independence of judges and lawyers): Clearly, a strong judicial power is the most effective means of combating corruption. The right of

accused persons to remain silent is very important. I am concerned about the situation of the Palestinian parliamentarians who are not being tried in accordance with due process, and in my capacity as Special Rapporteur I have protested on their behalf, against the violation of the basic standards of prosecution.

When it comes to the relationship between parliaments and the judiciary, the ability in some countries of members of Parliament to hand down prison sentences to their fellow parliamentarians goes beyond respect for parliamentary jurisdiction. In many countries the national human rights commissions play an important role in bringing to light miscarriages of justice, and in many situations these bodies have proven competent to intervene in a timely fashion. It is important to promote the presence and responsibility of judicial powers in the effective administration of justice, but there are limits to this. There have been many cases where parliaments, with political motivation, have been a factor in creating a situation that has destabilized the judicial branch of government. At the end of 2004, the Parliament of Ecuador removed the Supreme Court, the Electoral Court and the Constitutional Court, removed the judges from office and arbitrarily replaced them. This resulted in a constitutional crisis, which led to the President of the Republic being forced to resign. Often crises of the judicial branch of government can lead to institutional, political crises, in which I am required to intervene as Special Rapporteur. In the case of Ecuador, I requested the reconstruction of the judicial branch of government, and was an observer in that process. Ecuador now has a new Supreme Court, with an independent and fairly appointed judiciary.

Budgetary issues are very important, since adequate means must be allocated to enable the judiciary to function properly. Restrictions on budgetary allocations must be lifted, since the earmarking of amounts of funding allows pressure to be exerted.

Mr. L. DESPOUY (United Nations Special Rapporteur on the independence of judges and lawyers)

Problems occur all over the world with respect to witness protection. Real protection of witnesses is not guaranteed. In many countries, people who have filed complaints about corruption become victims of severe persecution and vengeful actions. It is essential that this issue be dealt with in order to successfully combat corruption. It is very difficult to find a model of an effective, operational judiciary, even in developed countries, since there are often considerable failings in the legal system. An interesting model to use as a point of reference is the Italian judiciary, which has been able to fight political crime and organized crime and has survived. Organized crime can only be combated through a holistic approach, with coherent coordination between all actors in the judicial system. This requires true independence at all levels. The judiciary must abide by legislation, and the law must sanction any efforts to limit the independence of the judiciary, in order to prevent it from becoming vulnerable and being subject to direct or indirect pressure and lobbying. Budgetary issues are very important, since adequate means must be allocated to enable the judiciary to function properly. Restrictions on budgetary allocations must be lifted, since the earmarking of amounts of funding allows pressure to be exerted.

Objective impartiality is a crucial aspect of the independence of the judiciary. A judge can be fairly appointed and independent, and yet be biased, which means that his or her judgements are not impartial. Judges must be able to withdraw from cases in which they have an interest, in order to maintain impartiality. The issue of the removal of judges from office is particularly important, since judges must be accountable for their action. Checks and balances must be in place to ensure that the judicial branch of government is honest.

Judges must be appointed and promoted on the basis of their competence. There should be no direct dependence between them and the executive. There should be no discrimination against candidates for judicial posts. The disciplining of judges should only take place through the judicial system itself. An effective judicial system must have mechanisms for disciplinary action, and must have an internal code of ethics to avoid judges being disciplined outside the judicial system. There must be a clear definition of the professional duties of judges. The judiciary is the branch of government most greatly affected by changes, and in countries emerging from crises, of the three branches of government the judiciary takes the longest to reform. Society needs a reliable judiciary that does not infringe the principle of independence. Judges must be protected in order for them to protect the human rights of the population.

SECURITY AND JUSTICE

THE USE OF MILITARY TRIBUNALS

ADMINISTRATIVE DETENTION ON SECURITY GROUNDS

SECURITY AND JUSTICE

THE USE OF MILITARY TRIBUNALS

Mr. F. ANDREU-GUZMAN (Deputy Secretary General of the International Commission of Jurists): The jurisprudence of the United Nations and regional human rights bodies shows that military courts give cause for concern in respect of the trial of civilians, impunity and the trial of cases involving grave violations of human rights. Although there are no human rights treaties that specifically address the issue of military courts, a number of rights contained in international treaties can be infringed by certain practices of military jurisdiction: the right of all persons to be tried by a competent, independent court established by the law, the rights to due process, equality before the courts, equality before the law, protection against discrimination before the law and the right to effective remedy.

Although there are no treaties, a number of international documents exist that address the issue of military courts, the main document being the United Nations Basic Principles on the Independence of the Judiciary, paragraph 5 of which states that everyone has the right to be tried by ordinary courts, and prohibits the establishment of jurisdictions that have procedures different from those of ordinary courts to replace civilian courts. This principle has been reiterated several times in documents and decisions of the United Nations Human Rights Committee, the Inter-American Court of Human Rights, the European Court of Human Rights and the African Commission on Human Rights, and has also been used by the International Criminal Tribunal for the Former Yugoslavia. The United Nations Declaration on the Protection of All Persons from Enforced Disappearance, in article 16, states that the alleged perpetrators of enforced disappearance shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts. The United Nations Human Rights Committee has stated that military courts must not be competent to try violations of human rights and that these can only be tried by ordinary courts. The United Nations Sub-Commission on the Promotion and Protection of Human Rights has adopted a set of principles on the administration of military justice, which is currently before the United Nations Human Rights Council for adoption. These principles are already being used by courts, including the European Court of Human Rights and the Inter-American Court of Human Rights, which consider that these principles crystallize international jurisdiction on this issue.

Further to international declarations and principles, the practice of United Nations political bodies provides a point of reference on military jurisdiction. Resolutions adopted by the United Nations General Assembly urge States to guarantee that civilians will only be tried in ordinary courts and not in military courts. The United Nations Commission on Human Rights¹ has also adopted resolutions urging States to guarantee that military courts are not competent to try violations of human rights, or crimes committed by civilians, and that the scope of competence of such courts is limited to typical military crimes committed by military personnel. International jurisprudence on military jurisdiction, produced by the United Nations Human Rights Committee in its communications, General Comments, recommendations and concluding observations to States parties, the Inter-American Court of Human Rights, the European Court of Human Rights, and decisions on individual complaints issued by the African Commission on Human and People's Rights, shows that military courts are a specialized jurisdiction. While international law does not prohibit such jurisdiction, it limits its scope of competence. The old theory that all crimes committed by the military should be tried by military courts has been totally rejected by international bodies for human rights protection, and by many modern military systems.

1. Now replaced by the Human Rights Council.

United Nations treaty bodies and regional human rights bodies have produced the most jurisprudence on the question of who can be tried by military courts. The right to be heard and tried by an independent, competent and impartial court established by law, and all guarantees for a fair trial under article 14 of the International Covenant on Civil and Political Rights apply to all courts. There is no reason why military courts should not uphold these standards. Any restrictions on rights must be in line with the law. According to the United Nations Human Rights Committee, the rights to trial by an independent court and to presumption of innocence are non-derogable. The judicial guarantees set out in article 14 of the International Covenant on Civil and Political Rights are also applicable in times of armed conflict, under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). According to international law, each State has a legal duty to prevent conflict and eradicate impunity, and therefore has a duty to investigate human rights violations and prosecute the perpetrators through the appropriate competent authorities: the ordinary criminal courts. The only objective reason to try a person under a specialized jurisdiction, such as a military court, is the nature of the crime and the persons involved.

Military courts must not be competent to try serious violations of human rights perpetrated by military personnel against civilians, such as torture, enforced disappearance and extrajudicial execution.

Mr. F. ANDREU-GUZMAN (Deputy Secretary General of the International Commission of Jurists)

The international jurisprudence of the United Nations, regional bodies and the regional human rights protection system concludes that military courts are not competent to try civilians. This competence falls to ordinary courts. This is linked to the inalienable right to be tried by a competent, independent and impartial court. Military courts must not be competent to try serious violations of human rights perpetrated by military personnel against civilians, such as torture, enforced disappearance and extrajudicial execution. Such crimes must be dealt with by ordinary courts, in order to ensure the right of the victims to effective remedy. All international jurisprudence agrees that the competence of military courts must be limited exclusively to crimes of a military nature committed by military personnel. This cannot be extended to the police. Although there is no specific definition of what constitutes a military crime, there are certain crimes such as disobeying orders and cowardice, which are typically found in military situations.

Over the past 15 years, developments have taken place in various regions to reform military legislation, which are a positive move towards restricting the scope and competence of military courts. It is particularly important to strengthen the procedural guarantees in place for accused military personnel who are being tried for military crimes. In that regard, military courts must be harmonized with international standards on fair trial before independent, impartial courts and ensuring that the scope of military courts is limited to military crimes.

ADMINISTRATIVE DETENTION ON SECURITY GROUNDS

Ms. L. ZERROUGUI (Chairperson of the United Nations Working Group on Arbitrary Detention): Administrative detention for reasons of security is a core subject of the work of the Working Group on Arbitrary Detention. The Working Group was established by the United Nations Commission on Human Rights in 1991 to investigate cases of detention that are incompatible with international standards. The Working Group's mandate covers administrative and judicial deprivation of liberty and the detention of asylum seekers and immigrants.

The right to freedom and security of person is a fundamental human right. Parliamentarians have the ability to suspend or restrict this right if there are legitimate reasons to do so, connected with the protection and security of the State and persons, and in exceptional circumstances there may be recourse to administrative detention. The role of parliamentarians is essential to monitor this form of deprivation of liberty, and to establish effective mechanisms to control the abuses that have always existed.

Since 11 September 2001, the use of administrative detention for security reasons has increased alarmingly. Detention is generally considered to be administrative if it has been decided by the executive and if it is the responsibility of an administrative or ministerial authority, even if there is an *a posteriori* recourse possible before a court. The United Nations Sub-Commission on the Promotion and Protection of Human Rights approved this definition in 1989. Administrative detention for reasons of security is an exceptional measure based on international humanitarian law, where it is defined as deprivation of liberty ordered by the executive without a criminal award having been laid down against the person in question. The administrative detention of persons alleged to endanger the security of a State is also practiced outside of situations of armed conflict. A number of legal systems provide for this type of deprivation of liberty, including international humanitarian law, international law on refugees and asylum seekers, and some national legislation.

In practice, administrative detention has often been used in an abusive manner, particularly to limit the right to self-determination in cases of political opposition to racist or totalitarian regimes, and to repress the peaceful exercise of freedom of expression, religion and belief. It is also used to imprison, without justification, immigrants whose papers are not in order, and asylum seekers. In many countries, marginalized sectors of society, such as the mentally ill, drug addicts, prostitutes, homosexuals and people living with HIV/AIDS are subject to administrative detention on the grounds that they pose a threat to society. Since 11 September 2001 administrative detention has been used, often to infringe judicial guarantees, under the pretext of the fight against terrorism.

Although deprivation of liberty is not prohibited under international law, it is only authorized if it is legal and not arbitrary. The right not to be arbitrarily deprived of one's liberty and the right to liberty and security of person are guaranteed under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the system of regional human rights protection instruments. The International Court of Justice considers the arbitrary deprivation of an individual's liberty incompatible with the principles of the Charter of the United Nations. This means that even if a State has not ratified any human rights treaties, there are other sources of international law that guarantee the right of every individual to freedom and security of person and not to be arbitrarily deprived of his or her liberty.

Under international law in the context of armed conflict, administrative detention for security reasons remains an exceptional measure, which is only admissible if it is absolutely necessary for State security. In its

General Comment Number VIII on the right to liberty and security of persons (article 9 of the Covenant), the United Nations Human Rights Committee states that even if one has recourse to detention for security reasons, this detention must be subject to the same legal provisions as all other types of detention. Interested parties must be informed of the reasons behind their detention. A tribunal or court must be able to pronounce the legality of the detention, and reparation must be available where appropriate. Total protection must be granted under the Convention in criminal cases.

In order to justify the abuse of administrative detention, States often have recourse to two juridical devices: they either declare a state of emergency or exception, or they take advantage of the existence of different bodies of law that provide for this type of deprivation of liberty, by applying the provisions of a legal regime in a situation that is not foreseen by that regime, with a view to giving the impression of legality to cases of arbitrary administrative detention, such as invoking the Geneva Conventions in the context of the war on terror, as a means of detaining people to interrogate them, rather than to prevent them from taking up arms. Parliamentarians therefore have an important role in preventing abuses and upholding the principles of legality and primacy of law, at the most crucial moments.

In a State where the rule of law applies, the declaration of a state of emergency should only result in derogations from or restrictions to the right to liberty and security of person in the context of pre-established constitutional and legislative provisions, which guarantee the respect of the rule of law. Although under international law derogations from certain obligations under human rights treaties are permitted, the system of derogations is protected by guarantees, and there are rights which are non-derogable. The International Covenant on Civil and Political Rights clearly states which rights can be limited, restricted or derogated from, and under what circumstances. Derogations are permitted in specific situations that represent a threat to the existence of the nation. Derogations are a last resort, and are temporary, and derogation measures should be lifted at the end of a state of emergency or armed conflict. Derogations must only take place to the extent that the situation requires. This rule of proportionality implies that derogations cannot be justified if the end can be achieved by less radical means. Not all rights are derogable, even in situations of exceptional public danger or armed conflict threatening the existence of a nation. The rights that are non-derogable under the International Covenant on Civil and Political Rights include: the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; the right to recognition everywhere as a person before the law; and the right to freedom of thought, conscience and religion. Under the Covenant, procedural guarantees, such as the rights to *habeas corpus* and the presumption of innocence must be respected without exception, even during states of emergency. The Working Group on Arbitrary Detention has stated on a number of occasions that an arrest made pursuant to laws of exception cannot be prolonged indefinitely, and that States must prove that the measures taken during states of exception are strictly in proportion to the danger invoked.

States increasingly use administrative detention for security reasons without declaring a state of emergency, as a means of avoiding judicial guarantees. This is the case with administrative detention of terrorist suspects. An increasing number of countries are adopting legislation of exception that restricts the fundamental rights of persons detained in the context of the fight against terrorism. The provisions of such legislation allow the detention of a person for an unlimited or prolonged period, without conviction or presentation before a judge, and without the possibility of the detainee contesting the legality of his or her detention. This type of administrative detention, which is also secret in some cases, aims to avoid the legal timeframe of remand in custody or provisional detention, and to deprive the persons concerned of the judicial guarantees that are the right of any person suspected or accused of a crime. Such detention, without judicial control, often leaves the way open for serious violations of human rights. Persons suspected of being involved in terrorist activities are also secretly detained by security forces as vital witnesses of an offence, which enables security forces to avoid the obligation of justifying the detention on the grounds of reasonable suspicion that a crime

has been committed. Administrative detention is sometimes used to obtain information from witnesses in cases that are already under way or from persons who are likely to be convicted later.

