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**THE ROLE OF PARLIAMENTS IN STRIKING A BALANCE BETWEEN NATIONAL
SECURITY, HUMAN SECURITY AND INDIVIDUAL FREEDOMS,
AND IN AVERTING THE THREAT TO DEMOCRACY**

**FIRST STANDING COMMITTEE ON
PEACE AND INTERNATIONAL SECURITY**

DRAFT REPORTS

Members will find attached the three reports presented by Lord Morris of Aberavon (United Kingdom), Ms. Hlengiwe Mgabadelo (South Africa) and Mr. L.M.Suklabaidya (India), co-Rapporteurs.

At this stage, the co-Rapporteurs have preferred to submit separate reports in order to provide the broadest possible view on the topic at hand, thereby placing at the disposal of Members extensive information for the panel discussion to be held during the 117th Assembly.

We also invite Members to read the most recent report (A/HRC/4/26) by the United Nations Special Rapporteur on the promotion and protection of human rights while countering terrorism, Mr. Martin Scheinin. Mr. Scheinin will be one of the special guests at the Panel-discussion in Geneva. This document can be found at this web site: <http://www.ohchr.org/english/issues/terrorism/rapporteur/reports.htm>

THE ROLE OF PARLIAMENTS IN STRIKING A BALANCE BETWEEN NATIONAL SECURITY, HUMAN SECURITY AND INDIVIDUAL FREEDOMS, AND IN AVERTING THE THREAT TO DEMOCRACY

***Draft report submitted by
Lord John Morris of Aberavon (United Kingdom), co-Rapporteur***

While there has always been a question of balance between national security on one hand and individual freedoms including human security on the other, the growth of terrorism has been a catalyst in the need to re-consider where the balance should lie.

The UN General Assembly Resolution 54/164 Human Rights and Terrorism (17 December 1999) recognises that terrorism is aimed at the destruction of human rights, fundamental freedoms and democracy.

The Council of Europe (Convention on the Prevention of Terrorism (CETS No.196 signed 16 May 2005) states:

"Recognising that terrorist offences, etc, by whoever perpetrated, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature."

The Universal Declaration of Human Rights, (UN General Assembly 1948) Article 3 states:

"Everyone has the right to life, liberty and security of person".

The European Convention for the protection of human rights and fundamental freedoms, states:

"Everyone's right to life shall be protected by law." The lawful exceptions are listed.

The Secretary General of the UN in his report, "uniting against terrorism, recommendations for a global terrorism strategy". (17 April 2006)

"The United Nations should project a clear, principled and immutable message that terrorism is unacceptable. Terrorists must never be allowed to create a pretext for their actions. Whatever the causes they claim to be advancing, whatever grievances they claim to be responding to, terrorism cannot be justified. The United Nations must maintain the high moral ground in this regard."

The summary of UN Resolution 60/158 reaffirms that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular human rights, refugee and humanitarian law and called upon States to raise awareness about the importance of these obligations among national authorities involved in combating terrorism.

This is the balance that has to be struck. The circumstances change, sometimes very rapidly. The principles remain the same.

The International Covenant on Civil and Political Rights (which came into force on 23 March 1976), article 4: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present covenant may have measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." France and Trinidad have entered reservations on the covenant.

UN Resolution 60/158 recalled that any measures derogating from the provisions of the covenant must be in accordance with that article in all cases, and underlined the exceptional and temporary nature of any such derogations.

Derogation provisions exist for the European Convention on Human Rights (Article 15). Article 15 incorporates, in effect, the principle of necessity common to all legal systems. Most states have provisions for emergency legislation, empowering them to take measures in a state of emergency which would not otherwise be lawful.

Notwithstanding problems caused for a number of contracting parties by increases in terrorism activity, there are currently no extant derogations to either convention.

The Secretary General of the UN in his report to the General Assembly 11 September 2006 in his conclusions refers to particular instances of concern.

