Conference Report on the Role of Parliaments in the Protection and Realisation of the Rule of Law and Human Rights

Executive Summary

There is a growing international consensus about the importance of the role of parliaments in the protection and realisation of the rule of law and human rights, which has emerged over the last five years. International and regional institutions, including the United Nations General Assembly, the United Nations Human Rights Council, the Council of Europe and the Commonwealth Secretariat, have taken a number of active steps to increase the role of parliaments.

As one of the primary institutions of the state, parliaments share a responsibility to protect and realise the rule of law and human rights and to implement the state's obligations, alongside the executive and the judiciary. While parliaments' role has historically been neglected, this is beginning to change, for two reasons. The first is the growing concern about the effectiveness of the international human rights machinery and its national implementation, and the need to address the gap arising when states do not effectively implement the internationally agreed standards they have committed themselves to. The second is to increase the democratic legitimacy of those standards, by having more debates in parliaments between elected politicians about what the state's international obligations require. Such discussion and debate helps to democratise the rule of law and human rights by encouraging elected politicians to take more ownership of these fundamental values, and to properly consider applicable international human rights and rule of law standards in their work.

Nevertheless, despite the growing consensus about the desirability of increasing this role for parliaments, there is very little in the way of concrete guidance to show how that desirable end could be achieved, nor are there any agreed standards about the minimum requirements for such parliamentary involvement to be effective. This conference was the first attempt to help parliaments to develop their role further, by considering the desirability of a set of internationally agreed principles and guidelines, distilling the essence of the good practices that have grown up and the standards that have begun to emerge.

At the conference, participants from the UN Office of the High Commissioner for Human Rights, the Inter-Parliamentary Union, the Commonwealth Secretariat, the Westminster Foundation for Democracy, a number of Parliaments around the world including in the Asia Pacific, Africa and Europe, inter-governmental organisations, non-governmental organisations and academia, agreed about the importance of parliaments' role in relation to the rule of law and human rights, that parliaments should be more involved than they currently are, and that developing guidelines in some form or other, to assist parliaments, is a good idea in principle. While there was a range of views about the scope and substance of any principles and guidelines, and about the best process for reaching international agreement, there was a strong consensus that some such agreement was a desirable end well worth pursuing.

Since the conference, the UN Human Rights Council has decided to convene a panel discussion at its June 2016 session to take stock of the contribution of parliaments to the work of the Council and "to identify ways to enhance further that contribution." This will provide a welcome opportunity to identify some concrete ways of enhancing the role of parliaments in relation to the rule of law and human rights, including possibly by distilling some principles and guidelines from current best practice. If you are interested in knowing more about this subject, please visit the project website of the Oxford University 'Parliaments, the Rule of Law and Human Rights' research project.

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Introductory and Welcome Remarks:

Professor Andrew Thompson (Arts and Humanities Research Council) welcomed to the conference over 65 delegates representing 12 parliaments, including parliaments from Africa, the Asia Pacific and Europe, and 49 organisations, including the Office of the High Commissioner for Human Rights (OHCHR), the Inter-Parliamentary Union, a number of inter- and non- governmental organisations, and academia.

Professor Thompson shared his perspective as an historian who had recently been focusing on the international humanitarian system during and after decolonisation, and offered three reflections on how the knowledge of the past may inform the challenges of the present.

First, the world we inhabit today has changed remarkably since the 1950s, and yet, many of the underlying fundamental challenges facing human rights are remarkably similar. Then, as now, the critical question was how best to hold the executive to account, and ensure that citizens were protected from abuses of rights. Then, as now, many politicians were more interested in human rights abuses in states other than their own. Then, as now, the critical challenge was building democratic consensus around human rights, and the need for parliamentarians to be actively involved in that process, if human rights are to be embraced by them, and not regarded as an external interference with states' national jurisdiction. Then, as now, there were competing views on fundamental questions of who are the legitimate guardians of human rights, on which rights should be realised and pursued, and on the unresolved relationship between international humanitarian law and international human rights law.

Second, it is worth pausing to remind ourselves that the international human rights system in the form that we recognise today was very much a product of the post-war period. The main components of our system, such as the High Commissioner for Human Rights, regional bodies, international organisations, and human rights NGOs, all came together at that time, but they were at first highly fragmented. It is perhaps not surprising, that although individual parliamentarians often strongly supported and provided a platform for human rights bodies, the role of parliaments as institutions was rarely directly addressed in that period. A post-war generation of human rights activists had many other things on their minds. Set in this historical perspective, it is comprehensible why the growing consensus about the importance of the role of parliaments has only recently emerged.

Third, while being careful not to elide humanitarianism with human rights, it is striking how both have looked beyond hard law to address the challenges they face, adopting principles and guidelines either to provide greater leverage for legislation that has been agreed and conventions that have been adopted, or to address areas where there may be a lack of legal safeguards and a deficit of laws. 2015 is the 50th anniversary of the International Red Cross and Red Crescent Movement's Fundamental Principles, which call for independent, impartial and neutral humanitarian action. These principles were adopted at the 20th International Conference Red Cross in Vienna, on the basis of discussions which identified four main criteria on which it was felt any set of humanitarian principles would have to stand. The first was the importance of reducing the number of principles in order to be able to explain them to the public. The second was to conceive of the fundamental principles as the key framework in which international humanitarian action would be justified and explained. The third was to recognize the principles had both to respect and develop in dialogue with international

humanitarian law. Finally, and perhaps most importantly, there was recognition that the Red Cross and Red Crescent Movement would more than ever depend on its universality. Lest we think that this was merely an intellectual exercise in lofty ideals, it is worth noting that the protection and visiting of political detainees in non-international armed conflict by the ICRC was very much influenced by an appeal to these fundamental principles, and may indeed never have happened without them.

Keynote addresses:

Gianni Magazzeni (Chief of the Americas, Europe and Central Asia Branch, Field Operations and Technical Cooperation Division, Office of the High Commissioner for Human Rights) welcomed the opportunity for the Office of the High Commissioner for Human Rights (OHCHR) to discuss the leading role of parliaments in the promotion and protection of human rights. He emphasised OHCHR's hope that the discussions would pave the way for even greater engagement by parliamentarians in the promotion and protection of human rights, and that OHCHR stood ready to assist in this endeavour.

Mr Magazzeni highlighted three main issues in his keynote address: (1) The specific role of parliamentarians in the promotion and protection of human rights; (2) The importance of increased cooperation with UN human rights mechanisms; and (3) The basic parameters that should frame the development of international principles on parliamentarians and human rights.

With regards to the specific role of parliamentarians in the promotion and protection of human rights, Mr Magazzeni emphasised that parliaments are cornerstones of national protection systems, play a critical role in ensuring States' compliance with their international human rights obligations, and share a responsibility, with other branches of the State, to protect, respect and fulfil human rights. Parliaments mainly discharge this role by:

- Contributing to building a legal and policy framework that is in accordance with the State's international and regional human rights obligations, and which strengthens the rule of law; and by
- Ratifying human rights treaties that have been signed by the Executive.

He added that parliaments also contribute to the protection and realisation of human rights by:

- Playing a fundamental role in the creation and effective functioning of relevant national institutions to promote and protect human rights, including national human rights institutions;
- Approving national budgets, by bearing in mind the human rights implications of their allocation of funds to institutions and activities;
- Exercising oversight of the Executive, ensuring that the Executive fulfils its role to respect, protect and fulfil human rights;
- Raising issues relating to human rights in the public debate; and by
- investigating alleged human rights violations.