Another practice is the abusive and discriminatory use of immigration laws to hold foreigners suspected of being a threat to security in detention for prolonged periods without conviction. In other situations, the fight against terrorism is considered to be a “war” and States invoke international humanitarian law as a means of justifying the detention of terrorist suspects for an unlimited period for the purposes of interrogation. Administrative detention for security reasons is an exceptional measure, the procedure for which is entirely different from that of the detention of criminal suspects. Confusion between the two regimes is very dangerous, since it allows the executive to ignore the presumption of innocence and all the judicial guarantees surrounding it. A person suspected of having committed a criminal offence, whether in the context of armed conflict or other situations, has the right to strict judicial guarantees provided for by international humanitarian and human rights law.

The role of parliamentarians and parliamentary human rights bodies is essential for the protection of the right to liberty and security of person. States are responsible for the security of persons and property. Maintaining security sometimes requires recourse to exceptional measures that limit certain rights and guarantees, including guarantees relating to the deprivation of liberty and the right to a fair trial. Measures taken must, however, respect the principle of legality. The provisions adopted in this context must conform to the international juridical norms that apply to administrative detention for security reasons, and particularly to the State’s obligations under international law. Persons under administrative detention must be informed of the reasons for their arrest, and must have access to legal counsel. Often in such cases the detainee does not have the necessary legal aid and has limited access to the law.

Internal control over the legality of detention is one of the most effective means of preventing and combating arbitrary detention. The experience of the Working Group shows that in many cases of arrest and detention for security reasons, recourse to *habeas corpus* is often either suspended or transformed into an impracticable formality. Since unlimited administrative detention is prohibited under international law, such detention must always be of limited duration, and its renewal should be subject to judicial controls. In order to protect people against the abuse of administrative detention, all arbitrary detention should be severely sanctioned by law and reparation should be granted to all victims.

Legal guarantees are meaningless unless the justice system is independent and the rule of law is respected. The role of parliamentarians is not merely to adopt good legislation, but to ensure that legislation is implemented effectively and that judicial decisions are fulfilled to guarantee respect for human rights. Parliamentary monitoring of the executive must be used to ensure respect of laws and the proper functioning of the justice system.

Ms. L. ZERROUGUI (Chairperson of the United Nations Working Group on Arbitrary Detention)

Legal guarantees are meaningless unless the justice system is independent and the rule of law is respected. The role of parliamentarians is not merely to adopt good legislation, but to ensure that legislation is implemented effectively and that judicial decisions are fulfilled to guarantee respect for human rights.

Parliamentary monitoring of the executive must be used to ensure respect of laws and the proper functioning of the justice system.

DEBATE

Mr. S. GINTING (Indonesia): Military reform in Indonesia began in 2000. The military mandate deals with defence and the police mandate deals with law enforcement, security and public order. The strengthening of the military includes the need to reform military tribunals by transferring the responsibility for their organization and financing from military headquarters to the Supreme Court. Under new Indonesian military legislation, military personnel suspected of violating civilian laws must be brought before ordinary courts. Indonesia is currently reforming its military court system, and the Government and Parliament are discussing draft laws on military tribunals. However, there are some obstacles to this process, since the military is not yet ready to accept the rule of the ordinary courts, owing to certain problems occurring in the judiciary. The Government has rejected a three year grace period to facilitate the handover of military tribunals to civilian courts. The Indonesian Parliament is assisting the Government in implementing the reform of the military courts, in the name of democracy. What are the best means of ensuring the promotion and protection of human rights and guaranteeing independent and impartial hearings in respect of the use of military tribunals.

Mr. M. GOWEILY (Egypt): Occasionally civilians are brought before military tribunals. In such cases, the necessary guarantees must be provided for the defendant, to ensure that he or she is tried fairly. Judges in military courts should be trained and qualified in the legal field, rather than simply being military personnel who are appointed as judges. Although military officials who have violated military law should be brought before military courts, if they have violated human rights, they should be tried by an ordinary court. Should civilians who have committed crimes against military property be brought before military courts, or does justice demand that military courts not judge civilians under any circumstances?

Mr. K. CHAMMARI (former Member of the Parliament of Tunisia, human rights expert): Within the United Nations system, is it possible to deal with subterfuge, where one or two military personnel are involved in cases in order to justify the trial of civilians or politicians in military tribunals? This tactic has been used in Tunisia.

In the past, there have been cases of arbitrary detention that have taken so long to investigate that the detention was no longer arbitrary when the case came before the United Nations Working Group on Arbitrary Detention. Does the Working Group have jurisprudence on this matter?

Ms. M. F. PONCE BROCKE (Guatemala): In Guatemala, military courts have been reformed in order to ensure that they only try military personnel. However, military personnel who have committed crimes are rarely tried. Despite reforms and idealism, violations of international standards occur, and political will and courage are required to ensure real change. Judges must not be threatened or intimidated. They must be able to hand down sentences to military personnel without fearing for their own safety. How can theory be made practice, in such circumstances? In a violent country it is easy to commit crimes, since the justice system is weak, corruption is widespread at all levels of the State, organized crime has permeated all sectors of society, drugs trafficking is rife and involves members of Parliament. Although the necessary legislation is in place, scapegoats are always used to ensure that military personnel are never sentenced.

Ms. A. M. MENDOZA DE ACHA (Paraguay): There is currently a case before the National Human Rights Commission of Paraguay of sexual harassment perpetrated by high ranking military personnel towards girls in a military academy. The victims were heard before a military court and were not provided

with a defence counsel. The accused persons were not called to appear before the court, and to date the verdict is that there is a lack of evidence. Often military courts question low-ranking personnel without any guarantee of protection. The girls finally withdrew their accusations owing to fear of their superiors. What can the National Human Rights Commission do in this particular case?

Ms. L. ZERROUGUI (Chairperson of the United Nations Working Group on Arbitrary Detention): Although the issue of extended periods of investigation of arbitrary detention raised by Mr. Chammari is typical of Tunisia it also occurs in other countries. The Working Group uses three criteria to establish whether a detention is arbitrary: if a person has been detained without any legal basis; if the reason for the detention is to restrict freedom of expression or freedom of assembly; or if the standards for a fair trial have been violated. There are increasing cases of parliamentarians being arrested for offences they have committed in the past. Administrative detention is being increasingly applied to immigrants, particularly those from South East Asia and Arab countries, under the pretext of the threat of terrorism, and they are being detained in high security prisons until their origins have been investigated. This situation is intolerable for people who have no connection with terrorism and crime.

Military courts must have a well-defined, limited jurisdiction. They must not be able to judge civilians, must only be able to judge military crimes committed by military personnel, and must not be able to judge serious violations of human rights.

Mr. F. ANDREU-GUZMAN (Deputy Secretary General of the International Commission of Jurists)

Mr. F. ANDREU-GUZMAN (Deputy Secretary General of the International Commission of Jurists): The experience of different nations shows that jurisdiction systems for military courts can be strengthened in a way that is compatible with international human rights obligations and that are coherent with the concept of how military courts should function. Military courts must have a well-defined, limited jurisdiction. They must not be able to judge civilians, must only be able to judge military crimes committed by military personnel, and must not be able to judge serious violations of human rights. Military courts and the criminal proceedings associated with them must respect all standard judicial guarantees. In many military justice systems, there is a judge-commander, who not only judges cases, but is also the military commander, and therefore judges those who are under his command. The relationship between the investigator and the commander must be broken. One way of ensuring this is to establish a separate body of military justice, which is separate from the chain of command. This guarantees a minimum of independence and impartiality. Resources before ordinary courts must be strengthened. Cases of conflict between competences of civil and military courts should always be resolved through the highest instance of the ordinary criminal courts, since military justice is a specialized justice system, all cases not of that specialization should be heard by ordinary courts. Military courts should not become tools to exert military influence.

Crimes committed by civilians against or on military premises are not military crimes, and are not committed by military personnel, and can therefore only be tried in ordinary courts. Jurisprudence is against the practice of trying a member of military personnel as a means of using military courts to try crimes involving civilians, since crimes dealt with by military courts must not only be committed by military personnel, but must also be military crimes. Political trials that try to restrict dissidence and freedom of expression should be heard by ordinary courts.

Pursuant to the 1991 decree reforming the military justice system in Guatemala, military personnel can be tried in ordinary courts. However, in the administration of justice in Guatemala, while courts are the heart of the system, unless parliamentary and executive activities support the operational capacity of the ordinary courts in terms of investigation, there can be no change in practice. Although Guatemala has good legislation on military authority, the hidden powers of the Parliament and the Executive are restricting the implementation of that legislation. The Executive could take measures in respect of disciplining military personnel who obstruct investigations regarding human rights issues.

Sexual harassment and violations between military personnel cannot be considered to be crimes of a military nature and must therefore be tried by the ordinary courts. Parliaments have the possibility to organize debates on this issue, and establish a committee to investigate the case. Such committees have been formed to investigate similar cases in Peru and Uruguay.

INTERACTIVE SESSION WITH THE PRESIDENT OF THE UNITED NATIONS HUMAN RIGHTS COUNCIL, H. E. MR. LUIS ALFONSO DE ALBA, ON THE WORK OF THE NEWLY ESTABLISHED COUNCIL.

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Mr. L. A. DE ALBA (President of the United Nations Human Rights Council): The United Nations Human Rights Council was established on the basis of a resolution of the United Nations General Assembly, which brought an end to the work of the United Nations Commission on Human Rights. The establishment of the Council was the result of the recognition of the exhaustion of the work of the Commission, owing to excessive selectivity of topics, which led to politicization. Although human rights are always a political issue, the Council will try to be less selective and more focussed in its work. One of the fundamental differences between the Commission and Council is the Council's commitment to evaluate the situation of human rights in each country. This provides a true balance in which all countries are on an equal footing, since every human rights situation will be scrutinized. A balance must also be established between civil and political rights on one hand, and economic, social and cultural rights on the other. A greater degree of transparency and honesty is being encouraged with regard to all rights in all countries. The Council also has greater authority, flexibility and possibility to act rapidly to respond to serious human rights situations rather than simply to denounce them.

While the Commission on Human Rights met once a year, the new Council will hold a minimum of three ordinary sessions and an unlimited number of special sessions per year. With this greater flexibility the Council will be able to function as a part of the multilateral system as a whole, and not merely as a specialized agency, and will therefore be able to influence other United Nations bodies, through recommendations. While the Commission was a body of the United Nations Economic and Social Council, the Council reports directly to the United Nations General Assembly, and its statute will be revised after five years, in order to establish whether it will become a permanent body of the United Nations.

New mechanisms have been put at the disposal of the Council, and it must assess all the pre-existing mandates, which were approved and established by the Commission. In order to develop a new protection system, it will be necessary to review the existing system. Certain fundamental systems of the Commission will be retained, such as the system of Special Rapporteurs, but others will be reviewed, such as the mandate of the Sub-Commission on the Promotion and Protection of Human Rights. The 1503 review procedure will also be developed. The principal advantage of the Council is that all countries will be treated equally. Parliamentarians will have a critical role to play in ensuring that all rights are given due attention, and that a clear balance is established between civil and political and economic, social and cultural rights. The Council will base its work on the fact that no country has a perfect human rights situation, and that there is always room for improvement. It will focus on political, economic and social development in all countries.

The major challenge before the Council is to break with the traditions and practices of the past, and the renewal, reform and revision of the multilateral system must be reflected in the Council's approach to addressing issues. Decisions and resolutions which have been in place for many years will also be revised. The first session of the Council was a period of protocol, and in its current, second session working procedures

and tools are being revised, and dialogue is being held with all of the Special Rapporteurs, the Office of the United Nations High Commissioner for Human Rights and Member States to establish what work has been done, and what work is in progress. A decision will be made during the current session as to whether to maintain the system already in place as a temporary measure while defining the new system, or whether to give a political message of greater strength and renewal on issues of particular importance that require the attention of the international community, while supporting work that is already under way.

DEBATE

Mr. J. BERCOW (United Kingdom): The most important priority for the Council is to highlight human rights abuses by States, and to ensure that there is adequate machinery to punish those abuses. The former Commission on Human Rights suffered a crisis of composition, which included countries that were serious oppressors, a crisis of chairmanship in which the Chair of the Commission was often a State with a bad human rights record, and therefore a crisis of legitimacy. The Council must eliminate these problems. What measures will be taken to prevent States suspected of abusing human rights, such as Burma from refusing access to United Nations Special Rapporteurs who are mandated to conduct country visits to assess the situation? Will the Council be able to submit recommendations to the United Nations General Assembly on the situation in a particular State and the consequences, including punishment, of the result of that State's abuse of the rights of its people? Although no country is perfect, and the Council should be fair to all, there should be no abdication of responsibility in regard to abuses by particular countries.

Mr. B. INDOUMOU MAMBOUNGOU (Gabon): The Council should make maximum efforts not to replicate the mistakes of the past. Parliamentarians from certain countries are conspicuously absent from this seminar. The majority of countries represented are from the developing world and the former Soviet Union. What measures will be taken to ensure that political issues, such as the question of sovereignty, can be present in the work of the Council, but not detrimental to it?

Ms. L. ROSALES (Philippines): The Philippines considers its membership of the United Nations Human Rights Council as an opportunity to move forward in respect of the promotion and protection of human rights. Since ratifying the majority of human rights treaties 20 years ago, the Philippines has failed to translate the provisions of these instruments into domestic legislation in order to internalize them and improve the human rights situation for the population. Will the Philippines, as a member of the Human Rights Council, be held accountable for this lack of action? A memorandum to the effect that Council members are expected to ensure that international human rights instruments are translated into their national legislation would be particularly useful. I endorse the comments made by the representative of the United Kingdom in respect of Burma. How will the Council operationalize the decision of the United Nations General Assembly to put Burma on the human rights agenda, and what can the Council do to assist in the development of democracy in Burma?