"40. The United Nations human rights system continues to address the question of the protection of human rights and fundamental freedoms while countering terrorism with a view to assisting Member states in abiding by their international human rights obligations while effectively combating terrorism.

41. The High Commissioner for Human Rights, human rights treaty bodies and various special-procedure mandate-holders of the Human Rights Council all have expressed grave concerns regarding the alleged use, by some Member states, of secret detention centres and the practice of irregular transfers of persons suspected of engagement in terrorist activities. Serious concerns also have been expressed over the use of diplomatic assurances to justify the return and transfer of suspects to countries where they may face a risk of torture.

42. Member States should reaffirm their commitment to the total prohibition of torture by prohibiting torture and cruel, inhuman or degrading treatment in national law; prosecuting those responsible for torture and ill-treatment; and prohibiting the use of statements extracted under torture, whether the interrogation has taken place at home or abroad. Measures should be taken to ensure access to all prisoners in all places of detention, and to abolish places of secret detention. Further, Member states should abide by the principle of non-refoulement and refrain from returning persons to countries where they may face torture.

43. The entry into force of the Optional Protocol to the Convention against Torture on 22 June 2006 is a significant development towards ensuring the protection of detainees around the world. The Optional Protocol strengthens the Convention against Torture by establishing an international Subcommittee on the Prevention of Torture with a mandate to visit places of detention in states parties and requiring States Parties to set

up national preventive mechanisms, which are also to be provided with access to places of detention and prisoners. The adoption by the Human Rights Council of the International Convention for the Protection for All Persons from Enforced Disappearance is an important step towards further strengthening the rule of law in countering terrorism. Member states should be encouraged to ratify and implement the Convention against Torture and its Optional Protocol, as an important practical measure of good faith and meaningful commitment to preventing torture and ill-treatment. Further the General Assembly is urged to consider the adoption of the Convention for the Protection of All Persons from Enforced Disappearance."

The Optional Protocol represents a major landmark in torture prevention. I welcome the creation of the Human Rights Council which came into existence following a historic vote at the UN General Assembly on 15 March 2006.

One of the key challenges facing the Council is the need to establish effective mechanisms for addressing human rights. The proposed universal periodic review mechanism is a potentially valuable new tool for addressing human rights in a non-secretive and transparent way.

Torture has no place in the 21st Century. It is one of the most abhorrent violations of human rights and human dignity. Its prohibition is absolute. There are no exceptional circumstances under which its use may be justified. Yet it continues in too many parts of the world.

Universal declaration of Human Rights Article 5:

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

Where persons are returned from one country to another, each country should satisfy itself on the possibility of torture. Any agreements reached by States for the return of individuals should be examined and monitored by Parliaments.

What other machinery is there for monitoring? Monitoring and supervision is not the exclusive province of Parliaments. National and international judiciaries have a positive duty to maintain the Rule of Law.

There is a presumption in favour of liberty which is central to the common law tradition. There is therefore a heavy onus on the State to justify by clear evidence any measure which reduces liberty.

The doctrine of proportionality has been followed by the European Court of Justice. Every action of the State or its organs affecting the liberty of the individual must be proportionate to the mischief itself. Proportionality ensures that the extent of any interference with a right must be as limited as possible.

The European Court of Justice explicitly takes into account the problems of preventing terrorism as part of the background when deciding the proportionality of interferences with certain rights (United Communist Party of Turkey v Turkey (1998) 26 ECtHR121 at paragraph 59). The fact that attacks have recently taken place will therefore be regarded as an important part of the context when the justification for measures restricting rights is being considered.

One of the current issues of controversy in the United Kingdom, and over the last few years, is the length of time for which a person may be detained for questioning pending charge. The problem is accentuated when the investigation is taking place before the occurrence of the terrorist incident against the background of new technologies, investigations in many other countries and the necessity for the opportunity and time for transaction. There is no European Court of Justice jurisprudence setting a clear limit on the length of time for which a person may be so detained. It is for Parliaments to consider this.