Mr Magazzeni also stressed the need for parliaments to develop the necessary institutional structures, processes and mechanisms, In order to put human rights at the centre of their work. He encouraged the establishment of a parliamentary committee with an exclusive human rights mandate as it sends a strong political message, while acknowledging that human rights is a cross-cutting issue that should be taken into account by all parliamentary committees. He then emphasised that parliamentary human rights committees should, first and foremost, focus on the national human rights situation, on the implementation of human rights obligations by their own country, as OHCHR often sees such committees pay more attention to the human rights situation in other States, neglecting to look into the protection of human rights in their own country.

Turning to the second issue of an increased role for parliaments in the UN human rights machinery, Mr Magazzeni recognised that some parliaments have not been very involved with the UN in the past, but stated that this has changed in the last few years. Parliamentary involvement at the UN is now considered a way to add democratic support to the work and recommendations of international bodies; and a means to increase human rights promotion and protection at the national level. He observed that the contribution by parliaments to the work of the UN on human rights can take different forms:

- Parliaments, in an independent manner, can regularly participate in the process of national consultations preceding the preparation of the national reports to be submitted to the Human Rights Council in the context of the Universal Periodic Review, or to human rights treaty bodies.
- Parliamentarians can also have a leading role in the implementation and follow up of recommendations made by UN human rights mechanisms.
- In particular, parliaments have a fundamental role in calling for the establishment of National Mechanisms for Reporting and Follow up and in ensuring an integrated approach to the reporting and implementation of recommendations.
- Similarly, parliaments have a significant role to play in calling for the development of a National Human Rights Action Plan for the implementation of the recommendations. They can also meet with human rights mechanisms, such as visiting UN Special Rapporteurs.

On the third issue of the basic parameters that should frame the development of international principles on parliamentarians and human rights, Mr Magazzeni encouraged the adoption of a set of principles on the role of parliamentarians in the promotion and realization of human rights, as another initiative which OHCHR believes may contribute to increased parliamentary engagement on human rights issues, and to further guide and strengthen parliaments in the fulfilment of their role in the protection and realisation of human rights. He recognised that this is an ambitious undertaking, but stated that there were precedents which may serve as a good source of inspiration, such as the Paris Principles, a set of international standards which frame and guide the work of National Human Rights Institutions, which were drafted in 1991 and later adopted by the United Nations General Assembly in 1993, and the 2012 Belgrade Principles on the relationship between parliaments and national human rights institutions may also be worth considering. Mr Magazzeni said that we should bear in mind the following overarching principles for the development of such a document:

1. Inclusivity: All relevant stakeholders need to participate in its preparation. This includes, first and foremost, parliamentarians, but should not be limited to them. Civil society representatives, members of other branches of the State, academics, have also much to contribute to the process. Discussion should also include representatives of specific groups, such as women, minorities and youth.

2. Universality: It is important that in the conceptualization of any set of principles or guidelines, different legal systems and traditions be taken into consideration. While parliaments around the world share many similarities, they also have different structures and methods of work, which should be considered for this exercise.

3. Basis in international human rights law: In order to ensure that the principles on parliaments and human rights fulfil their purpose, it is crucial that international human rights law is fully taken into account in their development. Firmly anchoring the document in international human rights law, will not only provide it with a solid legal basis, but will also guarantee that key human rights principles, such as the principle of non-discrimination and equality, are incorporated into the document.

Nico Schrijver (Member of the Dutch Senate; Professor of International Law at Leiden University and Executive Committee Member of the Inter-Parliamentary Union)

Professor Schrijver spoke on behalf of the Inter-Parliamentary Union, which he introduced as an organisation established in 1889, in pursuit of the common quest of peace through dialogue, and which has since embraced the idea that democracy, based on principles such as equality and respect for human rights is the best guarantee of peace and well-being. Today, the IPU has 166 Members who are national parliaments, and who participate in its work through delegations that reflect the entire political spectrum in parliament, debating issues that are high on the international agenda, including human rights. The IPU has a Standing Committee dedicated to Human Rights and Democracy and a Programme that helps parliaments gain a better understanding of international human rights standards and supervisory mechanisms and their own role in ensuring implementation. The IPU also has a special Committee for addressing human rights violations affecting individual parliamentarians.

Turning to the critical role of parliament in the protection and promotion of human rights and the rule of law, Professor Schrijver noted that this was in many ways self-evident. Parliament is the State institution at the very heart of human rights. It embodies the fundamental human rights of all people to shape their destiny and to participate in the management of their country's public affairs. Parliament has crucial responsibilities – in the areas of law-making, oversight and budget approval – to promote and protect human rights.

Yet, despite the self-evident nature of parliament's role and responsibilities, Professor Schrijver observed that reality often looks quite different. This is in large part due to the challenges that the institution of parliament faces as a whole. Professor Schrijver posed several sets of questions to illustrate these challenges:

What is expected of parliament today? What does the law-making role consist of since, in almost all countries, parliament initiates legislation only exceptionally? Does it mean that parliament should invest more in scrutinizing proposed legislation?

How can parliament exercise oversight in a meaningful manner? Given the extent and power of government and the emergence of many other centres of power affecting people's everyday life, what resources will parliament require? How does this affect its role in international affairs, an area previously considered to be the preserve of government? What role for parliaments in today's globalised world?

More fundamentally, how can parliaments best represent people, and reflect the increasing diversity in all our society? Can people provide direct input to the work of parliaments, through modern channels of communications, and if so, how?

Without claiming to offer responses to these questions, Professor Schrijver posed ten observations on what we need to acknowledge and do in order for parliament to discharge its human rights responsibilities more effectively:

First, formal rules need to be in place to allow parliaments to act as human rights promoters and defenders. Constitutional or other arrangements need to spell out clearly and firmly parliament's law-making, oversight and budgetary roles. Those arrangements need to give a robust mandate to parliament and its members to act in the best interest of citizens. This also requires safeguards to ensure parliament's financial independence.

Second, an important requirement is that parliament needs to be able to rely on excellent quality advice from staff trained in human rights, have access to parliamentary research and information services, as well as receive regular and quality input from relevant national human rights stakeholders, in particular national human rights institutions and civil society.

Third, there needs to be the political will within parliament to do everything possible to take the human rights agenda forward. It is critical for parliaments to ensure that legislation proposed by the Executive complies indeed with international and national human rights standards. It is also very important that where possible parliamentarians take the initiative themselves, through private member bills, to initiate human rights legislation. As for parliamentary oversight, it is critical that there is sufficient political space for parliamentarians to exercise this function fully and diligently. It is also critical that parliamentary oversight is not seen as a task that should be left to the opposition alone, but that MPs belonging to the governing party or parties are critical of what is being proposed by the Executive.

Fourth, in addition to political will, parliamentarians need to be able to express themselves freely without fear of reprisals, or being subject to human rights violations themselves. This entails that freedom of expression of parliamentarians is fully protected. It also requires, in a spirit of parliamentary solidarity, that parliamentarians should not hesitate to safeguard the basic rights of their colleagues when they are at stake.