Ms. S. MONAGENG (Commissioner, African Commission on Human and People's Rights): I am concerned about possible duplication of effort between the work of the African Commission on Human and People's Rights and the United Nations Human Rights Council, and I suggest that efforts should be made to find a way for the two bodies to cooperate and share information. There are 16 member States of the African Union that have never submitted a report to the African Commission, while they all fulfil their reporting obligations under the United Nations system. The African Commission is often obliged to use United Nations reports in order to question States on human rights issues, such as indigenous people's rights. The African Commission has access to information on the human rights system on the ground, which could be of assistance to the United Nations, and collaboration could therefore be useful to both parties.

Mr. K. CHAMMARI (former Member of the Parliament of Tunisia, human rights expert): One of the anomalies of the Council is the fact that it has member States that are violators of human rights. Perhaps membership criteria for the Council should include fulfilling reporting obligations to the United Nations human rights treaty bodies and cooperation with United Nations Special Rapporteurs. Will the Council maintain the modalities for appointing Special Rapporteurs that were established by the Commission on Human Rights? The Special Rapporteur system has developed considerably over the years, the Special Rapporteurs are truly independent; will that independence be maintained? What elements of the work of the Sub-Commission on the Promotion and Protection of Human Rights will be maintained in the work of the consultative body that will replace it?

Mr. F. SOPHOCLES (Cyprus): Does the Council have practical executive power to implement its decisions and take measures to improve the human rights situations in certain countries?

Lord F. JUDD (United Kingdom): Ambassador de Alba, do you agree that in order to be successful in commitment to human rights, efforts must be made to regenerate a widespread popular culture of commitment to human rights and a deeper understanding of the importance of human rights protection, and that the involvement of civil society and NGOs in the work of the Council is essential in this regard?

I was the rapporteur of the Parliamentary Assembly of the Council of Europe on the conflict in Chechnya for a number of years. There were many credible deeply disturbing allegations of violations of human rights in that conflict. The gap between the number of allegations and the number of cases that have been brought to justice is considerable. A priority across the world must therefore be a strengthening of the justice system in order to ensure that the perpetrators of grave violations can be held accountable. The application of the rule of law must be backed up by adequate human and financial resources.

Ms. C. MAZARIEGOS TOBIAS (Guatemala): The replacement of the Commission on Human Rights by the new Council is a positive move to eliminate the politicization in dealing with human rights issues. Does the Special Rapporteur of the United Nations, who recently visited Guatemala, report to the Council? The people of Guatemala are living in a situation of widespread violations of human rights, involving extrajudicial killings, rape and physical attacks. What measures will the Council take to challenge this, will the Rapporteur's review of the country situation continue, and will his report be accessible to the Guatemalan Parliament?

Ms. A. M. MENDOZA DE ACHA (Paraguay): How will the Council use the 1503 review procedure in relation to individuals and States?

Mr. L. A. DE ALBA (President of the United Nations Human Rights Council): The Council is currently discussing the situations in Somalia, Cuba and the Occupied Palestinian Territories, and NGOs are present at the discussions and have the right to contribute.

The General Assembly resolution establishing the Human Rights Council was the result of a consensus, although it was not adopted by consensus, since some States, including the United States of America, voted against it. Minimum standards have been established for the election of member States, including a higher majority in election. Candidates must undertake a set of commitments, and membership of the Council can be suspended if a State is not fulfilling those commitments. All regions presented more candidates than the number of vacancies available. All countries will be reviewed under the same criteria, which are yet to be developed. Urgent issues and human rights crises will be addressed through special sessions, which can be triggered by a request from one third of the members. Two such sessions have been held, the first on Gaza and the second on the situation in Lebanon. I do not have the authority to call a special session or present a draft resolution.

The same States are involved in the work of the Council as were involved in the work of the Commission on Human Rights. The move away from politicization will depend on the will of the members of the Council to tackle all problems, including those that the Commission did not address for political reasons. Mechanisms must be developed to enable the Council to deal with any subject either in the long to medium term, or as a matter of emergency. The Universal Periodic Review process will allow the Council to consider States' ratification status and implementation of international human rights treaties. The information used in the review process will be received from Special Rapporteurs and from civil society, rather than submitted by the States themselves. The Philippines, as a member State of the Council has undertaken a series of commitments in respect of human rights, which are outlined on the website of the Office of the United Nations High Commissioner for Human Rights.

The resolution of the United Nations General Assembly establishing the Human Rights Council sets out guidelines for cooperation between the Council and regional human rights bodies, such as the African Commission for Human and People's Rights. The task of the Council is to give coherence to the multilateral system of human rights protection, and it must work in harmony with the regional systems to avoid overlap and duplication of work. The Council will draw on the experience of peer review in Africa to establish its system of Universal Periodic Review.

There is a very important concern regarding the strengthening of the system of Special Rapporteurs: one particular group of countries wishes to reduce the number of Rapporteurs and restrict their mandates. A long debate will be held on the mandates of the Special Rapporteurs and of the Sub-Commission, which has the ability to take initiatives and draft binding instruments. This ability must not be lost. The Council can create a culture of human rights to generate an environment in which it is intolerable that a State with certain behaviour has enough political weight to implement its own political agenda. The Council does not have the power to make recommendations to the United Nations Security Council. Some countries have suggested that the President's report should only be submitted to certain Committees of the General Assembly, rather than to the Plenary. This would weaken the status of the Council considerably. Civil society and parliamentarians have a crucial role to play in promoting a culture of human rights. Regarding the situation in Guatemala, the reports of the Special Rapporteur and all the background documents will be made public, and all of the meetings with Special Rapporteurs are recorded.

The 1503 procedure system will be updated. The Office of the United Nations High Commissioner for Human Rights receives a large number of individual complaints, which are filtered by a set of criteria on admissibility. The Council has received three complaints regarding three countries. The system should be revised in order that the complaints can be addressed under the Universal Periodic Review system, to establish whether there are any patterns in the complaints that suggest recurring violations of human rights in certain States.

Mr. A. B. JOHNSSON (Secretary-General of the Inter-Parliamentary Union): Although civil society and NGOs play a role in the work of the Human Rights Council, parliamentarians have not, thus far, participated in the work of the Council or its predecessor, the Commission on Human Rights. The IPU will make every effort to ensure that parliaments get involved in the Council's work.

THE FIGHT AGAINST IMPUNITY: THE INTERNATIONAL CRIMINAL COURT AND TRANSNATIONAL JUSTICE

THE FIGHT AGAINST IMPUNITY: THE INTERNATIONAL CRIMINAL COURT AND TRANSNATIONAL JUSTICE

Mr. R. GARRETÓN (human rights defence attorney (Chile) and former United Nations Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo): Defenders of human rights have few opportunities to speak to parliamentarians. Respect for human rights is the responsibility of politicians, since they adopt the laws that may or may not facilitate violations. Politicians must decide whether they want a healthy society with true respect for human rights, or an oppressive dictatorship. Roles in society must be clear, and abuse should be eliminated. Reconciliation should not be based on forgetting atrocities. For centuries, throughout the world there has been a fluctuation between democracy and dictatorships, politicians have been assassinated, human rights have been violated and innocent people have been murdered. In Latin America, Asia and Africa, extrajudicial killings are still taking place. This culture must be recognized. Behind all torture, extrajudicial killings, arbitrary detention and other violations of human rights there are always lies. Authorities use excuses such as war, conflict or the fight against terrorism as a pretext to commit violations of human rights. In order to tackle impunity, justice and truth must be addressed. Injustice and lies must be eliminated in order to introduce a culture of truth and justice.

Authorities use excuses such as war, conflict or the fight against terrorism as a pretext to commit violations of human rights. In order to tackle impunity, justice and truth must be addressed. Injustice and lies must be eliminated in order to introduce a culture of truth and justice.

Mr. R. GARRETÓN (human rights defence attorney (Chile) and former United Nations Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo)

Impunity has four dimensions: juridical, political, moral and historical. Juridical impunity is when those in power abuse their authority. Political impunity is when there is a lack of political will and recognition of human rights, such as in situations where dictators are re-elected by the public, who are incapable of taking the appropriate political action to ensure that responsibilities are accepted. In Guatemala there are standards that prohibit heads of State who have previously established oppressive regime from resuming the post of President. This provision should be extended to all parliamentarians and ministers who have been directly or indirectly responsible for human rights violations. Political sanctions, independent of criminal responsibility, should be established. Moral impunity is such that some violators of human rights do not believe that they have committed an injustice, but rather feel that they are heroes for having saved the fatherland, or defended their religion. Historical impunity, in the form of heroic images of dictators, must be brought to an end. Human rights institutions must ensure that massive violations of human rights are not forgotten.

A number of steps have been taken to end impunity, and progress has been made. Truth and reconciliation committees have been established in countries such as Argentina and Paraguay, which recognize and register grave violations that took place in the past, in order that they are not forgotten. Regrettably, in El Salvador

these committees do not mention the names of those who committed grave violations of human rights. This practice should be changed. In general terms, progress is being made in respect of the promotion of human rights across the world, except in the United States of America. The system of naming and shaming violators of human rights is becoming increasingly widespread. A black list is being established by the United Nations of persons and companies involved in the arms trade. In the light of the link between arms trafficking and trafficking in persons, particularly women, and trafficking in natural resources, the United Nations should provide assistance in ensuring that the perpetrators of these crimes are tried before the International Criminal Court.

There are many difficulties in respect of combating legal impunity. National jurisdictions, universal jurisdictions and international jurisdictions all have the competence to judge crimes. Transitions to democracy take place through interaction between political leaders, but do not involve the victims of human rights abuses. Owing to the failings in domestic court systems, the search for truth and justice is often ineffective. Amnesty laws enacted by previous dictators, or by the new democratic powers, lead to moral deadlock, where the victims of abuses are forgotten. This does not encourage victims and their relatives to participate in politics and the democratization of their country. Although there are a number of regional human rights protection systems in place, there is no human rights protection body in Eastern Europe, and efforts are also needed to improve the administration of national justice in cases of grave violations of human rights.

Universal jurisdiction is such that the perpetrators of human rights violations can be arrested and tried in other countries, such as the arrest of General Augusto Pinochet in the United Kingdom for human rights violations perpetrated in Chile. In the case of Hissène Habré, although the whereabouts of his trial are yet to be decided, under universal jurisdiction he will be tried either in Senegal or in Belgium.

The first international criminal court in the world sat in 1474 when the Dutchman, Peter von Hagenbach committed a number of crimes, including the abduction and killing of men to rob their wives, and was tried by 28 Dukes, Counts and Kings. National, universal and international jurisdictions have been developing since the Nuremberg Trials, where it was said, in response to the claims that perpetrators of human rights violations were acting under orders, that violations of international law are committed by individuals, not abstract entities such as States, and the respect of international law can only be ensured through the punishment of individuals who perpetrate such crimes. In the first draft of the Universal Declaration of Human Rights, René Cassin included the notion that a court that tries a State is in fact trying individuals. Although the International Criminal Court has limitations, its existence is a step towards the better promotion and protection of human rights across the world. In many countries, progress has been made in respect of domestic justice. Impressive achievements have been made in Latin America: in Chile 424 military personnel have been tried for violations of human rights; in Argentina and Paraguay due obedience laws have been deemed unconstitutional and have been rescinded; in Peru the Fujimori crimes are being tried; and in Uruguay trials of the perpetrators of human rights violations have recently begun. There is currently only one case before the International Criminal Court, that of Thomas Lubanga Dyilo from the Democratic Republic of the Congo.

DEBATE

Ms. M. F. PONCE BROCKE (Guatemala): According to Guatemalan legislation, persons who have altered the constitutional order cannot stand for office. Unfortunately, José Efraín Ríos Montt, who is guilty of genocide, stood for office in the Guatemalan presidential elections in 2003. I opposed this candidature as a parliamentarian and suffered persecution as a result.

Mr. E. GUIRIEOULOU (Côte d'Ivoire): Parliamentarians must ensure that the aspirations of the people are more important than the interests and considerations of States. Parliamentarians must therefore promote the democracies of peoples. Unfortunately, it is usually the interests of the State that prevail, and parliamentarians must therefore consider how democracy can be promoted throughout the world. Justice cannot exist without democracy. Although measures are being taken to protect human rights within States, these same States often perpetrate serious violations of human rights outside their borders, which must be addressed. One such example is the way in which detainees in the Guantanamo Bay naval base in Cuba are treated by the American authorities. Conditions of arrest, as well as conditions of detention, must therefore be monitored. There are setbacks in the system of universal jurisdiction: the Belgian courts have recently had to modify their rules in response to an attempt to try the Israeli President. Certain countries that have the right to veto in the United Nations Security Council will never be the subject of sanctions.

If the International Criminal Court is to assist in the long-term success of the cause for human rights, it must be universal in its operation. The powerful must be as beholden to it as the less powerful, and it must not be seen as a court in which the less powerful can be brought to justice while the most powerful remain immune.

Lord F. JUDD (United Kingdom)

Lord F. JUDD (United Kingdom): In a long-term historical perspective, the International Criminal Court has the potential to undermine the cause of human rights, if it is perceived as a tool of the powerful for managing the world as they choose. If the International Criminal Court is to assist in the long-term success of the cause for human rights, it must be universal in its operation. The powerful must be as beholden to it as the less powerful, and it must not be seen as a court in which the less powerful can be brought to justice while the most powerful remain immune. Although individuals responsible for abuses must be brought to justice, consideration must be given to the responsibility of those who encourage them to commit those abuses, while they themselves remain above the law. In this regard, democratic institutions must be strengthened, since the successful operation of law cannot be separated from the issue of the accountability of power. If the agenda of the powerful is wrong, they may well ensure that they themselves escape justice while those who become their instruments are subject to the full wrath of the law.

Mr. E. KALISA (Rwanda): Impunity leads to violations of human rights. The duty of parliamentarians is to ensure the protection of the people. As a survivor of the genocide in Rwanda, I have first-hand experience of how impunity can lead to such large-scale violations of human rights. Efforts must be made to combat impunity in a timely manner, in order to avoid such tragic consequences. Although the International Criminal Tribunal for Rwanda has been established on the basis of a United Nations Resolution, in its 12-year existence it has spent vast sums of money, and yet has only convicted six perpetrators of genocide. Witness protection has not been guaranteed. While the Tribunal should be setting an example, it has thus far proven ineffective. No measures have been taken to provide reparation to the victims. In crimes against humanity, reparation must be provided and the survivors must be rehabilitated.

