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Legal and Human Rights Foundations of Parliamentary Oversight of Intelligence

Mr Chairman, Ladies and Gentlemen.

Thank you for the invitation to speak at this important meeting. I am particularly honoured to have been invited to contribute as an academic to a meeting comprised of members of national oversight bodies from so many European countries.

In this presentation I intend to do three things. Firstly: to say something about the distinguishing characteristics of effective Parliamentary oversight from a legal perspective. Then to address the place of Parliamentary oversight within European human rights law. Finally I plan to adopt a more evaluative perspective to consider how well Parliamentary oversight has functioned in protecting human rights, to identify some possible gaps and to make suggestions for strengthening oversight.

Legal Foundations

Most European states now have a detailed legislative framework for their services and in many cases one part of the picture is a parliamentary oversight committee.

The legal criteria and best practices for Parliamentary oversight are among the issues discussed in the 2005 report *Making Intelligence Accountable* and in the Venice Commission study of 2007 of arrangements in Council of Europe states. More recently these have been followed by the UN Special rapporteur's *compilation of good practice on legal and institutional and measures that ensure respect for human rights by intelligence agencies* that Dr Born will discuss.

Those are valuable documents and- if you are not already familiar with them- I commend them to you. They discuss for example the mandate of parliamentary bodies; the composition of a Parliamentary oversight body; the vetting and clearance of the oversight body; Parliamentary powers to obtain information and documents; reporting to Parliament; and budgetary control. They cover not only Parliamentary oversight of security and intelligence but also the basic minimum legal requirements, the position of the executive branch, the handling of complaints, the role of independent review through Inspectors-General and audit.

However since Dr Born is going to discuss the UN Special Rapporteur's guidelines, rather than duplicate his presentation I will take a more thematic approach. Three essential legal characteristics of effective oversight that I want to stress are comprehensiveness, independence and adequacy of powers.

The underlying idea behind comprehensiveness is that the legal framework for oversight leaves no gaps. The international norm is for parliament to establish an oversight body for all the major security and intelligence agencies (a 'functional approach' to oversight), rather than having multiple oversight bodies for specific agencies (an 'institutional' approach). This 'functional' approach facilitates seamless oversight since in reality different parts of the intelligence machinery work closely with each other. There is a risk that an oversight body established on a purely 'institutional' basis may find that its investigations are hampered if they lead in the direction of information supplied by or to an agency outside the legal range of operation. As the UN Special Rapporteur says in principles 3 and 6 of the guidelines, laws covering the intelligence and security services should exhaustively cover their powers and competences and oversight institutions should together cover all aspects of the agencies' work.

Independence is crucial if oversight is to command public confidence. There are several dimensions to independence in the sense I am using the term. Naturally it is a requirement that Parliamentary oversight bodies are bi-partisan. Nor should they be dependent on either the executive or the agencies they oversee. In short they should be 'owned' by Parliament: that is appointed by Parliament and reporting to Parliament. Decisions about their staffing, resources and use of their powers should all ultimately be for Parliament to decide. However professional the reports of an oversight body may be, if it lacks this crucial critical distance from those it oversees it is unlikely to command full public confidence. This precise problem has dogged the UK Intelligence and Security Committee throughout its 15 year existence. Although some of that Committee's work has been impressive, in the eyes of other parliamentarians and the press its work has been undermined- perhaps unfairly- by the fact that is appointed by and reports to the UK Prime Minister.

To my mind two further important principles follow on independence: that a Parliamentary oversight committee should have the power to initiate its own inquiries (this is referred to also by the UN Special Rapporteur in Practice 7) and that it should have an independent investigative capacity.

As well as comprehensiveness and independence a parliamentary oversight body, needs to have *sufficient power* to obtain information and documents from the government and intelligence services. The precise extent that a parliamentary oversight body requires access to security and intelligence information and the type of information concerned depends on the specific role that it is asked to play. An oversight body whose functions include reviewing questions of legality, effectiveness or respect for human rights will require access to more specific information than one whose remit is solely policy. Clearly, however, an oversight body should have unlimited access to the *necessary information in order to discharge its duties*- that is, powers to match its mandate,

Let me turn now to human rights and Parliamentary oversight.

National legislators have a particular responsibility to ensure that the legal framework not only grants adequate powers for the security and intelligence agencies' work, such as powers of interception of communication, surveillance or interference with property, but also respects human rights. Parliamentary oversight committees have a wealth or expertise that can be a resource for the Parliament as a whole in reforming these legal structures.

For all European Union countries legislative oversight of the security and intelligence agencies takes place against the background of the European Convention on Human Rights and Fundamental Freedoms 1950 (the "ECHR"). The Convention has been an important influence in promoting reform in this field. The European Convention allows restrictions to the rights of public trial, respect for private life, freedom of expression and of association "in accordance with law" where "necessary in a democratic society" in the interests of national security. Additionally, if the services possess the legal power to interfere with private property and communications, citizens should have a legal procedure available for making complaints if any wrongdoing occurs. This is one way in which states that are signatories to the ECHR can meet their obligation to provide an effective remedy for arguable human rights violations under Article 13 of that Convention.