Fifth, parliament needs to be representative of all segments of society and promote an inclusive decision-making model. A parliament that truly represents the full diversity in society and that has the means at its disposal to represent the views of its constituents and hold the Executive to account is a very powerful tool to avoid conflict, overcome divisions in society and uphold human rights. Equally important is that a representative parliament acts in an inclusive manner. Indeed, the winner should not take all and would be wise to aim for inclusive decision-making.

Sixth, parliament needs to have appropriate structures in place at Committee-level to promote human rights. A dedicated human rights committee can help ensure that human rights feature prominently and regularly on parliament's agenda. It can also send an important signal within and outside parliament that the parliamentary community is taking human rights seriously. It is also important that such committees do not work in isolation, in silos, and establish effective working relationships in and outside parliament.

Seventh, parliament needs to ensure that human rights are fully mainstreamed into its work. The creation of a human rights committee can help facilitate the adoption of a human rights approach for parliament. There are other strategies too to promote the systematic consideration of human rights in parliament's work. The legislative rights review which several parliaments have been undertaking is an excellent example of how parliaments can systematically examine draft legislation from a human rights perspective.

Eighth, parliament needs to be sufficiently familiar with international human rights norms and supervisory mechanisms.

Ninth, parliament needs to be more systematically involved in the UN human rights reporting mechanisms, in particular with regard to the implementation of their recommendations. Indeed, increased parliamentary awareness should go hand in hand with greater parliamentary involvement in the work of the UN human rights reporting mechanisms. How? At a minimum, international human rights recommendations should be systematically submitted to parliament for discussion and follow-up. Should parliament be involved in drafting the national report? Some consider this the preserve of the executive or feel that such involvement would compromise parliament's independence. Others believe that parliaments would do well to contribute to the report. Whichever view one holds, there seems to be consensus that, at the very least, parliament must be informed of the report and have an opportunity to debate it.

Tenth, parliaments should make sure that the political choices that human rights imply are recognized and receive democratic legitimacy. Human rights are not technical matters; they often require tough political discussions and decisions. The political component is therefore inevitable. The IPU believes that rather than try to keep the politics out, it is important to embrace the political process for what it is. Parliaments can help promote public debate on human rights and seek input from all segments of society. Moreover, they can lend democratic legitimacy to the outcome of that debate and galvanize public support for implementation.

Professor Schrijver concluded by looking back over the last 25 years since the end of the Cold War, and observing that we have witnessed a new commitment to parliaments, their central role in democracy and the critical contribution they can make to the enjoyment of human rights. Never before have so many countries included parliaments in their system of governance as today, nor have so many parliaments been the outcome of open political competition through free and fair elections and interested in taking the human rights agenda forward. Professor Schrijver suggest that we build on this achievement by providing support to parliamentary institutions, many of which are still young, and integrate them better in the global system for the promotion and protection of human rights and encourage them to use their full potential as agents for change.

Session 1: Parliament's role in relation to the rule of law and human rights

The Chair of the session, **Katherine Zappone** (Member of the Irish Senate), opened the session by noting that it was a working conference, and expressed her hope that the conference would not just consider, but agree that we do need a set of principles and guidelines on the role of parliaments in the protection and realisation of the rule of law and human rights. She concurred with the background paper that this is an idea whose time has come.

Senator Zappone began by noting that the marriage equality movement in Ireland began with a court case against the government for refusing to recognise foreign-registered marriages between same sex partners. While the marriage equality movement was too long a tale to cover in her remarks, two aspects were worth highlighting: The people were ahead of their parliamentarians on this prime human rights issue, and a seismic cultural shift has happened in Ireland because people said yes to equality on this human rights issue. The people are now ahead of parliamentarians on the refugee issue, volunteering to house far more refugees than their government is making provisions for. These are amongst many examples that demonstrate that parliamentarians need to have a deeper understanding of the rule of law, human rights and international human rights law particularly.

Senator Zappone then gave an overview of the steps she had taken to embed human rights oversight in the Irish parliament as a member of the Human Rights Commission. She noted that this process had been slow, with systemic resistance encountered at various points along the way, not necessarily by individuals, but by systemic barriers. She organised the first Irish parliamentarians' report submitted to the ICCPR a few years ago, though she noted that the parliamentarians weren't allowed to share government time to present the report. She also led the establishment of a Sub-Committee on Human Rights within the Committee on Justice, Defence and Equality, a small but systemic achievement, as the first dedicated human rights committee in Ireland. Whether this sub-committee will survive after elections in 2016, only time will tell.

Murray Hunt (Legal Adviser to the UK Parliament's Joint Committee on Human Rights and Visiting Professor at Oxford University) began by thanking the Arts and Humanities Research Council and Oxford University, the Office of the High Commissioner for Human Rights, the Inter-Parliamentary Union, the Commonwealth Secretariat and the Westminster Foundation for Democracy, as well as the speakers and parliamentarians for their contributions to and presence at the conference. He drew the attention of the conference to the background paper, which surveyed disparate developments across the world on the topic of the role of parliaments in the protection and realisation of the rule of law and human rights, and shows that there is a growing momentum around the world over the last three to four years. The purpose of the conference was to take stock of these developments at the international, regional, national and sub-national levels, and the actions of international organisations, and to explore ways to combine these developments to take them forward at the international level.

Turning to the questions of why parliaments should have a role in the protection and realisation of the rule of law, including human rights, and why we should increase that role, Mr Hunt briefly outlined a twofold answer. The first reason was the growing concerns about the effectiveness of the international human rights machinery and the increased focus on national human rights machinery and national implementation, in order to fill the implementation gap arising when states do not

effectively implement the internationally agreed standards on the rule of law and human rights that they have committed to observe. The second reason was to increase the democratic legitimacy of these standards, by having debates on human rights and rule of law obligations in parliaments by elected politicians. Such democratisation of the rule of law and human rights would address the need for elected politicians to take more ownership of these obligations, and properly consider applicable international human rights and rule of law standards in their work. Nevertheless, it is important to emphasise that this is not to replace the courts' role, but is very much intended to be complementary to the courts' role in protecting the rule of law and human rights, as Judge Robert Spano would later elaborate.

What should parliament's role be? Mr Hunt thanked Professor Schrijver for mentioning the various things parliaments should do, such as drafting legislation compatible with international human rights treaty obligations and the rule of law, ratifying treaties, and overseeing the government's response to judgments with human rights and rule of law issues. He stressed that parliaments need to ensure that there is democratic dialogue, deliberation and debate about the rule of law and human rights, ensure that there is proper consideration by parliamentarians of relevant international and national standards, informed by advice where necessary, when debating policy matters or drafting legislation and holding the government to account.

What institutional machinery do parliaments need? Mr Hunt outlined a number of mechanisms, such as specialised parliamentary human rights committees and parliamentary legal affairs committees that focus on rule of law and constitutional issues. It is also important that these committees are provided with the necessary research and legal expertise, for which they must be provided with the necessary resources, and must be able to access and engage civil society and outside experts. Mainstreaming of human rights and the rule of law throughout parliament is also extremely important. Although there is a tendency or temptation to see human rights and the rule of law as the responsibility of the specialised parliamentary committees, it is necessary for parliaments as a whole to consider human rights and rule of law standards. The key here was not so much to set up new institutional machinery as to establish the appropriate practices, procedures and relationships in order to enable parliaments to consider these standards in its proceedings. Amongst these practices, the organisation of research services and expert advice in order to make them available to parliamentarians on a proactive basis was highlighted as an essential means for ensuring that parliaments could mainstream human rights and the rule of law effectively.