Mr. K. CHAMMARI (former Member of the Parliament of Tunisia, human rights expert): While 20 years ago it was thought that the only form of reconciliation was amnesty, the examples of Chile, South Africa and other countries have shown that impunity can be eliminated. Universal jurisdiction is a major achievement. Although the Belgian authorities are making considerable progress in respect of universal jurisdiction, they

have been forced to halt their developments, since the United States of America is against the principal and mechanisms of universal jurisdiction. A number of States have been threatened by the United States to ensure that they do not ratify the Rome Statute of the International Criminal Court.

Morocco is the only Arab State that has established a truth and reconciliation committee to bring violators and victims together to learn the truth. The public hearings of the committee began in December 2005, and were broadcast live on national television. This was a major event, which attracted the attention of the entire population.

Ms. M. F. PONCE BROCKE (Guatemala): The Guatemalan amnesty law has prevented a real move from conflict to peace and has prolonged the silence with regard to the atrocities. A real move from impunity to justice, from corruption to transparency, from poverty to development and from exclusion to democratic participation is necessary in order for the situation to truly change. The people of Guatemala are still living in a culture of fear, silence, murder, poverty and human rights violations.

Mr. R. GARRETÓN (human rights defence attorney (Chile) and former United Nations Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo): In the case of Guatemala, the Constitutional Court said that the atrocities committed under the Government of Mr. Ríos Montt took place before the constitutional reform, and that the reform cannot be applied retroactively. Mr. Ríos Montt was therefore not prevented from standing for election. Fortunately, owing to the wisdom of the people of Guatemala, he was not elected.

The concept of the violation of the rights of women as a means of conducting ethnic cleansing is a new legal concept, which has developed from the work of the International Criminal Tribunal for Rwanda.

Mr. R. GARRETÓN (human rights defence attorney (Chile) and former United Nations Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo)

The fight for human rights has been under way for 1000 years. The term “human rights” has existed for 200 years. The concept of international human rights has only existed for 61 years. Although the International Criminal Tribunal for Rwanda has failings, it has been successful on some counts. The concept of the violation of the rights of women as a means of conducting ethnic cleansing is a new legal concept, which has developed from the work of the Tribunal. Although there have been setbacks regarding compensation, the work of the Tribunal has been a positive step.

Although there have been hindrances to the development of universal jurisdiction, progress has been made. Before the case of General Pinochet, universal jurisdiction had never existed in practice. Human rights violations must be considered in their political context. I hope that the International Criminal Court will not always remain a tool of the powerful. On the issue of bringing to justice those who give the orders for violations of human rights as well as those who carry them out, trials taking place in Latin America include former Presidents, such as Alberto Fujimori and Luis Echeverría Álvarez. The people who established the systems in which violations of human rights were perpetrated, and who previously benefited from impunity are now being tried. The cry is for justice, rather than revenge. The victims have chosen to punish the perpetrators with full trials that have full guarantees in place.

The people who established the systems in which violations of human rights were perpetrated, and who previously benefited from impunity are now being tried. The cry is for justice, rather than revenge. The victims have chosen to punish the perpetrators with full trials that have full guarantees in place.

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Parliamentarians are elected by the people, and have a platform from which to speak and dialogue with the executive. They can develop a culture in which there is never a good reason to murder or torture, and to ensure that human rights treaties are ratified, and their provisions transposed into domestic law.

EXECUTION OF SENTENCE

THE PURPOSE AND FORMS OF PUNISHMENT

THE PRIVATIZATION OF PRISONS AND ITS IMPACT ON THE HUMAN RIGHTS OF DETAINEES

EXECUTION OF SENTENCE

THE PURPOSE AND FORMS OF PUNISHMENT

Ms. S. MONAGENG (Commissioner, African Commission on Human and Peoples' Rights): I will be looking at execution of sentence. I will touch on the human rights aspect, the sociological aspect and, briefly, the philosophical aspect of sentencing.

The debate about sentencing is not new, but what has not happened in these discourses is asking judges themselves what they think about sentencing and its purpose. The purposes of sentencing are the focus of this morning's presentation. As a judge I know that our views are limited to a once off statement that we make in seminars and conferences, and to pronouncements that we make in court when we pass sentences. This is despite the fact that judges are the decision makers, we are the filters, and of course we are the human face of the process of sentencing. The daunting task that the judges have to discharge involves balancing the interest of society, the accused and the victim and their families, the judges have to do this within a legal framework. It is true that more often than not, the interests are conflicting, which makes the task of sentencing extremely difficult, complex and emotionally draining. In my conversation with you today, I have decided to share the experience of this forgotten group.

At the centre of the sentencing process is the foundational principle that convicted offenders should be treated fairly with due regard for their human rights, and this is where law makers come in.

Sentencing has always been about human rights. In that regard, the sentencing judge must always try to strike a balance between delivering retribution for the community; deterring would-be criminals from breaking the law; rehabilitating the offender and protecting the community from the deleterious effects of anti-social behaviour.

Ms. S. MONAGENG (Commissioner, African Commission on Human and Peoples' Rights)

Sentencing has always been about human rights. In that regard, the sentencing judge must always try to strike a balance between delivering retribution for the community; deterring would-be criminals from breaking the law; rehabilitating the offender and protecting the community from the deleterious effects of anti-social behaviour. As a matter of fact, the philosophy of classical criminal law theory proposes deterrence, retribution, protection of the public, and rehabilitation as objectives of sentences. Arguably then, sentencing becomes the symbolic bedrock that underpins the criminal justice system. Perhaps more than at any other point in the criminal process, the sentencing decision represents the stage at which the criminal law, the criminal justice system, and the public's values are translated into tangible action. It is at that juncture where the criminal law is both interpreted and applied.

What is important is that in any jurisdiction whatsoever, at the end of it all, everyone is looking for retribution. This is a fact and we will discuss this further. This is especially so historically in African communities. As the discourse continued over the years, our rulers became disillusioned with the rehabilitation and deterrence aspects of sentencing, and this was measured against rising criminal behaviour. Philosophical justifications for punishment can be broadly divided into two classes: the retribution tradition

or the utilitarian tradition. Essentially the retribution school believes that punishments should be based on just desserts, in other words, that convicted offenders ought to be punished or sentenced. This is rooted in a liberal justification of punishment, according to which the cheapest and probably the most effective way to reduce crime is to incapacitate known recidivists through incarceration, or even death.

The other tradition is the utilitarian one, and this tradition argues that sentencing should achieve some purpose. This is going to be the thrust of our conversation today.

One of the purposes is deterrence, and I note here that judges themselves are not agreed on what goes on in their minds when they sentence. They could either be deterring would-be offenders generally, or trying to deter individuals from recidivism. The question is, how do judges, and even law makers and the community, measure the success of deterrence? I give the example of the death penalty, and am using my own country, Botswana, as an example. From my personal experience, in Botswana, despite the fact that the penalty is retained and actually executed, Botswana has witnessed an unprecedented number of murders and so-called passion killings lately. Similarly, despite the harsh rape penalties enacted, there are daily reports of rape.

A few matters can be raised within deterrence. For instance, if one of the purposes of sentencing is deterrence, how do would-be offenders come to know about harsh deterrent sentences and appreciate that similar behaviour by themselves will attract similar or harsher penalties, thus preventing them from committing crime? It is a fact that deterrence is only talked about inside the courtroom when a judge justifies the sentence, and in practical terms, it becomes difficult to know how the would-be offender who is being deterred would come to know of the original sentence that was passed by the judge. The situation is further complicated by the fact that some offences are premeditated, while others are not. Those that are not premeditated include dangerous driving, which happens on the spur of the moment. Some offences occur outside the control of the offender, that is when he is not in control of his faculties, for instance alcohol and other drug induced offences. The question then is what offences qualify for deterrence? Some commentators have suggested that offences like robbery, which are normally premeditated and well publicized, qualify, since hopefully the would-be offenders would have come to know about them. My argument here is that normally the reasons for sentencing are not given by the media and other people, who are generally interested only in the actual sentence itself. The fact that the judge is trying to deter is normally not newsworthy, therefore people out there would not know about it.

There is also an assumption that a would-be offender sits down and goes through the thought process of what the repercussions would be if he/she were caught. To me this seems unnatural, and I don't think it happens, otherwise we would not have people committing crimes.

The second purpose is rehabilitation. I'm observing here that this is a purpose that has witnessed upheavals over the years, and it has suffered ups and downs throughout the history of mankind. What is very important in all jurisdictions is that demonstrating the positive results of rehabilitation is very difficult, if not an illusion. Judges and other commentators are agreed that rehabilitation as a sentencing purpose should be in the interest of the society as a whole, since these offenders who go to jail are ultimately taken back into society, but in reality, the question is, does rehabilitation take place in a prison, a place where a person is removed from the normal happenings of society and subjected to a routine that does not exist in society? This is one of the things I'm raising. This is a serious sociological and human rights issue, which should occupy the minds of law makers as they embark on the journey of establishing the real purpose of sentencing in their respective jurisdictions.

We have also been told that rehabilitation as a sentencing purpose places an obligation on the State to take responsibility for offenders and for their reintegration into society. The trail is this: the legislature

places custody of the offenders on the Courts; the Courts in turn pass the custody to prisons, which are underfunded, especially in Africa, and which have no capacity whatsoever to deal with any rehabilitation issue. The question is, when the judges pass custody on to prisons, are they doing this from an informed position? Should they worry about whether rehabilitation is really taking place in prisons? Is it their duty to be concerned with that? My own view is that crime is a symptom of societal ills and that the criminals are not necessarily responsible for these ills. Perhaps society as a whole is responsible, and the criminals are the victims, and if we treat them harshly and beyond what is necessary for public safety, are we not making them scapegoats? The social conditions that breed crime must be addressed and eliminated or at least reduced, and this falls squarely on the shoulders of the legislators.

The social conditions that breed crime must be addressed and eliminated or at least reduced, and this falls squarely on the shoulders of the legislators.

Ms. S. MONAGENG (Commissioner, African Commission on Human and Peoples' Rights)

This is a complex issue which calls for continuous discussion in workshops, debate, and education for all stakeholders.

There is another purpose, denunciation. Denunciation is normally directed at the convict. The hope is that when they are shamed in public, in a court, this might appeal to their conscience and deter them from committing further crime.

Of course, there is another important sentencing purpose, which complements the other purposes of sentencing, and this is protection of society. Judges invoke this mainly in cases of sexual violence. The idea here is to keep the convict away from the rest of society for some time, that is in prison, of course. The same arguments that I raised earlier about rehabilitation, deterrence, and so on, apply to this purpose of sentencing too.

We are in a conversation, and those are my thoughts on the purposes of sentencing. However, I have gone on to consider a few other issues in my paper, such as mandatory minimum sentences.

My view, however, is that it is desirable that discretionary powers should be vested in judges in order to assist in individualizing the application of the law, and make it adaptable to the circumstances of each case. Experience has shown that without discretion, the application of the law becomes mostly harsh and very unjust.

Ms. S. MONAGENG (Commissioner, African Commission on Human and Peoples' Rights)

In many States, parliaments have enacted mandatory minimum sentence laws, which force judges to deliver fixed sentences to individuals convicted of crime, regardless of culpability or other mitigating factors. We have heard that mandatory punishments are as old as civilization itself. We are also told that legislators at times and maybe members of the public feel that some judges trivialize crime by passing unnecessarily lenient sentences. My view, however, is that it is desirable that discretionary powers should be vested in judges in order to assist in

individualizing the application of the law, and make it adaptable to the circumstances of each case. Experience has shown that without discretion, the application of the law becomes mostly harsh and very unjust.

I had examples, but in view of time I shall give you just one example that sums up everything that you are looking for in legislature. In reaction to the rape menace in Botswana, my country, in 1998 Parliament decided to enact a law, a very draconian law in my view, for rape. It said that, one, a person charged with rape shall not be entitled to bail; two, when convicted shall be sentenced to a minimum of 10 years imprisonment, maximum of life; three, where the rape is accompanied by violence, minimum 15 years, maximum life, and corporal punishment. On conviction, a convict is tested for HIV with or without his or her consent. If on the balance of probabilities the convict is found not to have known that s/he was HIV positive, a minimum of 15 years, maximum life. If the balance of probabilities is that the convict knew that s/h was HIV positive, minimum 20, maximum life. If the person has been convicted of another offence, same transaction, the rape will always be consecutive.

It seems to me that this sums up my presentation. Legislators should take emotion out of legislating, should adopt a human rights-based approach in legislation, and try to consult as widely as possible. The minimum sentences I have indicated apply across the board. They have produced an outcry, and Parliament has therefore ruled that, although these sentences will be retained, a judge may vary a minimum sentence where s/he feels that it will embarrass a convict. This brings the whole system into disarray. In my view, these sentences cause more embarrassment to the judges than the convicts.

I have touched on the issue of public opinion. As regards the legislature, it is very clear that legislators are influenced by public opinion. As regards the judiciary, some people consider that a judge who is influenced by public opinion is not fit to be a judge. Others consider that judges are part of society, and should be influenced by public opinion. I am leaving it up to you to discuss this issue.

I have touched on sentencing guidelines, and have said that these do function successfully in some countries, for example in Australia. Sentencing guidelines were introduced in the United States, but the Supreme Court has recently reversed that decision. In as far as African countries are concerned, I am confining myself to customary law, which is now part of common law in many of these countries. The laws themselves are not written, the rulings are rarely recorded, so the population is forced to rely on what people understand as custom, and the memory of local court officials, to apply the law in good faith. Customary law is supposed to comply with the constitutions, and it should not contradict enactments of Parliament or principles of natural justice and equity. In such circumstances, how can sentencing guidelines be set?

I have touched on the death penalty, and I really can't say much more about it, except to note that the mood is now in favour of abolition of the death penalty. To the Honourable Members from Africa, I would like to point out that in 1999 the African Commission on Human and People's Rights passed a resolution asking countries which still retained the death penalty to declare a moratorium on its application. Some countries have done so, while a few others have actually abolished the death penalty, like Senegal. I would further advise them that the Commission has set up a working group on the death penalty, and that we are hopeful the working group will consult extensively with African countries. I appreciate that this is a very sensitive subject for African governments.

I have touched briefly on the alternative, restorative justice, and I am referring Honourable Members to the Resolutions and decisions adopted by the Economic and Social Council at its substantive session of 2002 on this subject². I am a believer in restorative justice, and I would ask you to look at that Resolution.