The European Court of Human Rights has scrutinized parts of systems of accountability in a number of cases. However, the examination of Parliamentary oversight by the Court is not direct as such. Rather it is a by-product of its scrutiny of national systems for the control of intrusive powers and of effective remedies for those who complain of violation of their Convention rights under Articles 8 and 13. In this context the Strasbourg court has treated systems of accountability as components of the requirements that a limitation on a given human right be for the "protection of national security", "in accordance with the law". "necessary in a democratic society" and accompanied by "effective remedies" at the national level. For example, the existence of the German G10 Commission was considered in this way in the *Klass* and *Weber and Saravia* cases. The European Court of Human Rights has in effect endorsed Parliamentary oversight committees as a safeguard where they sit alongside other procedures. Where, however, the national oversight arrangements do not involve a Parliamentary body in authorisation or review of surveillance or in handling complaints the European Convention is less likely to have even this indirect effect.

Nevertheless, in the course of exercising their oversight role parliamentary committees may come across allegations that the services have violated human rights or they be asked to or initiate their own inquiries into allegations of human rights abuses. Even where human rights protection is not specifically part of their legal role it is right that such matters be investigated since they will usually raise other questions concerning the legality of the agencies actions or their policies. In the UK, for example, the Intelligence and Security Committee has investigated the circumstances of the agencies presence at interviews of prisoners held by other countries' services in Afghanistan or Guantanamo Bay where mistreatment is alleged to have occurred [1] and UK knowledge of and involvement in Renditions.

In most countries parliamentarians are not directly involved in dealing with allegations of abuse of the rights by specific complainants brought against the services. There are, however, several routes by which parliamentarians can commission or task others to take on this role and to report to them. As we have heard the Norwegian parliamentary oversight committee, whose members are not parliamentarians but are appointed by and report to parliament, is mandated to scrutinise whether the services have respected the rule of law and human rights.[2] The duties of the Belgian Standing Intelligence Agencies Review Committee are another example.

Let me turn now to the question of whether Parliamentary oversight frameworks need to be strengthened for the better protection of human rights.

Since 9/11 and in particular in the past five years irrefutable evidence of human rights abuses in the name of counter-terrorism has mounted up- renditions, black sites, torture and the exchange and use of information obtained by torture. It is now appropriate to ask: what role has democratic oversight played in preventing these abuses and, where they have occurred, in exposing them? The record is rather mixed. I have yet to see convincing evidence of preventing abuse as a result of oversight although some oversight bodies (for example, those in the Netherlands, Belgium, Norway and the UK) have given valuable consideration to principles that should apply in the future especially in the field of international liaison.

Instead the exposure of recent abuses has occurred mainly through the work of bodies *outside* the conventional oversight structures- through international investigations such as those by the Council of Europe. Litigation (such as the prosecutions in Italy surrounding the abduction of Abu Omar and in the UK the Binyam Mohammed actions) has also played an important part as have ad hoc inquiries (such as the O'Connor and Iacobucci Commissions in Canada). Moreover investigative journalists acting on tip-offs from insiders and NGOs such as Human Rights Watch, Amnesty International, Reprieve and the International Commission of Jurists have led the way in investigating these matters.

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[1] Intelligence and Security Committee, The Handling of detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq, Cm. 6469 (May 2005).

[2] Act relating to the Monitoring of Intelligence, Surveillance and Security Services. Act No. 7 of 3 February 1995.

One reason why conventional oversight bodies may have had relatively little impact in preventing or investigating these abuses may be because they face the wrong way. Despite the many and varied oversight schemes represented at this conference there is one point in common. All these accountability structures were devised track the policies or actions of *national* security and intelligence agencies. On the other hand the common theme in the recent abuses that I have mentioned is that they all arose in the context of *international* collaboration between the agencies of more than one country.

In short national systems of oversight or accountability were designed for a different era and to guard against different dangers of abuse (for instance, interference in domestic politics or civil society) by the security and intelligence agencies. Accordingly they stress political impartiality and independence but tend to pay less attention to audit of the agencies' actions on human rights' grounds. Post 9/11 the dangers are globalised. A clear gap is the failure to address concerns over circumventing human rights standards by international collaboration.

Many existing Parliamentary oversight committees suffer, however, from a serious impediment in the post 9/11 world of extensive intelligence liaison. They are one-sided: these committees have no power to obtain information from uncooperative international partner agencies. Domestic agencies may be unwilling refuse to divulge partner infotination if they fear that to do so may adversely affect future cooperation. It is no surprise therefore that the UK 1SC investigations into renditions, for example, above took place without co-operation of US agencies or testimony from US officials. The same is true of oversight bodies in other countries - for example Norway or Germany that have sought to examine international liaison.