The longer the possible period of pre-charge detention the more important are the procedural safeguards needed for the detainee to guarantee against arbitrary or disproportionate detention.

Where an attack has taken place the State is required by Human Rights Law itself to review the adequacy of the legal measures it has in place to protect people from terrorist attack and to bring perpetrators to justice, and to take such measures as are identified as being necessary to provide adequate protection. This must be the first implication of the attacks themselves.

The onus is on governments to demonstrate the necessity for a new measure to limit the freedom of the individual and it is for Parliaments to scrutinise closely such measures.

It is a good discipline for governments to certify formally that their proposals are in accordance with international law and human rights in particular. The rights and duties of citizens should be clearly set out.

It is for consideration whether recent terrorism is quantitatively different from anything experienced before. Some countries have a long experience of terrorism. Extraordinary powers sought may, if one is not careful, become ordinary powers.

A supreme court said a few years ago that a democracy must sometimes fight with one hand behind its back. It is for Parliaments to judge each circumstance as it arises.

One of the problems is that the State usually has greater resources in assessing security than the Judiciary and the State can always claim necessity, and Parliaments must be ever vigilant in their role. In matters of national security a judge has stated "the cost of failure can be high". Nevertheless there is a particularly strong imperative to subject the impact of policies on legal rights to the most stringent examination.

The challenge is to decide the extent that an interference with rights can be justified in order to combat the risk.

In the case of *Chahal v UK* 1997 23ECtHR413 a substantial minority of the judges in the European Court of Justice held that States are entitled under articles of the Convention to balance the extent of the potential risk of ill treatment of the deportee on the one hand against the threat to their national security on the other. In other words, on the minority's view, a State is entitled to expel an individual on national security grounds even where there is substantial risk of torture or ill-treatment in the receiving country. The majority found otherwise. The UK is asking leave, which has been granted to intervene in cases from the Netherlands and Italy which are pending, to ask the Court to revisit its earlier decision "in the light of current circumstances".

This case brings to the fore the problem for the courts which so far has been very divided. The question might be asked how far can a detainee, who for example possessing biological weapons with the intention of fatally polluting a large part of a state be permanently protected from expulsion to a state which might torture him.

Databases, identification cards, data-sharing across government, control orders, crime prevention orders, surveillance cameras are examples of the kind of intrusion which governments have to justify before Parliaments and sometimes before the courts.

Parliaments should monitor the range and quantity of surveillance and data collection by public and private organisations to measure whether there has been a change in the balance between the citizen and the State. In particular Parliaments should consider what forms of surveillance and data collection they regard as constitutionally proper. There has to be a balance between individual privacy and the duty of the state to provide effective security measures. Parliaments might consider the constitutional and institutional mechanism they have for making such decisions.

To sum up:

- (1) Parliaments must be constantly vigilant in balancing national and human security and individual freedoms.
- (2) The independent courts have a vital role in ensuring that the State acts according to the Rule of Law.
- (3) Both Parliaments and the courts must do their utmost to ensure that laws are framed and administered to take account of fast moving developments in technologies and may have to re-appraise in individual matters where the balance should lie.

DRAFT REPORT

submitted by Ms. Hlengiwe Mgbadeli (South Africa), co-Rapporteur

Introduction

Before one can even begin to unpack the topic:

- The parliament
- The role in striking the balance
- National security
- Individual freedom etc, one needs to say:

(a) The past resolutions that have been the build up to such an interesting and challenging topic, have got to be revisited. The aim of such re-visitation being, among others:

- Checking how have these resolutions been implemented;
- Which instruments exist within the PU and within different parliaments to do so (to implement);
- What monitoring structure/s are there to ensure that these resolutions do bring about a difference.