2. United Nations Economic and Social Council (2002). Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. No. 2002/12.

I have touched on restitution as an approach, which is not terribly different to restorative justice. Some commentators say that this approach rests on an approach that is not morally sound – namely that criminal offences are not really wrongs against a victim, but simply the cost of doing business in a society where every harm or loss can be compensated; if compensated adequately, the wrong is removed. Needless to say, people feel that the restitution approach tends to favour the wealthy in society, who can ‘afford’ their crimes. People say that restitution is reduced to a financial payback. As you know, restitution is basically an approach where victims are compensated without the involvement of the State.

In conclusion, I can confirm from my personal experience that there is a lot of confusion in the minds of judges about the concepts of retribution, deterrence, rehabilitation, etc. There is a need for continuing education on purposes of sentencing for all judicial officers, and indeed parliamentarians, and society at large. I am convinced that this would lead to uniformity of practice and judicial thinking, which will lead to satisfied communities. However, we also need legislatures that are well versed in human rights issues, in the social implications of sentencing, and are sensitive to the role that the judiciary plays in the society.

We need our legislatures to be aware of the content of national constitutions and regional instruments, in particular the African Charter in the case of Africa, and of the international instruments that bind us all. Legislature should make it their business to have some oversight on the judiciary, because that is where everything is happening.

THE PRIVATIZATION OF PRISONS AND ITS IMPACT ON THE HUMAN RIGHTS OF DETAINEES

Mr. I. ROBBINS (Professor of Law, American University, Washington, USA): The subject of my presentation is a very serious one.

The profit motive behind privately operated prisons has led to a situation in which the rights and needs of prisoners and the direct responsibility of States for the treatment of those it deprives of freedom have diminished in the name of greater efficiency.

Mr. I. ROBBINS (Professor of Law, American University, Washington, USA), quoting Sir Nigel Rodley (former United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment)

In the 1980s the United States criminal justice system was confronted with rising numbers of inmates and overcrowding in prisons. The concept of privatization of corrections came into being. The State contracted with private companies to operate and sometimes even own correctional institutions. The practice spread abroad, for example to Australia, Canada, New Zealand and the United Kingdom. However, as Sir Nigel Rodley (former United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment) has pointed out, the profit motive behind privately operated prisons has led to a situation in which the rights and needs of prisoners and the direct responsibility of States for the treatment of those it deprives of freedom have diminished in the name of greater efficiency. My own position is that private correction is bad policy, is based on a tenuous legal

foundation, and has profound moral implications. Moreover, private correction is also contrary to many human rights instruments.

The proponents of private correction, including some corrections professionals, major financial brokers and investors, maintain that State provision has produced rising costs and shocking prison conditions which are detrimental to inmates, and conversely that private providers, whose facilities are inherently flexible and involve minimum bureaucracy, save taxpayers' money by building facilities faster and more cheaply, and operating them more efficiently and economically.

Critics assert that it is inappropriate to operate prisons on the basis of the profit motive, which provides no incentive to reduce overcrowding, especially if remuneration is based on prisoner numbers, no incentive to consider alternatives to incarceration, and no incentive to deal with the broader problems of criminal justice. According to the critics, private companies have an incentive to build more prisons and hold more prisoners. Experience shows that the number of incarcerated criminals always rises to fill the number of prisons available.

I believe that private prisons may violate constitutional provisions in the United States of America. Furthermore, there is also a very wide range of policy questions to be addressed on the issue. Some relevant questions concern the standards by which private prisons should be governed, and with whom responsibility for monitoring their implementation should lie; whether operating companies may refuse certain types of inmates; what options would be available to the government in the event of fees being raised substantially. Quasi-judicial issues exist concerning treatment of prisoners, such as the extent to which private employees may use force against them. When the State relinquishes direct responsibility and accountability in this area, accountability is dispersed, vindictiveness can take hold. For example, an employee in charge of reviewing disciplinary cases in a private facility told a reporter from the New York Times, "I am the Supreme Court". This is clearly wrong. Thus, two decades after the introduction of private correction it continues to attract criticism.

The proportion of private to public prisons has remained steady for the last five to ten years in the United States, where private companies control about 6.5 per cent of total prison beds. I would draw your attention to the fact that those companies are consequently looking abroad for opportunities to maximize their revenues.

Human rights instruments under which prisoners retain their human rights present additional barriers to the practice of private incarceration, in which prisoners are seen as units from whom profit can be derived. On a theoretical level, it is clear that prisoners retain their human rights even when they are deprived of their liberty. Relevant instruments include the International Covenant on Civil and Political Rights, the Basic Principles for the Treatment of Prisoners, the Body of Principles for the Protection of all Persons in Any Form of Detention or Imprisonment, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights.

The functioning of private prisons is contrary to these instruments and other human rights standards in a number of respects, including staffing, staff experience and training, medical access, prisoner programmes. International human rights instruments recognize that well-trained professional staff who have suitable values and capacities play a crucial role in prisons. They also recognize that staff should enjoy certain conditions, such as civil servant status, full-time employment, conditional security of tenure, favourable employment benefits. Due to non-selective hiring practices and economic considerations, the employees of private prison facilities do not meet or enjoy these conditions.

The effect on staff turnover can be illustrated by statistics from the United States which show that annual staff turnover is 16 per cent in public prisons, and exceeds 50 per cent in private prisons. An annual staff turnover rate of 200 per cent has been recorded in a prison in Florida. Differential rates of assault and escape also exist between the two types of prison. For example, statistics for the state of California show one escape for every 14,000 inmates held in public prisons, and one escape for 600 inmates in private prisons. International instruments also emphasize that trained and experienced staff are required in order that deprivation of liberty can be enforced while other human rights are upheld. However, statistics show that in public prisons in the United States staff receive substantially more training than their private counterparts. High staff turnover rates can lead to situations in which inmates have more experience of prison conditions than the staff, leading to loss of control. At a prison in Texas, costs were cut by denying expensive weapons training to staff, although the use of weapons remained mandatory. At the same prison, staff made a training video demonstrating the use of stun guns and dogs to control naked prisoners. Such abuses are common practice in private facilities. They are, of course, contrary to the provisions of human rights instruments.

Prisons have a duty to provide protection of the physical and mental health of prisoners which is equivalent to the standard of protection provided to persons who are not detained.

Mr. I. ROBBINS (Professor of Law, American University, Washington, USA)

Prisons have a duty to provide protection of the physical and mental health of prisoners which is equivalent to the standard of protection provided to persons who are not detained. This is reflected in the document, Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Cost considerations lead to inadequate medical provision, and I can provide individual examples of problems from different contexts, including Australia, Scotland, Texas. The same considerations of cost cause institutions to skimp on their duty to provide rehabilitation programmes relating to substance abuse, education and job training. Indeed, there is a second reason for neglecting rehabilitation, in that it reduces recidivism, which is contrary to the economic interests of the operators of private facilities. With private prisons, the bottom line is that they are all about money.

My position is that it is appropriate to use the private sector to provide certain aspects of prison care, such as food service, education and vocational training, on condition that there is no reduction in the overall quality of the service or training provided. Other functions in which accountability to the public is essential and inexorable, that is government function of justice-based incarceration and control, should be seen as uniquely governmental in nature. Privatization of these functions should be considered bad policy and should be unlawful.

I agree that action is required to improve the state of prisons in many countries. However, that action should not impact on the basic responsibilities of controlling the lives and living conditions of those whose freedom has been removed. I appeal to you to remember that the use of private prison facilities leads to dangerous situations, which affect not only the prisoners detained, but also the citizens who work with them, and the communities in which the prisons are located.

I suggest that, if the laws in your country do not at present exclude the privatization of prisons, you should consider legislation to prohibit privatization in the sector. Do not be fooled by the representations of the private prison industry. They are in it for the money. They want to do well, not to do good. The profit motive

should not be introduced into the criminal justice and correctional systems, it will only serve to complicate situations that are already difficult. Legislators and parliamentarians should seek alternative solutions if an incarceration crisis exists or is anticipated in their country. I would urge you to resist the conclusion that privatization in this critical area of criminal sense is right merely because some governmental entities in the United States have voted to contract out some of their prisons. Do not adopt or expand our deplorable experiment with private incarceration.

DEBATE

Mr. O. MAGARA (Kenya): Small children are subjected all over the world to rape, and particularly in Africa. Such rape constitutes a massive infringement of the rights of those children, and inflicts on them a lifelong psychological trauma. According to our speakers the rapists retain human rights, and these must be observed in the course of their punishment. I would like to ask, what punishment would be adequate to match the damage rapists inflict on children?

I would like to make a point on the American experience of privatization of prisons. I entirely agree that incarceration in comfort does not constitute correction. To assert that offenders should be comfortable in prison is tantamount to asserting that their rights are greater than those of their victims.

Dr. E. HARRIS (United Kingdom): I share the concerns of Mr. Robbins about the motives of private companies.

However, I believe that two measures are available, which would meet his reservations concerning the principle of private incarceration. The first would be to provide competent, independent inspection of private prisons and a suitable complaints procedure, and to ensure that the results of both were reflected in the public domain through a free press. The second would be to conclude a clear contract with private providers of prisons, and organize public monitoring of compliance around health care, training, and minimum standards. No such checks exist on public prisons, and it is only assumed that their services meet acceptable standards. Is it not the case that, subject to these conditions, private prisons could constitute an opportunity to improve on public standards?

Mr. M. GOWEILY (Egypt): Execution of sentences is a function of the effectiveness of legislation. It is essential that government should guarantee the human rights of all citizens, and that offenders serve their sentences. There are cases, specifically in Egypt, when offenders do not serve a sentence simply because they cannot be found, or because they go to live abroad until the sentence imposed on them expires. Failure to apply sanctions constitutes a violation of the victim's human rights. Legislators should give thought to overcoming obstacles to the application of sanctions.

I am opposed to the privatization of prisons. Responsibility for prisons and all aspects of the penitentiary system, including provision of medical assistance to convicts, lies with the State. The State must not abrogate that responsibility.

Ms. C. MAZARIEGOS TOBIAS (Guatemala): My question is addressed to Judge Monageng. In the wake of 30 years of armed conflict in Central America, the justice system is weak, in particular in my country. Judges there have an authoritarian mentality, and sentences are often harsh and unfair. In view of these circumstances, how can we stimulate discussion of human rights and bring about change in the way legislation is implemented? It is clear that the issue should be examined by parliamentarians, and that a wide-ranging debate should be initiated.

The presentations at this seminar have convinced me of the need for greater supervision and monitoring of the justice system in my country, and the need to introduce change into the system, for it is one of the pillars of society and freedom.

Mr. J. BERKOW (United Kingdom): I enjoyed the first presentation, which gave us a tour d'horizon of the rationale for a criminal justice system. The view commonly held in my country is that the principle purposes of that system are to punish, in order to convey society's disapproval of offences, to deter individuals from repeating or imitating an offence, and to perform the important purpose of rehabilitation. The retributive principle is increasingly being discarded as inappropriate in the modern world, and to my mind this is entirely satisfactory.

The thesis of the second presentation was as unpersuasive as any I have heard in a public forum. The Professor sought to posit a scenario in which actors who are open to the possibilities for private correctional institutions see them as a panacea to the problems which exist in public prisons. It is always a mistake to pose a Manichean divide between the forces of good and evil, in this case utopian provision in the public sector versus appalling and inescapably evil provision in the private sector.

That is not the situation at all. In the United Kingdom, the view is that the decision on whether to use the private or the public sector should be made on the basis of the quality of the service provided to the State. It is an issue of means and not principles. The frequent references in Mr. Robbins' paper to private profit suggest that motives or principles are crucial in the matter, but that is not the case. There is nothing inherently wrong about private provision of correctional services.

Mr. Robbins reported that an arrogant American official had told the New York Times that he constituted the Supreme Court in his prison. Such a statement is wrong, and it is unimportant. Mr. Robbins also cited statistics illustrating a significant turnover of staff in private prisons, and that the experience level of staff in private prisons was low. In reply I would point out that it is inevitable that some employees should be relatively inexperienced when a new solution is first tried.

Politicians from all the political parties consider the relevant issue to be who is able to best provide a necessary service, and that may be the public or the private sector. When private provision is used, it is essential that the public sector should play a strong regulatory role, and the Ministry of the Interior, known in the United Kingdom as the Home Office, has a duty to draw up a properly specified contract. It must be recognized that the role of the private provider is merely to meet the terms of that contract.

It is far-fetched to erect a theology according to which privatization of prisons is a damnable evil, and which it is incumbent upon all societies to remove. It is a position which I consider scarcely worthy of further public discussion.

Mr. D. TUNGA (Angola): Judge Monageng referred to minimum mandatory sentences. In Angola we value the independence of the courts and of our judges very highly. As judges pass sentence according to their conscience and in the light of evidence established during trial, what purpose is served by legislating to establish minimum mandatory sentences? Our criminal law makes a range of sentences available. For example, in the case of rape the sentence may be between two and eight years imprisonment at the discretion of the judge, depending on the circumstances of the case, and no obligation exists to hand down a fixed mandatory sentence. Sentencing is more severe in the case of rape of a child of 12 years or younger. The most severe sentences are applied in cases of rape by a member of the family. I would like to have more information from Judge Monageng concerning the principle of mandatory minimum sentencing.

The presentation concerning private prisons was very interesting. In Angola prisons are the responsibility of the State, and our modern service is geared towards reintegration and socialization of delinquents or criminals after they are released from custody. We are seeking to establish a system of vocational training in prison, such as computer training and training in electrical skills. Literacy is taught, which is especially beneficial to women prisoners. In this way offenders do not lose all their rights through incarceration. I would like to ask how inmates of private prisons spend their time.

Ms. A. M. MENDOZA DE ACHA (Paraguay): As a member of parliament I have visited many prisons over the years, and in the last three years have visited 16 prisons in Latin America. In my country we have had some very bad prison administrators. We have only one private prison. The physical conditions there are very different from those in the public prisons, and indeed that prison represents the light at the end of the tunnel.

I do not believe it is wrong for prisoners to be comfortable and to enjoy the right to health, food, a dignified life. However, in my country comfort in prison is a utopian ideal. In public prisons 20 inmates may live in a corridor, while in private prison there may be two people in a single cell. Mr. Robbins has described private prisons manned by untrained prison officers and poorly paid guards, but those conditions are standard in our public prisons.

I do not understand how the introduction of private prisons can lead to greater numbers of prisoners, as Mr. Robbins has suggested. The number of people incarcerated depends on the legislative and judicial arms of government. It is their responsibility to control services that are dependent on them.

In my country we require that private prisons should be governed by an executive board consisting of judicial and other officials. Private prisons should control prisoners in the same way as public prisons. As parliamentarians we in turn bear responsibility for controlling the prisons. Would the presenter agree that this is a good solution to the problem we face in my country?