Natalie Samarasinghe (Executive Director, United Nations Association - UK) began by stating that UNA-UK was greatly encouraged by the topic of the conference, as it believes that serious discussion of the role of parliaments in the protection and realisation of the rule of law and human rights is long overdue, not just because of domestic debates within the UK, but also because the international human rights system is under considerable strain.

Ms Samarasinghe observed that we have come a long way since the days in which it was commonly argued at the UN that human rights issues were matters of domestic affairs. There is certainly now an acceptance and expectation that states' compliance with their international human rights obligations can and should be discussed at the international level. However, it remains the case that implementation is essentially a domestic affair. States choose to ratify international treaties and are responsible for ensuring that these commitments are incorporated into domestic laws and policies.

UN bodies may provide advice and make recommendations, but ultimately the real action remains at the national level, with human rights protection being part of a national conversation between governments and their citizens. Parliaments, representing people, are absolutely crucial to this process. As an example, the Inter-Parliamentary Union had found that about 60 to 70 per cent of Universal Periodic Review recommendations require actions by parliamentarians.

Ms Samarasinghe made a plea from civil society to parliamentarians to make human rights a reality for the people that they represent. This meant active engagement in translating international human rights obligations onto the national level, holding the executive to account over implementation, and supporting complementary bodies such as national human rights institutions and NGOs to ensure their independence and their ability to operate effectively, including by ensuring their financial and human resourcing. She noted that budgeting is not just about how money is spent nationally, but also internationally, so, for example, development aid budgets could help support international human rights institutions. Parliamentarians could also serve as a bridge between the public, government and UN system, highlighting the connection between international and national human rights obligations, demonstrating the relevance of international human rights mechanisms to the people, and helping constituents see that international mechanisms are designed for their protection.

Within the UK, there remains a need for parliamentary debate on national human rights issues. UNA-UK has been monitoring parliamentary business on human rights issues and overwhelmingly the focus is on situations in other countries. While there have been considered debates and questions on particular national issues – the UK's report to the Committee on the Rights of the Child, for example – this engagement is not systematic. This means that valuable opportunities to strengthen human rights protections in the UK, at a time when many people, including UNA-UK's members and supporters, are concerned that these protections could be weakened, are being missed. There is also a need for more engagement within parliament with national reports to the UN treaty mechanisms and the Universal Periodic Review (UPR) and the shadow reports produced by civil society. Parliamentarians should participate in the UPR itself, and follow up on recommendations, pushing the executive to answer why recommendations are not accepted. Ms Samarasinghe emphasised that the strength of the UPR lies in the fact that it is an on-going process, and not just something that happens in Geneva once every four years. She also noted that the UK can do more to integrate good practices by other states. For example, South Africa ensures that all national reports are debated by parliament before they can be sent to the international mechanisms, Brazil conducts parliamentary hearings on the UPR, while Germany sends parliamentarians to the UPR. Parliamentarians could also do more to engage with the concluding observations and recommendations of international human rights mechanisms and UN Special Procedures. Ms Samarasinghe concluded by welcoming the endeavour to outline a set of principles and guidelines, with the involvement of parliamentarians internationally, as one that would help to strength the protection of human rights.

Robert Spano (Judge of the European Court of Human Rights) brought the perspective of an international human rights judge, who has to deal with cases involving human rights every day, where it is important to understand the necessity of democratic engagement with human rights issues at the domestic level. The question he sought to answer was, what is the role of a legislator in a country of a Member State, when it comes to the impact that decision-making in parliament should have on human rights litigation when human rights cases are brought to a court?

Judge Spano started by quoting Article 1 of the European Convention on Human Rights, which states that the High Contracting Parties [Member States of the European Convention] shall secure to everyone within their jurisdiction the rights set out in the Convention. Compliance with this obligation has traditionally been seen to be a legal issue, and the remit of the lawyers and the courts, a view especially prevalent in the USA, because Congress has a lot of difficulty in actively engaging in human rights issues due to its incredible partisanship. By contrast, in European societies, many contemporary human rights issues, such as same-sex marriages, same-sex unions, and abortion, are being debated in parliaments, and not simply left to the courts and international courts to resolve. This is a good thing from the perspective of an international human rights judge because human rights are multifaceted and multidimensional. He drew a distinction between what we consider to be absolute human rights such as the prohibition of torture, which parliaments may never pass legislation to abrogate, and human rights that allow for restrictions in the interest of public policy considerations. It was with regards to this latter set of rights that he stated the necessity of democratic engagement with the scope and content of the rights.

Judge Spano then elaborated on the recently refined principle of subsidiarity under the European Convention on Human Rights. This principle stresses that the international court is a subsidiary mechanism to domestic authorities, including parliament, the executive and the judiciary, who have the primary obligation under Article 1 to secure human rights. The international court only comes into play when domestic protection is ineffective. When dealing with policy issues, it is becoming increasingly important and recognised at the international level that effective parliamentary engagement in the "pre-interference assessment" of human rights, the assessment by the legislator of the possible human rights implication of draft legislation, is fundamental.

Judge Spano used four recent cases decided by the European Court of Human Rights to illustrate how parliamentary engagement was very important or even crucial to the outcome.

In *Animal Defenders International v United Kingdom* (a Grand Chamber decision, delivered in 2013), it was clear that the way the UK parliament discussed the human rights impact of legislation banning political advertising had a heavy impact on the decision by the European Court to find no violation of Article 10 (the right to freedom of expression).

In *SAS v France* (another Grand Chamber decision, delivered in 2014), the case regarding the absolute ban in France on women wearing the burqa and nijab in public, the European Court found no violation of Articles 8 and 9 (the rights to respect for private life and to manifest their religious beliefs) because the French Parliament had considered the human rights implications extensively when dealing with the issue.

In *Lambert v France* (a Grand Chamber decision, delivered in 2015), relating to a person who was in a persistent vegetative state, over whom there was a clash by family members over whether he should be allowed to die, the European Court looked at how the French Parliament (and courts) had dealt with the issue and whether it was cognisant of the underlying values and interests, before coming to the decision that the case fell within the national margin of appreciation accorded to France.

In the most recent case, *Parrillo v Italy* (a Grand Chamber decision, delivered in August 2015), concerning Italian legislation imposing an absolute ban on donating women's embryos to scientific

research, the European Court looked extensively at the legislation-drafting stage in the Italian Parliament, before coming to the conclusion that there was no violation of Article 8 (right to privacy and family life) as the case fell within the national margin of appreciation accorded to Italy.

Nevertheless, Judge Spano stressed that these cases demonstrate that, while it is not a sufficient condition for finding no violation of a human right, it is definitely a necessary condition for Parliaments to debate the human rights considerations so as to give their decisions the necessary legitimacy in order for international courts to grant deference or a large margin of appreciation to these decisions.

Referring to the judgment of the European Court in *SAS v France*, Judge Spano distilled three elements which he believe need to be considered in any elaboration of guiding principles for legislators considering human rights issues. Firstly, the democracy element – a human rights culture needs to be created within parliament, so that it becomes almost natural for parliamentarians to consider human rights issues. Human rights issues must not be seen as a fringe issue, to be taken into account if essential interests align, but should be considered the foremost responsibility of parliaments. Secondly, the element of domestic knowledge and expertise – it is incumbent on national government before the Court to demonstrate that if it believes that solutions at the national level are warranted because of special domestic circumstances, this needs to be demonstrated at the outset so that domestic knowledge and expertise may be brought into the legislative exercise. Thirdly, the policy element – it is important that the different policy issues and proposals must be debated. Here Judge Spano referred to the element of the proportionality test concerning the "least restrictive measure" that is possible to attain the legitimate aim that is pursued. From the perspective of the international human rights judge different legislative or policy proposals must be on the table and discussed, in order for a parliamentary decision to be granted deference.