(b) Separate as IPU and UN might appear, they do however have a lot of similarities, inter dependency by virtue of the fact that IPU consists of Parliaments whose countries are members of UN (except here and there), the above revisitation, be looked at jointly where possible, to ensure that structures like:

- Kofi Annan Reform Measures,
- UN Human Rights
- Universal Declaration of Human Rights
- Ratification and Implementation of International Conventions and Protocols etc, are consciously made to find a place in the thinking, action of different member Parliaments and Countries towards bringing about possible progress that will be the IPU's legacy years to come.

What and who is Parliament?

Parliaments are individual representatives of the people and, as such, are in a position to relay the people's concerns relating to security to their executives. (These Representatives consist of women, youth, people with disabilities as well as men).

Parliaments generally play a monitoring role, evaluating the work carried out by Governments, ensuring that they carry out their mandate, as well as ensuring that the legislation enacted by Parliament meets the needs of the society hence: Parliamentary oversight, constituency period, "Taking Parliament to the People" (RSA successful process) and obviously other means.

The role in striking a balance ... and national security

In this "delicate balance between national security and human security ...", Parliaments generally face a number of challenges in exercising oversight in the security sector because of:

- Secrecy laws and sometimes the absence of laws that protect or promote freedom of information may hinder efforts at enhancing transparency in the security sector - {Geneva Centre for the Democratic Control of Armed Forces (2003)}.

- The complexity of the field is such that not all Parliamentarians have sufficient knowledge or expertise to deal with these issues in an effective manner.
- The emphasis on international security co-operation may affect the legitimacy of a country's security policy if this leads to Parliament being excluded from the process. It is therefore vital that Parliaments are able to contribute to participate in, and follow up on debates and decisions in international arena.

It is a "delicate balance" because it calls upon Parliaments to ask questions (when debating national security policy documents), questions for example – {Geneva Centre for the Democratic Control of Armed Forces (2003)}.

- What are the kinds of threats and risks that the particular society faces?
- Which and whose values need to be protected?
- Does the national security policy address new risks, such as terrorism?
- Is the policy consistent with international human rights laws and humanitarian principles?
- How much security is enough?
- What are the kinds of operations most likely to be undertaken by the security services?
- What are the financial implications of the policy?
- What impact will the policy and its implementation have on foreign relations and regional stability?

Parliaments should scrutinise government actions with all the tools at their disposal and with the aid of other monitoring institutions.

My own view says: National Security can never be isolated from the historical socio – economic situations and their aftermath. Therefore different Parliaments and their countries will define national security according to who they are; what is their past like (e.g. politico – socio – economic situations etc) but central to the role of Parliament is : Averting the threat to Democracy as explained, understood and voted for by the people those parliaments represent. In short within the context of the above, there can be no Universal definition of National Security.

While different country's development may not be the same, the question that is likely to give Parliament the answer to What National Security is, is the one that asks:

What are the kinds of threats and risks?

The responses from the people put together by different Parliaments will help to arrive at the real threat as pronounced by the people / respondents / those the Parliaments represent. While in other countries top in the priority list will be issues like:

- Terrorism
- Weapons of mass destruction
- Interstate conflict etc, other sets of respondents in other countries will be saying what is the threat to them. Examples:
 - Poverty
 - Underdevelopment
 - HIV/AIDS
 - Unemployment
 - Remnants of racism and their complexities
 - Remnants of Colonialism and their complexities etc.

So people's views and debates become the centre to definition of national security.

Human Security

Human Security can not be a stand alone problem away from the national security as defined by the people of those nations in question.

Human security refers to an emerging paradigm for understanding global vulnerability. Its proponents challenge the traditional notion of national security by arguing that the proper referent for security should be the individual rather than the state. Human security holds that a people – centered view of security is necessary for national, regional and global stability – {Wikipedia}.

The United Nations Development Program (UNDP) 1994, Human Development Reports definition of security argues that the scope of global security should be expanded to include threats in the following seven areas: - {United Nations Development Program 1994}

- Economic Security
- Food Security
- Environmental Security
- Personal Security
- Community Security
- Political Security

Therefore, logic for me begins to say: These are areas that if delivered for any human being, we can therefore say the human is secured (human security).