Ms. L. ROSALES (Philippines): We are fortunate to have heard from two people who are so expert in their respective fields.

The idea of restorative justice is new but seems highly relevant, especially in relation to the administration of justice for women and children. Would it be possible for us to encourage more legislation sharing, in order to introduce more humanity into prison camps?

It is the first time I have heard of prisons for profit, and would ask Mr. Robbins to tell us more about the operation of private prisons in his country. As prisons in the Philippines are controlled at both national and local level, I would be interested to know whether the companies concerned in the United States are paid by the Federal Government or by local governments.

Regulatory instruments should certainly be used to make the administration of both public and private prisons more transparent. It has been our experience during the privatization of public utilities that companies are able to profit to the hilt from privatization, and to impose expensive terms and conditions on their clients for the services they provide. A government which believes in public welfare will always be more concerned to offer fair rates than the private sector.

I believe that government must do its job in respect of prisons, and be encouraged to do so through legislation.

Mr. A. BORGINON (Belgium): I would like to illustrate the importance of the subject we are discussing today by noting that there is currently a problem with prisoners in my country, which may make the Government to fall if no solution is found urgently.

In my country there is a major discrepancy between the public perception that prisoners are treated insufficiently severely, and the overcrowding which exists and has been criticized by international observers. We have adopted legislation on the issue, but have not been able to implement it. This situation is common in the countries of northern Europe, and the discrepancy I have described constitutes a challenge to the governments concerned.

I enjoyed Mr. Robbins' arguments, but would point out that some of the problems he describes as typical of private prisons occur equally in State-owned prisons, and I would suggest that the gap between them is not as wide as he indicates. I agree, however, that prisoner numbers may increase if the private sector is allowed to earn a lot of money from building and operating prisons. I was pleased with the presenter's conclusion that it was acceptable to privatize some limited aspects of prison services.

Ms. M. F. PONCE BROCKE (Guatemala): I have a reservation concerning Judge Monageng's statement that it is acceptable for judges to be influenced by public opinion, for the public does not understand the legal parameters which judges consider when handing down sentences. I agree that sentences should be aimed at rehabilitation, and that restitution is less important.

In my view, it is exclusively the function of the State to hand down sentences. I agree that certain services such as provision of food, health and recreation could be outsourced to private entities. Nevertheless, it is a fact that the ultimate purpose of private entities is profit.

The case of the employee who said he constituted the Supreme Court in his prison should not be taken lightly. I entirely agree with the points made by Mr. Robbins on the subject, as it is a serious matter if that person thought he was free to inflict punishment and suffering on prisoners.

In my country, there is a trend towards abolition of the death penalty, and Congress is entitled to abolish it without amendment of the Constitution. I agree with abolition of the death penalty, because it has been shown that the penalty does not act as a deterrent. Indeed, there is statistical evidence that crime is rising in countries where the death penalty is still in force.

Mr. D. D. GAMEDE (South Africa): Would Judge Monageng please elaborate on her statement that the legislature should have oversight over the judiciary because that is where things are happening.

What in her view are the most critical disadvantages of minimum sentences? Does she consider that minimum sentences contribute to overcrowding in prisons?

Mr. J. POCONGO (Angola): My country has not had the death penalty for a long time, and we do not impose life sentences. I do not agree with the view expressed earlier by my colleague that sentences of two to eight years are sufficient for rape. We are currently amending our penal code, and I would like to ask Judge Monageng to share her experience of practice in other countries, and for her recommendations on the response we should adopt to the violent crimes that we have witnessed recently, such as the rape of young girls, murder of children for their mobile phones, murder of politicians.

Privatization is taking place in my country, but we have not chosen to make the prison system an area for private investment.

Mr. S. GINTING (Indonesia): Mr. Robbins cites empirical data to support his view that the private sector does not operate prisons more successfully than the public sector. Our colleague from the UK considers that privatized prisons are acceptable if they provide a competitive service. It would be interesting to debate this subject further in another forum, especially because conditions are very different between developed and developing countries and there could be much to say. In a developing country there might be a risk that rich individuals sentenced to imprisonment would buy the prison concerned and enjoy their term of imprisonment in comfort. In my country basic functions of the State, including law enforcement, sentencing and prisons cannot be privatized under the terms of our national constitution. It is a matter of philosophy. It would be interesting to discuss both the practical issues and the philosophical issues in more depth.

Mr. F. SOPHOCLES (Cyprus): In my country we have enacted legislation to provide the option of community service as an alternative to imprisonment. We worked hard to persuade the judges that this was an experiment worth conducting, and that they should give offenders who would otherwise serve between one and twelve months in prison the option of this alternative form of punishment. Such service can include work in municipalities, communities, parks, libraries, and so on. A two year study has shown positive results in terms of rehabilitation of offenders and reduction in overcrowding of prisons. I invite other countries to share their experience in this area.

Mr. I ROBBINS (Professor of Law, American University, Washington, USA): I would like to respond to the points raised by the two representatives from the United Kingdom and the representative of Paraguay.

I do maintain that certain functions which have traditionally belonged to the State must remain in the public sector. Such functions include the use of force against prisoners. They may include writing up prisoners for violence, since this function can extend the term which prisoners must serve, and be in the interests of the private entity operating the prison.

Mr. I. ROBBINS (Professor of Law, American University, Washington, USA)

I agree that the public sector needs to do better, and can learn from the private sector concerning technology, methodology, efficiencies in building design, and that a partnership between sectors can work well. If a government decides that more prisons should be built, I am not against them being built by the private sector. However, I do maintain that certain functions which have traditionally belonged to the State must remain in the public sector. Such functions include the use of force against prisoners. They may include writing up prisoners for violence, since this function can extend the term which prisoners must serve, and be in the interests of the private entity operating the prison. I am concerned about the monitoring and constant control of prisoners by private companies, and consider that human rights issues are involved.

The performance of the public sector in the area of prison provision is variable. However, it is not the case that the private sector provides a better service. The private sector may claim to provide an equivalent quality of service at a cheaper price, and under some contracts private providers do undertake to make savings of 10 to 15 per cent a year. The savings actually achieved are in the order of one per cent, and in some cases private facilities are more expensive than the relevant public service.

Leaving aside the moral and constitutional questions raised by private prisons, it has been suggested that the practical problems associated with private prisons can be solved by introducing more detailed contracts and using a strict regulatory function to monitor their implementation. Theoretically this should work, but what happens in practice is the following. Monitors assigned to oversee the operation of private prisons report violations of contract to the government. Examples of violations include the use of force, failure to provide contractually agreed programmes, failure to hire personnel in accordance with the contract. After a monitor has reported a violation, a period of extended communication ensues and several months go by before the company resolves the issue. The period in which a service was not provided enables the company to reduce its overall costs. Subsequently the company claims to have operated in an efficient manner which saved tax monies. In my view this is not a good solution.

Neither the public nor the private sector has a monopoly of wisdom. A problem exists in the correction area. When the profit motive is added to the equation, new kinds of violations occur. We should face the important questions that arise concerning correction, such as whether we are incarcerating the right people and whether our sentences are too long. Correction is not a separate entity, and the questions associated with it are inextricably intertwined with all the other questions in the criminal justice system.

Ms. S. MONAGENG (Commissioner, African Commission on Human and Peoples' Rights): I shall answer the questions in reverse order.

In South Africa, community orders are issued as one of the alternatives to incarceration. Systems must be in place to supervise the discharge of extramural labour orders. For example, in Botswana offenders discharging a community order go to prison only once a week to collect their rations; it is essential that they should be required to clock in at the beginning, middle and end of each day to ensure that they do the work they have undertaken.

In reply to the representative from South Africa, the critical disadvantages of minimum sentences are that they take sentencing discretion away from judges, and place sentencing in the hands of legislators, who do not have the requisite training. Minimum sentences do contribute to overpopulation in prisons, because they are not legally thought out. The subjection of convicts to a compulsory HIV test in Botswana, which is an offence against human rights, is an example of the problems that measures imposed by legislator can cause. I would suggest that in the area of sentencing, legislators should confine themselves to fixing maximum sentences.

I have said that there is a need for the legislature to exercise oversight over the judiciary in the context of the overt or covert pressure that is exerted on judges by the legislature and the executive in some countries. Parliamentarians have to make it their business to ensure that all is well with the judiciary, that proper structures such as security of tenure are in place, and that judicial officers are responding appropriately to the expectations of electorates.

I would repeat that there is an overall trend towards abolition of the death penalty. The penalty still exists in some 84 countries. I do not believe that it is effective. I would just suggest to those parliamentarians whose national legislation has retained it that they should consider whether to abolish the penalty.

As the representative of Guatemala has said, sentences should be aimed at rehabilitation. However, it is the responsibility of legislators to ensure that it is properly implemented in places of detention.

The representative of Belgium referred to the problem of overcrowding, and we should and are looking for alternatives, hence the discussion about the merits of private versus public prisons. In response to the

representative of the Philippines, I regret that it was not possible to consider the concept of restorative justice in greater depth. I confirm that it is a new concept. It is not an exclusively positive concept, but I do suggest that legislatures should consider it as an additional option. Incidentally, it was part of traditional practice in Lesotho, and has become part of the criminal justice system in that country.

My advice to the representative of Angola is to bear in mind that the trend towards abolition of the death penalty is strong in Africa and worldwide, and to avoid the introduction of minimum sentences.

My response to the representative of Kenya is that the punishment of men who have raped children should be viewed in a holistic manner by the criminal justice system. It is the duty of legislators to establish the reasons for which this offence continues to be committed. I am convinced that there are offences for which people should be sent to prison. However, those people are later released, and it is important to consider their rehabilitation and reintegration into society. Sentencing is an intricate and complex matter. Ideally, the legislature should set maximum sentences and increasingly seek to involve the judiciary in its work.

My work with the African Commission on Human and Peoples' Rights has made me aware that there are real benefits associated with an organization becoming attached to the Human Rights Council. I would suggest to parliamentarians working with organizations that they should encourage this practice. The application of human rights concepts in our daily work is important, but it is something which does not happen automatically.

VULNERABLE GROUPS

THE DETENTION OF ASYLUM SEEKERS, IMMIGRANTS AND MENTALLY DISABLED PERSONS

JUVENILE JUSTICE

VULNERABLE GROUPS

THE DETENTION OF ASYLUM SEEKERS, IMMIGRANTS AND MENTALLY DISABLED PERSONS

Ms. L. ZERROUGUI (Chairperson of the United Nations Working Group on Arbitrary Detention): Today I shall discuss the detention of immigrants and asylum seekers, and of people in custody because they are mentally disabled.

Yesterday I spoke about the issue of detention of migrants and asylum seekers for security reasons. Under the guise of fight against terrorism and transnational organized crime, countries experiencing strong migration flows have strengthened their legal machinery to fight against irregular migration, and have restricted the right to asylum in ways which are not always in tune with international humanitarian law and the rights of refugees. A number of countries have resorted to systematic detention of persons who are on their territory illegally, while others systematically stigmatize migrants. Whole sections of the population are assessed as being potentially dangerous, and are at risk of administrative or extended detention.

Asylum seekers should be subject to detention for reasons specified in international law, but in recent years practice in this area has changed. There is a greater likelihood of detention if migrants are from certain regions of the world or are of certain religions. National regulation of migration is legitimate, and each country should set its own migratory policy. However, we must find ways of ensuring that those legitimate processes are not abused.

Individuals possess fundamental rights when they arrive in a country. In particular, countries have a duty to protect vulnerable groups such as asylum seekers, refugees, persons with a mental disability, or traumatized persons.

We have found it is often the case that people labelled a risk factor are sent to await trial or investigation not in a detention centre, but in prison, even in high security prison. They should be treated in line with the relevant international norms.

Under international law and refugee law, detention is a measure which should be applied to people newly arriving in a country only in exceptional circumstances. It is within the scope of legislators to separate the issues of the fight against terrorism and criminality from the problems of managing migratory flows and economic migrants.

Ms. L. ZERROUGUI (Chairperson of the United Nations Working Group on Arbitrary Detention)

Under international law and refugee law, detention is a measure which should be applied to people newly arriving in a country only in exceptional circumstances. It is within the scope of legislators to separate the issues of the fight against terrorism and criminality from the problems of managing migratory flows and economic migrants. Countries which have ratified international instruments enshrining the principle of non-

refoulement may not repatriate a person where there is a risk of torture, degrading treatment, persecution or execution on return.

The four situations in which a country is entitled to resort to detention are the following.

Detention can occur before arrival on a territory. It can occur after arrival, if an identity check establishes that a person's presence on the territory is illegal. It can occur during an investigation of an asylum application. It can occur when a person is no longer entitled to be in the country, and an administrative decision has been taken to deport them. In the latter case, the period of detention can be long if there is, for example, a situation of armed conflict in the country of origin, or there is a risk that the person would be tortured in case of repatriation.

The following treatment of immigrants and asylum seekers is lawful. Their identity must be checked on arrival. If the initial interview is unsatisfactory, the person may be placed in custody. It is important that custody should not be systematic or discriminatory, and that the right should exist to challenge the legality of detention before a judge or an independent impartial body having the authority to release the person, subject to provision of guarantees.

When investigation leads to the conclusion that a person does not have a right to remain, or that an asylum application may not be bona fide, detention can follow. In some countries the legislation specifies that only asylum claims made immediately on arrival and in due form are valid. It is important that procedural norms should specify how people are advised of requirements, and ensure that they are advised in a language they understand. People are entitled to legal aid, but it is not made available in all countries. Applications are at times rejected because they have not been properly formalized. These are the type of cases that must be considered when devising legislation for countries which receive migrants and asylum seekers.

People encounter a very wide range of obstacles on arrival. The cultural differences that exist between North and South are a source of difficulty. Immigration service officials are often unaware of the situation and problems in a migrant's country of origin, while migrants do not know what is required of them. An individual from a war-torn country may arrive in a country with a highly organized administrative system and find he is required to submit documents which he does not possess and of whose existence he may be unaware. People without the necessary documents are sometimes advised to apply for them to their country's consulate, but for refugees this may not be a practical solution.