In the **discussion** that followed the speakers' presentations, four questions were asked and answered. The first concerned the extent to which parliaments should be seen as an authoritative interpreter of human rights obligations. Mr Hunt responded by emphasising that all the institutions of the state, including the courts and parliaments, shared the responsibility to protect human rights, and that parliament's role was not meant to be an alternative to that of the courts. The provisions in a recent Immigration Bill concerning deportations were a good example of this agreement about shared responsibility: the UK Government invited the UK Parliament to consider what the right to respect for private life in Article 8 ECHR requires in the context of deportations, but did not seek to assert that the UK Parliament's interpretation of Article 8 displaced any role for the courts when deciding what Article 8 requires in individual cases. He also explained that the concept of the margin of appreciation, the principle of subsidiarity and due deference doctrines had been developed to present an alternative to the debate over who has the power to make authoritative interpretations. Judge Spano added that it was a fallacy to believe that parliaments could ever give an authoritative interpretation, in the sense that, while legislators can have some foresight over the way legislation may impact the real world, they could not perfectly foresee all the consequences of legislation. Thus, even if parliaments set out their view, it can only serve as guidance, but cannot be authoritative in the sense of binding the courts. Nevertheless, he stressed that the effectiveness of human rights protection is a collective enterprise, and that the practice of some parliaments producing extensive committee reports is conducive to the perpetuation of a human rights culture.

The next three questions concerned the principle of subsidiarity Judge Spano had outlined. The second question concerned the extent to which parliaments had to consider less restrictive measures and policy alternatives in order to get deference to its decisions from the European Court of Human Rights: was evidence that parliament had considered or discussed different measures sufficient (i.e. would the European court take a procedural review approach), or would the European Court go further to consider whether a legislative measure was rational or irrational, and substitute its view for that of parliament where it believed parliament's decision to be irrational (a substantive review approach)? Judge Spano answered this by stating that an historical review of the European Court's case law provided examples of both procedural and substantive reviews of the decisions of parliaments. However, in the four "post-Brighton cases" that he had mentioned earlier, the European Court had primarily taken a procedural review approach, asking whether Parliament has considered the human rights issues, rather than how it considered these issues. As such, the European Court did not in substance re-examine the reasonable choices made by the legislator. This demonstrates what Judge Spano has called a "qualitative, democracy-enhancing approach", empowering parliaments to discuss the human rights issues in order to get deference from the European Court.

The third question was on how we could ensure that there is a still a role for the courts to have an active voice on human rights issues, while the fourth question was concerned with whether the concept of margin of appreciation and the principle of subsidiarity would impact the universality of international human rights law. Judge Spano answered these questions together by emphasising that that the courts still had a role in adjudicating human rights cases, and that although parliamentary consideration of the human rights impact of legislation may be a factor relevant to the decisions of the courts, this was a necessary but not a sufficient condition for deference. He also stressed that governments were still not allowed to restrict core provisions of international law, such as the prohibition on torture. Nevertheless, he said, we have to recognise that in a situation where restrictions on human rights are permitted by the language of the Convention, there is room for different interpretations and outcomes.

Finally, David Donat-Cattin (Secretary-General of Parliamentarians for Global Action) emphasised the importance of the mandates of parliamentary human rights committees, and stressed that they needed to be broad and to grant legitimacy to their committees. With respect to the ratification of treaties, David warned that it should not be assumed that this is final, as present experience discloses problems with some parliaments withdrawing from treaties, and others taking retrogressive steps, and strategies need to be put in place to avoid this.

Keynote address: Dr Josephine Ojiambo, Deputy Secretary General of the Commonwealth

Dr Ojiambo expressed her appreciation**, o**n behalf of the Commonwealth Secretariat and the Secretary-General, to the parliamentarians present as well as the practitioners who are of the view that the time has come to constructively consider taking forward an international standard for parliaments.

Dr Ojiambo recalled that it is well-known that parliamentarians have a special role in the promotion and protection of human rights and the rule of law. Indeed, the successful discharge of this role is simultaneously a marker of good governance and a key factor in one's ability to live a life in dignity. As a representative institution, parliament and those who serve in it enjoy a unique democratic legitimacy. Its members are entrusted by the people with, amongst other things, the protection and realisation of human rights. Accordingly, parliaments should seek to use this democratic legitimacy to faithfully represent the views of the people in the policy-making process and work towards fulfilling their expectations with regard to the full enjoyment of their human rights.

Dr Ojiambo reminded the audience that it must also remember that the legislature is just one of three organs of the state with an obligation to respect, protect and fulfil human rights and the rule of law. The institutional responsibility for securing human rights and incorporating them into domestic law is, of course, shared with the executive and the judiciary. The Commonwealth Latimer House Principles are regarded as a set of guiding principles on the separation of powers that offer guidance on the complex and interlocking relationship between the legislature, the executive, and the judiciary. The Principles set out the means of maintaining effective working relationships between these three branches of government. They are 'designed to help the business of fair, efficient, transparent, responsive government - government for the people. The confidence, belief and trust that people have in their government is the ultimate litmus test.' In 2013 and at the Commonwealth Heads of Government Meeting, Heads 'reiterated their support for the Commonwealth Latimer House Principles'.

In spite of shared responsibility in the area of human rights, and owing to its primary role in law-making, Dr Ojiambo stated that parliament is the branch of government best placed to give effect to human rights, take practical measures to prevent abuses, and to ensure that law provides practical means through which remedies may be sought for alleged violations of rights. To this end, parliamentarians may influence policies and budgets at the national level, monitor policy implementation programmes at local levels, address the needs and concerns of their constituencies, and act as a catalyst in the realization of human rights domestically and internationally.

Dr Ojiambo concluded by expressing her sincere hope that this conference will help to give further momentum to these developments and provide the next steps to take forward advocacy with parliamentarians on the efficacy of a gold standard. She said that the Commonwealth Secretariat stands ready to work with partners towards this goal through its on-going programmatic work.

Session 2: Desirability of internationally agreed principles and guidelines

George Kunnath (Head of Programmes, Westminster Foundation for Democracy) focused his remarks on the utility of human rights principles and guidelines in parliamentary strengthening, based on his extensive work with parliaments in helping to redress the democratic deficit.

Mr Kunnath spoke about the obstacles to accepting a standard set of principles, though he stressed that there were more similarities than differences between parliaments in implementing their human rights obligations. Where there were differences, he identified three causes. The first is the stage of the country's political transformation. It is necessary to understand the context and history of the country, whether it is undergoing transition to democracy, undergoing conflict or dealing with reconciliation or restitution issues, as these would affect the country's parliamentary institutions. The second is the extent of political will. Here, it is necessary to understand the political economy and incentives, such as whether it is in the political interest of government leaders to support reforms strengthening parliaments and human rights. The third is the level of resourcing in terms of both people and finances. A large part of the reason why parliaments do not pay attention to human rights issues may simply be because they can't afford it.