Individual Freedom

"... since 1945 however, many of the most significant threats to state security have been internal, rather than external", resulting in a fundamental rethinking of the very framework of national security. Since many of the state apparatus – which may, after all, be the oppressive tool of an elite – ought not to be as significant a concern. As a result, a new concept has been suggested to express the need of individuals for safety in other arenas of basic need, i.e. access to clean food and water, environmental and energy security, freedom from economic exploitation, protection from arbitrary violence by the police, gangs or domestic partners etc.

In practice, this has led states to widen their responses to threats against security by including: {Sachs (2003)}

- Preventive Action
- Intervention
- Reactive Action

Conclusion

Flowing from the analysis above, as well as many more other issues, it is clear that Parliaments can not deliver excellent services if they are far removed from those people they represent. Parliaments can not be vigilant in striking this balance between national security, human security and individual freedom if most of their time is spent on national issues in isolation from taking the human and individual security, check where it tallies with the government policies, with the people's needs and how best can the balance between the policies, needs, be struck. Mandate, accountability and report back which is done inclusively by representatives become the most important tools in averting threats to democracy.

IPU, as indicated by the Geneva Centre for the Democratic Control of Armed forces (2003), that "Not all parliamentarians have sufficient knowledge ...", needs to look at the possibility of a training center (IPU) Training Center.

This can only be successful if there is a thorough revisitation of all the relevant resolutions – (relevant to such sensitive and touchy topics); in order to check what makes those resolutions to be paper resolutions and not to be resolutions that need processes that will leave an IPU legacy long after today.

REFERENCES

1. Geneva Centre for the Democratic Control of Armed Forces (2003). Parliamentary Oversight
2. Wikipedia (2007). Human Security <http://enwiki.pedia.org/wiki/Human-Security>
3. United Nations Development Programme (1994), Human Development Report
4. Sachs, SE (2003). The Changing Definition of Security. Oxford Merton College.

DRAFT REPORT

submitted by Mr. L.M. Suklabaidya (India), co-Rapporteur

National security, human security and individual freedoms are issues of national as well as international concern. Past experience has made it amply clear that it is the evil of terrorism which by threatening peace, security, development and human rights poses a serious challenge to democracy in various parts of the world.

Terrorism threatens all societies and countries, irrespective of their socio-political system. As the motives and means of terrorists have become more broad-based and sophisticated, their targets have moved beyond an individual and his property to the very power structure and the entire governing system. Recent terrorist activities have underscored the stark reality that the world community cannot adopt a casual or restrained approach to this growing menace.

The international community should ensure that no country finances or provides shelter to terrorists who are engaged in terrorist activities against other States. When a State Party's report is under consideration by the Committee of the Human Rights Convention concerned, it should take into account the acts of terrorism which have resulted in innocent people being deprived of their right to life and property. All States should, therefore, deal with terrorists in a strong and determined manner using all force that is necessary.

Several international conventions have been adopted by the United Nations to counter the evil of terrorism but each of them covers only a specific aspect of international terrorism. Since there is no single type of goal that the terrorists pursue, no single type of conflict and no single centre of gravity that, if neutralised, would eliminate the problem of terrorism; therefore, multilateral cooperation with synchronization of efforts at the international level is essential for tackling the scourge of terrorism. The international community needs to show a far greater commitment and resolve than is evident today in order to avert total chaos and disintegration of the societies afflicted by terrorist acts in various parts of the world. It is imperative to conclude a Comprehensive Convention on International Terrorism (CCIT) which would be a comprehensive multilateral legal instrument to deal with terrorism in an effective and integrated manner. India had presented in the UN General Assembly a draft CCIT as far back as 1996 and since then it has been actively pursuing with other Member States the expeditious finalization of the CCIT.

It is against this backdrop that the national Parliaments have a crucial role in strengthening inter-governmental cooperation to evolve a global consensus towards an early conclusion of the Comprehensive Convention on International Terrorism.