People who may have been advised by traffickers to destroy their identity documents and withhold cooperation need legal assistance. This is especially important in countries where the consequence of non-cooperation is detention and expulsion. There are countries in which free legal aid is theoretically available, but aid providers cannot in practice reach migrants held in detention in inaccessible locations. Aid may not be available at all to an immigrant held in a high security jail. A person may be advised that s/he can be released from detention if a guarantor undertakes that s/he will come to an administrative office when summoned; the only option of those who have no local connections is to stay in prison. In many countries officials advise detainees that they are entitled to make telephone calls, but often such calls are not free of charge, and the right is useless to people without money or local contacts. More options are available to people who have resources, or people who have been assisted by traffickers than to more ordinary people. In this as in many other areas, judicial procedures produce situations in which the most vulnerable people are least able to take advantage of assistance available.

Applications are often examined by an immigration service, that is by an administrative service. People are often advised that their application has been rejected and a decision taken to expel them, with no

possibility of appeal and summary implementation of the decision. Unless the fundamental right to appeal against such a decision is guaranteed, there is a likelihood of abuse. Thus, I have seen planeloads of rejected migrants or asylum seekers landing in Latin America, and would question whether those people have had the opportunity to make use of the legal guarantees available. Moreover, I would point out that collective expulsion is prohibited under international law.

Countries must be reminded of their responsibilities under international legislation and their duty to look for solutions which take into account the risks to which some people may be exposed, such as the risk of torture.

Incarceration is a form of punishment. The appeal process can be long. There is no justification for incarcerating individuals for the duration of an appeal process. The practice is a form of deterrence, of inducing people to abandon their intention to remain. A whole series of rights violations is associated with detention. Illegal entry to a country by an individual who is not involved in criminal activities, trafficking or terrorism should not constitute a criminal offence. There is a stigma attached to imprisonment. In prison detainees may be exposed to violence or abuse and so it is important to avoid incarcerating detainees, especially women, together with criminals. The treatment of children is an especially difficult issue, particularly if they are alone. Children should be helped to stay with their families, and should not be subjected to the trauma of imprisonment. I would refer you to Document 99 of the Working Group on Arbitrary Detention concerning the measures recommended to legislators.

I shall now consider the second issue, namely the detention of the mentally disabled. Medical reasons for internment, such as a handicap, drug addiction, positive HIV status or mental disability can be the basis for an application to remain. This can lead to forcible internment in a psychiatric or specialized institution. The United Nations Working Group on Arbitrary Detention has noted that people are sometimes placed in psychiatric hospital for an assumed mental disability, when the real purpose is to repress convictions, political, ideological or religious activities. A report was published (ref. EC/N.4/2005/6) in 2005 in which the Working Group adopted opinion number 7 concerning the protection of persons detained on the basis of mental disability. I would like to take this opportunity to bring the document to the attention of parliamentarians, and invite them to note particularly the criteria which the group defines for the psychiatric confinement of persons supposed to be suffering from a mental handicap. The text is available as a UN document on the internet.

Opinion number 7 is the result of experience acquired by the Working Group in the course of 15 years, and is based on official UN documents and the report of the Special Rapporteur Ms. Erica-Irene Daes.

A person who suffers from symptoms of mental disability must be medically examined to establish the nature of his condition. Deprivation of liberty can then be motivated by the need to provide treatment to which the patient has refused to submit. A patient suffering from a psychiatric condition may be interned in a closed establishment to avoid prejudice to others or themselves. Within a judicial system under which mentally disabled persons are not held criminally responsible for their actions, a person accused or suspected of a crime can be detained, forced to undergo mental examination and await a medical diagnosis. If mental pathology is diagnosed, the person can be constrained by a legal decision to have treatment for as long as is considered necessary. There are situations when such measures are appropriate, but consideration should be given to the vulnerable situation of such individuals. The following criteria have been suggested by the Working Group on Arbitrary Detention to assess whether proposed measures are in line with international standards. Psychiatric internment as an administrative measure should be considered to constitute deprivation of liberty if it takes place in a closed establishment which people cannot leave freely. The law defines conditions in which deprivation of liberty is appropriate and individual cases are studied by

the Working Group. The minimum condition by which it may be established that internment is not an act of arbitrary detention is that the measure should not be clearly disproportionate, unjust, unforeseeable or discriminatory in nature.

Paragraph 3 of article 9 of the Covenant on Civil and Political Rights applies to all persons who show the signs of mental illness and are arrested or detained for criminal activity. Due consideration should be given to the person's limited ability to contest the decision, and if he has no lawyer one must be appointed. Paragraph 4 applies to anyone placed in a psychiatric hospital or similar institution following an administrative, judicial or other decision, and stipulates that the necessity for detention shall be re-examined regularly at reasonable intervals by a tribunal or other independent impartial body, and the person shall be released if the condition ceases to exist. Decisions on psychiatric detention should not automatically follow the expert opinion of the institution in which a patient is held, or the report and recommendations of the attending psychiatrist. Genuine adversarial procedure should be conducted, to enable the patient or his legal representative to challenge the psychiatrist's report.

Internment should not be used as means to limit freedom of expression, or punish or discredit people for their religious, political or ideological convictions and activities, or dissuade them from holding them.

In certain countries people suffering from psychiatric conditions are held in prisons managed by prisoners, and where no treatment is available. Such a situation creates the greatest vulnerability, and internment in a psychiatric hospital subject to guarantees can be a better option for such people.

DEBATE

Ms. A. M. MENDOZA DE ACHA (Paraguay): I understood the presenter to say that children should not be separated from their families, and that they should in no circumstances be placed in prison or detention. What are the regulations concerning young people?

Mr. A. LO (Senegal): At present immigration is largely due to poverty in the rural areas of poor countries. Thousands of young people are crossing borders to seek a better life, leaving behind even poorer families. I suggest that parliamentarians should be drafting new texts to avoid the systematic criminalization of those young people.

Mr. D. TUNGA (Angola): Prisons in my country contain people sentenced to several years' imprisonment. I would like to ask what attitude I should adopt as a Member of Parliament if I become aware that among those inmates there are people with some form of mental disability, bearing in mind that separation of powers exists in my country.

Lord F. JUDD (United Kingdom): I particularly appreciated the compassion underlying the presentation.

We maintain that our migration and asylum policies are upholding the humanitarian values of a decent society. In reality they are failing to do so, and their administration is causing bitterness which could be responsible for attracting new recruits to extremism.

Lord F. Judd (United Kingdom)

Parliamentarians should start an international debate on the issues raised in the presentation. We maintain that our migration and asylum policies are upholding the humanitarian values of a decent society. In reality they are failing to do so, and their administration is causing bitterness which could be responsible for attracting new recruits to extremism.

I view these issues from a socialist perspective. At present we have free movement of goods and capital, but not free movement of labour. This constitutes a massive contradiction in the operation of the market, and produces pressures which we describe as illegal. It would be more appropriate to face up to the contradictions in the way we operate the market.

*Punishment is necessary, but the real challenge
is rehabilitation, both for humanitarian and
practical reasons, in order to reduce recidivism.*

Lord F. Judd (United Kingdom)

The Joint Select Committee for Human Rights, of which I am a member, produced a report on deaths in custody in my country. All of us who worked on the report grew angry, irrespective of our political position, because we became convinced that our prisons contained an excessively large number of inmates who were mentally ill or disturbed. It was clear that their experiences in prison would not help them to deal with the factors that had brought them into conflict with the law. We encountered good people in the prison service who told us they were angry with politicians for succumbing to the pressure of the popular press, which demands vengeance and punishment instead of action to deal with the real causes of crime. Punishment is necessary, but the real challenge is rehabilitation, both for humanitarian and practical reasons, in order to reduce recidivism.

I suggest that a system to meet the needs of mentally disturbed people caught up in crime would be completely different to the present arrangements, and not necessarily more expensive. Present penal policies and institutions are thoroughly inadequate. It would be an excellent thing if the IPU could help us to start a debate on what could and should be done in this area.

Ms. L. ZERROUGUI (Chairperson of the United Nations Working Group on Arbitrary Detention): Migration caused by poverty is related to globalization. It is therefore neither a national nor even a regional problem, and we need to find solutions at the international level which do not stigmatize and further frustrate people. I fully agree with the representative of the United Kingdom about the need to open a debate on the issues involved.

The means for dealing with mental health problems need to be considered. Worldwide it is often the poor who break the law due to family problems and poverty. Even if the prisons do contain dangerous criminals, they contain many people whose problems could have been addressed by society elsewhere and earlier.

To the representative of Paraguay I would say that of course minors should be separated from adults in prison. Separating children from parents is a different matter. In some countries there are fortunately centres where families are held as units. Separate provision may be suitable for older children aged about 15 or 16, but it is important that they should maintain contact with their families. There are solutions available for people, provided care is exercised and blanket solutions are not applied.

To the representative of Angola, I would point out that the principle of the separation of powers is intended to provide checks and balances on different actors. Rules are being broken if people are being held in conditions which are contrary to a country's constitution, or else to international treaties ratified by the country. Prisons are run by members of the executive branch of government, and parliamentarians are entitled to hold them accountable for their actions. Moreover, I would say that parliamentarians may communicate with the judiciary.

Prisons are run by members of the executive branch of government, and parliamentarians are entitled to hold them accountable for their actions. Moreover, I would say that parliamentarians may communicate with the judiciary.

Ms. L. ZERROUGUI (Chairperson of the United Nations Working Group on Arbitrary Detention)

JUVENILE JUSTICE

Mr. V. MUNTARBHORN (Professor of Law, Chulalongkorn University, Bangkok Thailand, United Nations Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, former United Nations Special Rapporteur on the sale of children, child prostitution and child pornography): This morning I presented my 2006 report for the Human Rights Commission to the Human Rights Council on the human rights situation in the Democratic People's Republic of Korea. There was a lively discourse, as all the countries impacted by the situation were making statements. Children are affected by the situation too. If they have left the country, they may be detained; if they are sent back, they may be interrogated. Clearly, juvenile justice is not only about ordinary prisons, but also about immigration and detention.

Clearly, juvenile justice is not only about ordinary prisons, but also about immigration and detention.

Mr. V. MUNTARBHORN (Professor of Law, Chulalongkorn University, Bangkok Thailand, United Nations Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, former United Nations Special Rapporteur on the sale of children, child prostitution and child pornography)

There is a very rich country in which I visited a detention centre, where alleged juvenile offenders are locked up in air-conditioned cells without fresh air or daylight. How can we hope to change behaviour in such an environment? Protracted punishment without psychological awareness cannot be useful. Children need a second chance, but many do not get one.

Standards do exist, in the form of the International Convention on the Rights of the Child, to which almost all countries are party, and which defines children as persons below the age of 18. We are going to think about how the justice system impacts on children, whether they are offenders, victims, witnesses, or all three at the same time, as is often the case. I propose to lead you through some of the basic principles and issues relating to children affected by the justice system, and to discuss some of the challenges that arise.

There are three basic approaches to juvenile justice, and countries adopt variations of one of those approaches. In the first, children are treated very mildly, they are neither imprisoned nor castigated nor named as offenders, and social facilities are used for healing children.

The second is the model of justice aimed at public protection. In the harshest variants this leads to retribution, jail and even execution. The root causes of the offence are not considered, the offender is treated like an adult and is not offered a second chance.

The focus of the third approach is restorative justice, which is being used experimentally in many parts of the world. Typically the child's family and the plaintiff will meet and the child will perform a service in compensation for the offence, such as washing windows, as part of community service. The offender is not exonerated from blame, but the offence does not attract a criminal record, nor is the very formal justice system invoked.

Many actors impact on child offenders, from the State and law enforcement officials, to family, parents, the community, and non-state actors. Many suicide bombers are children, recruited by non-state actors.

Diversion and mediation are key modern concepts in the treatment of child offenders, the aim of which is that courts and prisons should not be involved, and ultimately child offenders should be reintegrated into the community.

Mr. V. MUNTARBHORN (Professor of Law, Chulalongkorn University, Bangkok Thailand, United Nations Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, former United Nations Special Rapporteur on the sale of children, child prostitution and child pornography)

Children are vulnerable, and those who have lived through a traumatic experience need professional help and must be treated in a child-sensitive manner. There are many entry points into the justice system, many of which traditionally have not had child-friendly facilities. Experiments are being conducted which are aimed at avoiding trauma to children. Diversion and mediation are key modern concepts in the treatment of child offenders, the aim of which is that courts and prisons should not be involved, and ultimately child offenders should be reintegrated into the community.

A number of international standards interplay with the juvenile justice system. One of these is the Convention on the Rights of the Child, to which all the countries represented at this meeting are party. One of the countries that is not a full party to the Convention is the United States of America. Among recent positive developments in the United States is the decision taken by the Supreme Court to prohibit the execution of people under the age of 18, a judgement that is linked to the rights to life, survival, development, and to protection and participation of the child.

Non-discrimination is another fundamental principle inherent in the concept of the rights of the child. It is essential that the child's best interests should be considered for and with the child concerned. The obligation to consult with the child, which applies even to judges, is linked to the international principle of respect for the views of the child. Article 37 of the Convention is the provision that capital punishment should not be applied to children. In the event of arrest, detention should be as brief as possible, and the child should be kept separately from convicted adult and minor offenders. Children should have contact with their family, access to legal assistance, and to a prompt decision by the authorities dealing with their case.

Another Article of the Convention interplays with presumptions of criminal law which are based on international standards, such as the presumption of innocence until proved guilty.

A key issue of juvenile justice is the age of criminal responsibility, below which children do not come into contact with criminal justice at all. There are dramatic differences between countries in this area and in many countries the policy is problematic. In one developed country the relevant age is 10. In my country the relevant age is seven. It is my belief that there are ways of dealing with responsibility without linking children to criminal justice at an early age. Where appropriate, cases should be processed without recourse to judicial proceedings, and a variety of alternative dispositions should be available, such as care and child guidance.

Many treaties have implications for children. Thus, the United Nations International Covenant on Civil and Political Rights stipulates that the death penalty shall not be applied to persons under the age of 18. The Human Rights Committee has stipulated that a key developed country should introduce legal reform, so that sentences of life imprisonment should not be imposed on children without the possibility of parole.

Further specific guidelines exist which provide more focus on operations. These include the United Nations Standard Minimum Rules for the Administration of Justice which make a number of provisions on juvenile offenders, such as that the minimum age of criminal responsibility should not be too low, which is an issue that we should discuss further. The guidelines recommend the use of diversion techniques, of psychiatric measures, separation of child offenders from adult offenders, development of competent adjudicating bodies which would consider institutionalization a last resort, and special concern for female offenders. In this connection I would draw attention to the issue of the treatment of indicted women who have children; it is important that special facilities should be made available, so that children remain with their mother as much as possible. There are countries in which women with children are awaiting execution, raising the question of the fate of the children.