Mr Kunnath then shared some recent work the Westminster Foundation for Democracy (WFD) had been doing with Oxford University's Parliaments, Rule of Law and Human Rights project, in order to determine the current states of parliaments in terms of their capacity, ability and responsiveness in the areas of human rights and the rule of law. This was based on an assessment toolkit with 108 questions, which also draws on IPU's benchmarks for parliaments and upon the learning of WFD's government and transparency programme, and which had been piloted in Uganda, Tunisia, and the Ukraine. The pilot assessment found that all three parliaments met many of the standards that might be included in any set of principles and guidelines, but had a number of areas where they could improve, demonstrating the advantage of using some principles and guidelines to develop the ability of parliaments to perform their role in relation to the protection and realisation of the rule of law and human rights.

Mr Kunnath concluded by stating that a set of principles and guidelines would be desirable to help draw out areas where parliaments could be strengthened, and that WFD's work could help feed into the process of developing and refining these principles and guidelines. He believed that these principles and guidelines would work best if there is some sort of peer-review or association that applies influence and encouragement, and that they need to lead to some sort of analysis and capacity building tool. Finally, he observed that support would need to be provided to parliaments for changes to be implemented.

Karen McKenzie (Head of Human Rights, Commonwealth Secretariat) spoke about the Commonwealth Secretariat's work on parliaments and human rights, developing the capacities of parliamentarians in Africa, the Caribbean and the Pacific, in collaboration with IPU and OHCHR. This work has resulted in substantive outcomes. In the Caribbean, for example, national parliaments have asked for help with capacity building. The African parliamentarians adopted the Mahe Declaration, which established an African parliamentary Human Rights Group, aimed at strengthening regional cooperation on human rights issues, strengthened engagement with national Human Rights Institutions (NHRIs) and the implementation of Universal Periodic Review recommendations. Previous

experience shows that parliamentarians have not engaged with the annual reports of NHRIs, or have engaged but not systematically. This year, Pacific parliamentarians met and adopted the Pipitea Declaration, which commits them to establishing a Commonwealth Pacific parliamentary Human Rights Group, for which the groundwork is currently being laid. She then highlighted one unexpected effect of the Commonwealth Secretariat's work, the establishment of a parliamentary Human Rights Caucus in the Kenyan parliament. Regarding the discourse around increasing the role of parliaments in the work of the Human Rights Council, the Commonwealth Secretariat has and will continue to participate in advocacy in Geneva to take this forward, while drawing attention to the needs and experiences of small island Pacific states, such as challenges relating to issues around ratifications. She concluded by stating that the Commonwealth Secretariat remains committed to the role of parliamentarians in the protection of human rights, and stands ready to help them take this role forward.

Hon Neto Agostinho MP (Member of Kenyan Parliament and Convenor of the Kenya Parliamentary Human Rights Caucus) shared some of the challenges that a set of principles and guidelines would have to meet, such as the reliance of parliamentary human rights committees on the political goodwill of the executive. He stated that principles and guidelines would need to accommodate a variety of different circumstances, and suggested that in some circumstances, where the effectiveness of parliamentary committees was questionable, a national special rapporteur system may be more effective. He stressed the need for some form of peer review mechanism, and argued that there should be enforcement of standards in the form of sanctions for non-compliance. He concluded with a reflection on cultural differences, noting that there was a stronger emphasis on minority rights in some states, which should be accommodated in any set of principles and guidelines.

In the **discussion** that followed, an African parliamentarian acknowledged that parliamentary committees on human rights could help protect and realise human rights, but stressed that they had to be independent in order to hold the government to account, and not headed and chaired by a government MP. This explained the enthusiasm for the Kenya Parliamentary Human Rights Caucus, which was constituted of self-selecting MPs interested in protecting human rights in parliament. George Kunnath responded by referring to the challenges of establishing a human rights committee in Uganda, which was surrounded by concerns that it would be "hijacked" by the LGBT lobby or opposition, and which would not have been established without the compromise of having it chaired by a government MP. He emphasised the need to establish a human rights committee because it can deal with human rights issues systematically and sustainably, such as questioning whether the budget reflects national human rights obligation, and following-up on national reports systematically. He reiterated that one of the big challenges facing parliaments, even those with standing human rights committees, was resourcing, and stressed the importance of building capacity to create strong parliamentary libraries, researchers and committees.

Rogier Huizenga (Head of Human Rights Programme, Inter-Parliamentary Union) noted that many of the challenges raised by panellists were not necessarily related to human rights per se, but were common challenges facing parliaments as a whole. He highlighted the importance of human rights mainstreaming as one of the areas where a case could be made for a set of principles and guidelines, in order to create a culture within parliaments facilitated through mechanisms and internal procedures that helped make sure that parliamentarians are aware of human rights and ensure that they respect them.

Session 3: Substance: what should be the content of any principles and guidelines?

Professor Sir Jeffrey Jowell QC (Director of the Bingham Centre for the Rule of Law), chair of the session, began by noting that the rule of law was an essential and somewhat neglected precondition for the assertion of human rights, and their protection and realisation through law. In 2011, the Venice Commission, on which Professor Jowell was the UK Member, produced a report on the rule of law. They had struggled for 5 years to achieve consensus about the concept of the rule of law, but in the end reached unanimous agreement that there was a core, universal meaning of the rule of law. Fortunately, Lord Bingham had just published his book on the rule of law, and his definition of the rule of law was adopted, with his eight elements of the rule of law cited in the report.

Professor Jowell reiterated that the rule of law is a practical concept and a universal one, arguing that it is patronising to say the rule of law only applies to Western countries or the rich. The concept of the rule of law contains principles and mechanisms which ultimately shift from arbitrary decision-making to accountable decisions. The rule of law does not only concern lawyers and courts, but parliaments must be engaged on the rule of law, in order to establish and maintain a culture of human rights and respect for democracy and the rule of law. Professor Jowell then turned to the question of how do we implement the rule of law, and illustrated his answer with several examples. For example, on the need for independent judges to help establish accountability for human rights violations, Professor Jowell said that the Commonwealth Secretariat and the Bingham Centre for the Rule of Law are currently working on judicial appointments, engaging with a number of countries to shift from executive appointments to appointments by judicial appointment committees, and modelling a draft law on judicial appointments. Professor Jowell also elaborated on the work of the House of Lords Constitution Committee, which has helped to identify rule of law issues not just through legislative scrutiny, but also through more general inquiries. Finally, Professor Jowell noted the development of a new All-Party Parliamentary Group on the Rule of Law within the UK Parliament with the purpose of investigating the UK's rule of law obligations on various issues, within a cross-partisan format, before legislation is made. He concluded by calling on the panellists to examine the rule of law issues that should form part of the content of any principles and guidelines.

Sarah Cleveland (Professor of Human and Constitutional Rights at Columbia Law School, Member of the UN Human Rights Committee, and US Member of the Venice Commission) began by noting that her remarks were made in her personal capacity. She said that she had found the work of the Venice Commission and the Human Rights Committee to be highly complementary, in the sense that the Human Rights Committee focuses on whether states are meeting the details of their human rights obligations, but does not tend to focus on the structural issues in government that produces inadequate legislative and human rights outcomes. By contrast, the compliance of governance structures with the rule of law was the focus of the Venice Commission.