Frequently, the relevant national legislation contains either express or implied limitations that inhibit oversight or review of arrangements made with the intelligence agencies of other countries. (This is treated as 'sensitive information', for example, in the UK under the Intelligence Services Act 1994.) Additionally freedom of information exemptions apply in many countries to protect information about liaison, State secrets doctrine or public interest immunity may likewise be invoked in the courts- as has happened in the US in the Arar litigation, in the UK in the Binyam Mohammed cases and in Italy in the prosecution brought following the Abu Omar abduction.

Such restrictions on obtaining information about liaison are arguably excessive, have the potential to cover human rights abuses and have become an obstacle to effective oversight.

It will be said, of course, that this is a field where overseers should tread softly for fear of jeopardising vital intelligence liaison. Partner agencies may withdraw cooperation if information shared is subject to possible foreign oversight. It is worth observing, however, that such statements are often made about agencies in countries where they are subject to equivalent oversight regimes themselves. Moreover one sometimes finds the reported fear of withdrawal of cooperation made by *each* of the liaison partners about the others. In such cases it is hard not to conclude that we are dealing with a generalised aversion by intelligence officials to international intelligence liaison being scrutinised rather than a bona fide objection. Particularly where long-standing liaison arrangements apply between countries and where the intelligence and oversight communities are in regular dialogue with each other it hard to take these exaggerated claims at face value.

There will be other instances in which the threat of withdrawing cooperation comes from a country with no meaningful democratic oversight and a poor human rights record, for example one of torture. In these cases I would suggest there needs to be careful evaluation of the damage to domestic human rights and legitimacy before accepting that lack of oversight is the price of cooperation. It by no means follows that this is always a price worth paying.

Parliamentary oversight bodies can also make a valuable contribution to review of the terms on which international cooperation takes place. A useful step would be routine scrutiny by oversight bodies of the liaison agreements (as recommended by the Arar Commission in Canada). Oversight committees may also have a role to play in reviewing the use made of intelligence exchanged, particularly whether caveats designed to reflect legal or human rights concerns have been observed.

The post 9/11 abuses that I have mentioned contain another lesson for oversight. This concerns the relationship between oversight and public discussion of illegal or unethical behaviour by the agencies. As we all know wild conspiracy theories are something of an occupational hazard in the secret world. Indeed one of the side benefits of effective oversight should be public education- so that through sober and level headed public reports the public becomes better acquainted with the agencies' work. In this context whistleblowers may either seem like fantasists or, at best, immature and self-indulgent individuals who are acting unprofessionally.

Nevertheless - as recent events show- when there is unethical or illegal behaviour whistleblowers assume special significance. Sometimes the only way in which illegal behaviour will come to light is if an insider breaks ranks. A number of scandals and abuses involving security and intelligence agencies in the past have been exposed in precisely this way- leading to the creation of some of the oversight bodies that are represented at this conference. To take another prominent recent example the investigation of the (now acknowledged) programmes of renditions and black-sites by the Council of Europe would have been impossible without the covert assistance of officials who were appalled at what had been happening.

I want to suggest then that whistleblowers can be an ethical resource- a lightning conductor if you like- for oversight. Let us be clear : if someone is prepared to over-ride their professional training, to place their career in jeopardy (not to mention in many countries risking imprisonment) they deserve to be listened to and not dismissed as a renegade. The reporting of illegal behaviour is something that be encouraged not punished. Please do not misunderstand- I am not arguing that whistle-blowers have a right to go to the press. That may remain a quite exceptional option, if all else fails. Far better, however, if there are credible routes for raising ethical concerns internally within an agency. If these internal routes for raising ethical concerns do not command confidence and respect from officials that they will be taken seriously and will be protected for raising concerns, then this is a problem for *oversight.*

The experience of exposure and investigation of scandal post 9/11 suggests that there is a need to strengthen oversight regimes to make the reporting and investigation of ethical concerns much more robust. In particular there needs to be a safe and secure way for whistleblowers to raise concerns directly with oversight bodies. I am strengthened in this analysis by the work of the UN Special Rapporteur who emphasises protection of whistleblowers in Practice 18 of the guidelines. This refers not only to internal procedures within the services for raising ethical concerns but also to the capacity for an independent body to investigate and take action where internal processes have proved inadequate.

Conclusion

Democratic intelligence oversight has come a long way since its inception in the 1970s. In a sense, though, the challenges post 9/11 are entirely familiar ones- how to ensure public trust whilst safeguarding necessary secrets. I have suggested that recent exposures and scandals demonstrate some areas where oversight needs to be strengthened if it is to remain effective and command public confidence. Ultimately an oversight regime that does not command public confidence is not in anyone's interests- least of all the agencies.