In the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), provision is made against status offences applying to minors but not adults, such as truancy in the streets.

Under rules for juveniles specified by the United Nations, juveniles have rights in the pre-trial period, and a right to a minimum period of detention. Juvenile detention facilities are required to keep records, and to ensure that minors are held separately from adults. There is a preference for open facilities, and for the minors to have some access daily to fresh air, recreation, and contact with the outside world. There must of course be rules concerning discipline, but corporal punishment should not be used, and there should be minimum recourse to physical restraints. We are aware that in practice multiple abuses occur in juvenile prisons, which are often a law unto themselves.

Here, too, I would refer to the Vienna guidelines³, and finally to the United Nations guidelines on justice for child victims and witnesses of crime of 2004. The latter document emphasizes that children appearing before the juvenile justice system can have multiple status, and that there are many examples of cases which should be treated by trained professionals. Even young children should be able to participate in the judicial process. Children have the right to be informed about charges against them, and the other rights to which adults are automatically entitled, including the right to have their case reviewed. The court may appoint a guardian for a child who has no one else to represent him. Children are entitled to be shielded from the media, to be protected from hardship during the trial process, they have the right to safety and protection against danger, such as contact between a victim and the alleged perpetrator of an offence. The court order is a suitable protective mechanism. Children have the right to reparation or compensation, and the right to the application of preventive measures against repetition of offences against them.

3. United Nations Social and Economic Council Resolution 1997/30 – Administration of Juvenile Justice: The Vienna Guidelines (1997).

Through your deliberations here you have shared experiences at various levels which are interlinked in terms of child justice in the justice system. Action is often at the national and local levels, but there are also regional entry points all over the world, one example of a regional human rights system being the African Charter on the Rights and Welfare of the Child, and there is the system of multilateral treaties, which includes those mentioned above.

Parliamentarians have a major role to play in engaging with current issues. On your return to your country I invite you to check the actual age of criminal responsibility. That age varies dramatically. Legislators can help to raise it to a realistic level, and in my view it should be above the age of 14. You should investigate whether you have specialized juvenile courts, whether child sensitive procedures are used in your country, whether humane discipline is applied. You should consider the nature of humane discipline. Based on conversations with children, I believe that they suffer a great deal of physical abuse in detention. You should investigate whether alternatives exist to detention and promote them. Careful standards are necessary in relation to the current experiments with privatized detention.

You should think about the treatment of children captured in armed combat. Humane standards do exist. International criminal courts have no jurisdiction over persons under the age of 18, which implies that minors should be treated in accordance with the principles which I have advocated, the focus of which is rehabilitation.

We should examine what the actual situation is in our own countries. There is potential for legislative reform, for change through national plans of action. Good programmes do exist all over the world. For example, the sub-committee on children of the Commission for Human rights in Thailand makes prison visits all over the country, in response to a suggestion of mine. We must work together amicably to prevent problems and achieve further improvement. Children who are being used as criminal instruments are often invisible, and trained professionals are necessary to reach them. We must foster monitoring and review of judicial decisions. We must develop cooperation and networking, and involve civil society in finding solutions to these issues.

The justice system is linked to international standards, which call for prevention of abuses, protection of children's rights, and humane treatment of children in criminal situations. We must legislate to provide facilities other than those that meet formal requirements. We must ensure the participation of children in their own destiny and help them to have a second chance.

Mr. V. MUNTARBHORN (Professor of Law, Chulalongkorn University, Bangkok Thailand, United Nations Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, former United Nations Special Rapporteur on the sale of children, child prostitution and child pornography)

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DEBATE

M. S. A. RIAZ (Islamic Republic of Iran): I am the Vice-Chairman of the complaints committee of the Iranian Parliament. I would like to read you a short report.

A high value is placed in our country on minors and their care, as they represent the future. In our legislation we have taken into account all the religious precepts concerning youth education, and have given much consideration to the education of children. We have advised the United Nations and the United Nations Children's Fund of our laws, and we strive to implement them. A committee on child psychology and the needs of children has been created in our country, and a bill will shortly be presented to Parliament regarding the training of children.

The Prophet said that children need to be loved and respected. They need to be taught precepts, there is a role for education and for punishment. The courts dealing with minors apply all existing international human rights legislation, and we respect all existing legal precepts.

Formerly, the nature of punishment was penal, it has now become corrective and educational. Our Parliament has passed a special law on children, which considers minors in a holistic fashion. We always try to respect the rights of minors, and do not look into their identity or origins. Under Article 219 of our legislation we have an obligation to train special judges and create special units within the courts, so that the needs of minors can be taken into account. These courts have to observe rules, according to which the father must bring the child's identity papers, or a tutor must take responsibility for the child. The parents are asked about the child's psychological make-up and the child must be supported in all areas. We may review the operation of these courts after the training of judges has been further developed, which we are doing in consultation with UNICEF. The needs of minors in all areas (health, social, professional, food, education, etc.) are covered at the training centres, and we strive to safeguard the physical welfare of minors in school, and the welfare of their leaders and teachers. Schools include legal topics in their syllabus.

Children who are in the street when they should be in school are picked up by the local authorities. The labour code prevents children from taking up employment before the age of 15, and people who employ children below that age are subject to a fine. A help line exists for children to make complaints.

Ms. G. A. DE LEON RUIZ (Guatemala): Children in my country do not enjoy the protection of adults, nor do private schools take responsibility for their wellbeing. Authority is less prevalent than in other States. Children aged 10 or 12 are used to commit crimes such as murder, because they cannot be held in custody. I wish that country enjoyed the framework of provisions described by the previous speaker.

Mr. M. BOUDIAR (Algeria): In my country there is a special minors' tribunal, at which the judge is assisted by educators and others, the provision is that a child should always have a defence counsel and other assistance. The interrogation of children always takes place behind closed doors. The principle of non-discrimination was introduced 30 years ago. Different sentences are applied to adults and to minors, that is persons under the age of 18. There is provision for the protection of women, and capital punishment is not applied to women who are breastfeeding a child under the age of two.

I would like to thank the presenter, and to ask him for his views concerning children exposed to public psychological dangers, namely the many children who have not committed a crime but live in the street and become the victims of drug traffickers and others. Our legislators have studied this issue, and the Government has been told that it is responsible for finding a solution.

Mr. E. KALISA (Rwanda): My thanks to the speaker for his presentation and for sharing his expertise with us. I would like to note that the rights of children are respected in my country.

My first question is whether the presenter has any recommendations concerning the treatment of children born in prison, either because their mother has not yet been tried, or because she is serving a sentence. My second question is how we should deal with minors who rape other minors, a minor being a person under the age of 14.

Ms. L. ROSALES (Philippines): I have a piece of good news to report, which is that a comprehensive juvenile justice act has just been passed in my country. We have started to implement the act at various levels of local government. I have distributed a list of the act's salient features at the present conference.

Under the Convention on the Rights of the Child, does an organ exist which can monitor or impose compliance of governments with the Convention by means of periodic reports?

Human trafficking is one of the offences associated with crimes against children and international cooperation efforts are made in this area. I wonder whether a mechanism exists among the various international bodies through which some cooperation could be achieved concerning the issues we have discussed today.

In many countries, including my own, children are in conflict with the law. We also have to deal with the phenomenon of child soldiers mobilized to fight in internal conflicts, of which there are many cases in south-east Asia, in particular Burma, and also in my own country.

Dr. A. EL JAALI (Sudan): This presentation was particularly interesting and enriching, as it raises a number of issues concerning the implementation of legislation in different countries, and under different constitutions.

In Sudan the constitution forbids us to impose the death penalty on children, that is persons under 18, as well as persons over the age of 70. We have not, however, settled the question of the age at which criminal responsibility should begin. This issue has been discussed for a long time and is controversial in many countries and under various judicial systems. There are four doctrines or schools of thought which differ in minor ways under Islamic sharia, and the age of criminal responsibility generally varies between the ages of 10 and 14. The question of centres for young people is also interesting, and we have visited a number as part of a parliamentary commission.

Mr. V. MUNTARBHORN (Professor of Law, Chulalongkorn University, Bangkok Thailand, United Nations Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, former United Nations Special Rapporteur on the sale of children, child prostitution and child pornography): The criminal age of responsibility is often too low, and 10 is too low. In Spain and Austria it is 18, which may be too high at present for developing countries, but increasingly legislators are raising the age of responsibility. It may be that the preferred age is currently 14 or 15. In my country we tried to raise it from 7 to 14, but were prevented from making the change by government ministers.

A question was asked about dealing with psychological damage to children. Teams working in the juvenile justice system should be multi-disciplinary and include psychologists, social workers, friends of children. A health report should be produced on each child for the use of the court and the support team. Accessible educational and medical facilities should be provided for street children. Street children themselves say they want help at night. Child participation in identifying needs makes it possible to reduce the cost and increase the efficiency of provision.

I repeat that children who have done something wrong must accept some responsibility, and there has to be discipline. That responsibility, however, must be shared between the children, according to their age, and the community. Treatment of child offenders must be humane, which closed prisons are not.

In response to the technical questions about the Convention on the Rights of the Child and monitoring, there are national Children's Rights Committees. My team and I answered questions on the children of women prisoners in that context earlier in the year. There is now a proposal to have a special representative on violence against children who would take complaints and address issues, irrespective of whether countries are party to the Convention. There is the United Nations Convention against Transnational Organized Crime with protocols on smuggling, trafficking and firearms, which has a soft review process consisting of periodic conferences of States Parties. Trafficking is also covered by many human rights review bodies, such as the Committee on the Rights of the Child, and can also come within the scope of the UN Special Rapporteurs on trafficking in persons, especially women and children, on violence against women, on the sale of children, child prostitution and child pornography.

There is a special treaty relating to children in situations of armed conflict, namely the Optional Protocol to the Convention on the Rights of the Child.

The United States of America is a party to the Optional Protocol, and we hope will soon come before the Committee on the Rights of the Child, even though it is not a party to the Convention itself.

The Optional Protocol contains standards, for example, there should be no child soldiers under 18 years old, and non-state actors are addressed. If a child has done wrong as a child soldier, rehabilitation and demobilization should be used, the psychological side of his traumas should be addressed, he should be treated as a victim as well as a perpetrator. To be realistic, some cases are so extreme that there is no remedy; but there is always hope, and we must reach out to as many children as possible.

Ms. G. A. DE LEON RUIZ (Guatemala): I am convinced that juvenile delinquency is the result of negligent, irresponsible, lazy societies. In my country the legal framework for the protection of young people is quite sophisticated. There is a code on minors and the family. However, existing legislation is not always implemented. 36 years of war have taken their toll on our society. The children who were orphaned by the war are adults now, and most of them are criminals. We have some 26,000 street children, and it is estimated that 18,000 of them are being sexually exploited, especially in the border areas.

The problem of street children exists in many countries. Unless parents behave reasonably and responsibly, the problem of street children and anti-social behaviour will always exist. UNICEF makes recommendations, but there is also a need for more effective measures. Legislation against adoption will have negative repercussions in third world countries, because neglected children are likely to grow up as delinquents.

Ms. S. MONAGENG (Commissioner, African Commission on Human and Peoples' Rights): I would like to offer some advice, particularly to the parliamentarians from Africa. There is a need to monitor the activities of the traditional courts which handle children. They are inclined to act autonomously and without reference to the community expectations which weigh on the ordinary courts.

I have another point concerning education. Some parents are eager to pass on their responsibilities to the State. In my country, delinquent children who have refused to attend school are made to attend a School for Industry and are forced to go through a process of formal education. We have learned from teachers that the behaviour of the children becomes more delinquent in that institution. As an alternative to forced education I would recommend modular courses, which assist reintegration and rehabilitation, and enable children to be closer to their parents.

LIST OF PARTICIPANTS

LAW AND JUSTICE: THE CASE FOR PARLIAMENTARY SCRUTINY

SEMINAR FOR MEMBERS OF PARLIAMENTARY HUMAN RIGHTS BODIES ORGANIZED
JOINTLY BY THE ASSOCIATION FOR THE PREVENTION OF TORTURE, THE
INTER-PARLIAMENTARY UNION AND THE INTERNATIONAL COMMISSION OF JURISTS

GENEVA, IPU HEADQUARTERS, 25-27 SEPTEMBER 2006

LIST OF PARTICIPANTS

Ms. Louise ARBOUR

United Nations High Commissioner for Human Rights

Mr. Anders B. JOHNSON

Secretary General of the Inter-Parliamentary Union

Ms. Martine BRUNSCHWIG-GRAF

President of the Association for the Prevention of Torture and member of the Swiss Parliament

Mr. Mark THOMSON

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----------------------	---

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Dr. Evan HARRIS (LD) ⁶	Member of the House of Commons, Member of the Joint Select Committee for Human Rights

Uzbekistan

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------------------------------	--

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Ms. Agita SERZANE	Administrator, Committee on Civil Liberties, Justice and Home Affairs

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Mr. Philippe TREMBLAY	OPCAT Campaign Coordinator
Mr. Matt POLLARD	Legal Adviser

International Commission of Jurists

Mrs. Marie-Laure BAZEROLLE	Executive assistant to the Secretary General
----------------------------	--

Inter-Parliamentary Union

Mrs. Ingeborg SCHWARZ	Human Rights Programme Manager
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1. DSB: Democrats for Strong Bulgaria
2. CB: Coalition for Bulgaria
3. FP: Liberal Party
4. L: Labour Party
5. C: Conservative Party
6. LD: Liberal Democrats

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HEADQUARTERS:
INTER-PARLIAMENTARY UNION
CHEMIN DU POMMIER 5
CASE POSTALE 330
1218 LE GRAND-SACONNEX/GENEVA
SWITZERLAND
TELEPHONE: +4122 - 919 41 50
FAX: +4122 - 919 41 60
E-MAIL: POSTBOX@MAIL.IPU.ORG
[HTTP://WWW.IPU.ORG](http://WWW.IPU.ORG)

OFFICE OF THE PERMANENT OBSERVER
TO THE UNITED NATIONS IN NEW YORK:
UNION INTERPARLEMENTAIRE
SUITE 3002
220 EAST 42ND STREET
NEW YORK, N.Y. 10017
USA
TELEPHONE: +1212 - 55 75 880
FAX: +1212 - 55 73 954
E-MAIL: NY-OFFICE@MAIL.IPU.ORG
[HTTP://WWW.IPU.ORG](http://WWW.IPU.ORG)

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