Professor Cleveland spoke about the current state of the Venice Commission's rule of law project, in particular as it relates to the work of parliaments. After the production of the report already cited by Professor Jowell, the Venice Commission had turned to the task of creating a "rule of law checklist", that would be a guide to states, civil society, international organisations and other actors to evaluate each country's structures, and provide a practical tool to provide detailed guidance on the rule of law. The idea of the checklist is not that a country has to satisfy every single element, but to evaluate the strengths and weaknesses of each country's compliance with the rule of law. It is not specifically

focused on human rights compliance, except where they are specifically linked to aspects of the rule of law. The concept of the rule of law is closely interlinked with, but not identical to human rights. Whereas human rights seek to protect individuals from arbitrary and excessive interferences with their freedoms and liberties, the rule of law focuses on imposing limits on and independent review of the exercise of public powers. That said, compliance with human rights is essential to the rule of law, and nearly every single element of the draft checklist is footnoted with references to the decisions of the European Court of Human Rights and the Inter-American Court of Human Rights as these are all issues which have been a concern of human rights law. She reiterated that it is very important to remember that creating compliance with the rule of law is only effective where there is the political will and resources and commitment to make this happen.

Professor Cleveland then elaborated on the elements of the checklist, while noting that it was still in draft form. The first set of questions that were asked focused on whether the process for enacting laws was transparent, accountable and democratic. The next set of questions focused on the duty to implement laws. Parliaments can have a role here in ensuring that legislation is designed to be effectively implemented, that laws provide sanctions for non-obedience with the law, and that the obstacles to the implementation of laws are analysed ex ante as well as ex poste. If law-making powers are delegated to the executive, some questions that arise are whether the delegated powers are narrowly constrained, whether the parliament retains the core of its powers, and whether there is oversight of the exercise. Some of the other questions focused on the foreseeability of the law, non-retroactivity, and the prohibition of arbitrariness, the implementation of human rights, non-discrimination and equality before the law.

Turning to the role of parliaments in embedding attention to human rights in the executive branch, Professor Cleveland noted that this was an underappreciated issue in the discussion to date. While she was a State Department lawyer, she had come to appreciate the function that was served by offices that the US Congress had intentionally created in the executive branch, charged with the protection of human rights in foreign policy matters. Her experience was that if the executive branch didn't have that voice at the table, on many occasions no one at the table would be raising the human rights issues because there were too many other interests at stake. While this human rights office concerned external relations, there was no reason why parliaments could not create human rights offices charged with looking at internal human rights compliance. The US Congress has also mandated the executive branch to suspend foreign assistance to states responsible for gross human rights violations, or that have been subject to a military coup, and suspending assistance to military units which there is credible evidence to suggest have committed gross human rights violations. She concluded by noting that ongoing oversight of executive branch compliance with human rights commitments is important part of parliament's role.

Kirsten Roberts (Post-Doctoral Researcher, Dickson Poon School of Law, Kings College London) spoke about the "Effective Parliamentary Oversight of Human Rights" project she had jointly led with Professor Philippa Webb in 2013. The project had brought together parliamentarians, academics, national human rights institutions and international organisations for a workshop, and focused on determining how parliamentary oversight could be effective.

Beginning with the question of what is effectiveness, Ms Roberts noted that effectiveness is a widely used yet poorly defined term, and that every proposal that seeks to define effectiveness is open to

challenge. The project relied on organisational effectiveness theory, and suggested that, in order to be effective, any parliamentary mechanism must have clear goals, legitimacy and engagement with stakeholders. Any parliamentary mechanism must also take into account the position of parliament within the structure of the state. States have an obligation to protect and respect and fulfil their human rights obligations, and parliaments play an important role in this, but it is the executive that can implement human rights changes. Furthermore, the challenges to parliamentary oversight of human rights need to be acknowledged. These include political realities, lack of independence, shifting national priorities, the existence of a multiplicity of actors, the unavailability of sufficient resources and varying levels of human rights expertise. In addition, the 'iceberg phenomenon' means that the impact of parliamentary human rights activity may not be visible in public, affecting the legitimacy of the parliament, and making it difficult to establish its effectiveness.

Ms Roberts then turned to discuss the goal of the parliamentary mechanism. Some participants at the workshop argued for 'compliance with human rights' as a goal or even the ultimate goal for parliamentary oversight. Others contended that such a goal was unattainable and extremely difficult to measure. The division between these views might be bridged by the concept of 'aspiration', which, unlike a goal, is unattainable by parliamentary bodies on their own, but it is something to strive for and orient oneself towards. Compliance may be the aspiration that serves to orient the actual achievable and measurable goals of parliamentary oversight. The project thus proposed an aspiration and operative goals that are more readily definable and achievable, as follows: *To help ensure increased compliance with human rights and a better life for all the people in this country through publicly examining existing or potential human rights deficits identified by parliamentarians, international organisations, the National Human Rights Institution, Civil Society Organisations, the media, the public, victims, whistleblowers and others; making proposals on areas for change or improvement, and calling the government to account for failures to protect the rights of the people of this country.*

Ms Roberts then stressed the need for the parliamentary mechanism to be legitimate, and that it has to have a process that is accountable and transparent, and takes into account views of stakeholders. She then outlined a number of factors that impact effectiveness and which may be criteria for assessing effectiveness, including: quality, resources, bravery, political support, partnerships, mandate/powers, method of operations, and politics, and national context. She concluded by agreeing that there was a consensus forming on what should be the content of any future principles and guidelines.

Sam Muller (Director, Hague Institute for the Internationalisation of Law and former Chair of the Rule of Law Global Agenda Council of the World Economic Forum) began by explaining that the Hague Institute for the Internationalisation of Law and Raoul Wallenberg Foundation had published a "Rule of Law Guide for Politicians" in 2012. The purpose of the Guide was to set out in as clear and simple terms as possible what rule of law is, and targeted politicians, including the parliamentarians that are the topic of this conference. The main driver behind making the guide was Hans Corell, former Legal Counsel of the UN and a great rule of law leader, as well as Professor Jansen at the University of Glasgow. Thanks to Hans Corell's drive, the Guide has now been translated into 15 languages, including: Arabic, Russian, Spanish, Chinese, and Kiswahili, with further translations were forthcoming.

The Guide sets out what the rule of law *is* and also contains special pointers for politicians, including parliaments. Some of these pointers include: making sure that laws are made public and known, that new laws are consistent with existing laws, that laws don't contain retroactive elements, that civil society organisations are involved, and that parliamentarians act within the framework of checks & balances and respect for the roles of the executive and judiciary.

Dr Muller observed that he found it hard to think of many examples that he had been involved with where parliaments – as institutions – were *the* catalyst for drastic rule of law change. What he had mostly seen was parliaments that: are under resourced with very little capacity of its members to really *know*; with members far too close to the executive; are not all that present in serious debates; have a tendency to define democracy as 'the winner takes all'; ride the waves of Twitter-based populism with little anchoring in rule of law or that make it an afterthought; that are clientelistic and involved in corruption. He observed this with the proviso that he had seen amazing and courageous MPs on the rule of law frontlines.

Dr Muller then sought to recap a few things about what he thought we know and do not know about developing the rule of law, following which, he offered a few thoughts on the value of guidelines and how they might be further developed. In terms of what we know and do not know about developing the rule of law, Dr Muller highlighted five points:

1. *Developing the rule of law is inherently a political and not a technical process*. Bringing laws and training judges is not the same as building roads. One of the key functions of a legal system is to mitigate power. If you start developing rule of law you start tinkering with power. Some will win and others will lose. It is conflictual, almost by its very nature. For far too long, rule of law and human rights development has been seen as a technical process of 'simply' training judges and lawmakers, writing better laws, and building case management systems.
2. *We are learning but we don't know enough about how rule of law develops (or not), takes root (or not).* The Guide tried to make rule of law simple. That was the point of the book. But think about how many millions of things need to come together in exactly the right way to make rule of law work. Some magical mix of good laws, known laws, good government and a system within which those laws function, well trained policemen and judges, free media, good schools, a sense of community, social glue, a sense of belonging, a basic living standard, faith, health, trust, and a whole lot more. So rule of law is a huge thing. And yet we all use that one concept: rule of law. So whatever we do: modesty is in order. He posed a riddle: The international community has assessed that Mali does not have a well-developed rule of law. A nationwide justice needs and satisfaction survey conducted last year shows that there are many justice journeys that don't work. Separation in a broken marriage, getting an inheritance sorted out, or having a conflict with your employer: the survey tells us these justice journeys have serious flaws and it also tells us where. At the same time: Bamako is the safest African capital city he knows. He can walk around there at midnight, with a full backpack and wallet. What makes that happen?
3. *Too often, we get lost in concepts.* Efforts to develop the rule of law too quickly get lost in institutional strategies that put a concept (like 'rule of law' or 'independent judges') at the core of what is being done, rather than the goal of rule of law: the nuts and bolts of delivering justice and guaranteeing freedoms to citizens and their organisations.

4. *Too much of what is done is based on beliefs, inadequate assessments, and insufficient learning.* We lack data or don't use data. The UK Independent Commission for Aid Impact and the OECD have recently made that point again. Only in the last decade have we seen the emergence of some serious data around justice and rule of law. The Rule of Law Index of the World Justice Project is an impressive example: it provides a very good benchmark and tracking mechanism for the quality of a rule of law system. HiiL has developed a Justice Needs and Satisfaction tool, which collects data on justice needs and the quality of justice journeys of citizens. That tool is now being used in Mali, Yemen, Uganda, Indonesia, Ukraine, the UAE, and The Netherlands. We can know much more about how the users of a justice system - the customers - perceive the system. In Yemen we learned that consumer problems were one of the most frequent justice problems for urban citizens, and yet: nobody was doing anything in that field. Data from users does one other important thing: it puts the challenges of *users* at the centre of strategy design, not concepts and institutions. But collecting data is not enough: his experience has been that donors and recipient countries lack the capacity to use data in their programming. Sometimes, they even lack the willingness to do so.
5. *Grand design does not work*. Research shows that ambitious multi-year plans with Big Targets rarely deliver results. Smaller, more open, iteratively developed plans with well-designed (data-based) learning loops are generally more effective. But donors can't really work like that; big design is politically more attractive and administratively easier to sell. Smaller projects entail more overhead and they make less headlines.

Turning to the value of guidelines and how they may be further developed, Dr Muller made four points:

1. The five points he just listed must, first and foremost, make us *modest* about the value and impact of guidelines. They have an important role, but what they deliver will never be instant, easy, and straightforward. They need to be made and worked with in a mix with many other things. And they must take into account the lessons we are learning about rule of law development.
2. Secondly, he thought we should put more thinking in guidelines about *change processes themselves*. It's one thing to know what *ought* to be done, it's quite another to *do* it. What 'guidelines' can be offered there on change processes?
    a. *Politically*: can we say more about the political processes that can lead to more rule of law? What stalls those processes? What increases chances of success? HiiL has taken a step in that regard. Together with the Dutch Ministry for Foreign Affairs, HiiL assembled in the Peace Palace a carefully selected group of justice leaders at the highest political levels (people who were or had been minister, chief justice, attorney general, and the like) from the main geographical regions of the world, who had all led or were leading impressive justice change. We asked them: what is justice leadership? What difference can it make? Is it different from other forms of leadership? And if it is, how can it be promoted? There was unanimous agreement that justice leadership is not your average leadership and that it can make a big difference. Out of that meeting the Justice Leadership group was set up this year, modelled after the Elders. It brings together now 8 justice leaders (the group will grow – and can include MPs) who work to provide out of sight coaching, diplomacy, and mentorship to justice leaders at the higher levels of government. HiiL have one concrete case in which this has started. The

Raoul Wallenberg Foundation will also work to promote research and understanding of the role of leaders in justice change processes [see www.justiceleadership.org].

b. *More operationally*: Assuming we have a parliament that works hard for rule of law change and gives you budgets to do it, assuming there is a true justice leader as minister: what does the proverbial director general do to achieve innovation and change around concrete justice needs like the ones the women of Mali told us about? Dr Muller calls this justice innovation. Within the Global Agenda Council on Justice of the World Economic Forum, which he co-chaired with Chief Justice Mutunga of Kenya, we have made this notion a core element of our work programme. In a book we published in 2013 – *Innovating Justice* - we worked to bring some of these lessons together. One of the key lessons we learned form researching that book is that putting problems at the core generally works better than putting a rule of law concept at the core. So: working on better procedures for separation after broken marriages is more useful than working to enhance the independence of the judiciary. The latter should be part of the former effort. Another lesson is: it can be a long way from a good idea to a good idea supported by a sustainable funding model. Lawyers generally think about funding models last – which is often too late.

3. We can also think about how we can include data about the "rule-of-law-ness" of countries, institutions, and processes in guidelines, and how politicians might obtain such data and work with it. Data – especially data on experiences of users – is a great asset in justice change processes.
4. Technology has a lot of innovation to offer. In that sense, HiiL has been thinking about turning the Guide into an App that is easy to access and carry around. In addition, this will allow HiiL to include much more functionality: adding more layers of specific information, links to local sources, data, etc. We might also think about guidelines for *processes* that help develop the rule of law. This will be something HiiL will be looking at with the Justice Leadership Foundation.

In the **discussion** that followed, Professor Jowell noted that statistics are becoming more important with the introduction of the rule of law as a target in the Sustainable Development Goals, which will come into effect soon, some aspects of which will need to be measured. On the other hand, can we neglect the non-quantitative aspects of the rule of law? How do we measure this?

One of the questions directed at Kirsten Roberts concerned the importance of the cultural dimension to legitimacy and whether she considered this one of the factors determining effectiveness. The questioner also welcomed partisanship as inevitable, and desirable if we want debates about what human rights really mean. Kirsten Roberts responded by acknowledging that the composition of the oversight mechanism is important to its legitimacy, and that she had placed the cultural dimension as a factor almost external to parliaments, which is not readily within parliaments' control, whereas parliaments could shape national attitudes towards human rights. Nevertheless, she stressed that engaging human rights in parliaments is important towards building acceptance of human rights. Responding to another question on how the principles should be taken up and endorsed within parliaments, she stated that some oversight of the effectiveness or compliance with the guidelines would be beneficial in the same way as is done for national human rights institutions. She also stressed that the principles and guidelines should focus on parliaments as a whole and not just on

specific parliamentary mechanisms, because principles and guidelines need to accommodate a diversity of national circumstances.

Rogier Huizenga of the IPU asked to what extent is it useful to develop principles and guidelines that combine human rights and the rule of law? Are we being overly ambitious? Sarah Cleveland answered no, though she joked that she has been accused in the past of being overly optimistic. The Venice Commission has had very interesting conversations about the relationship between the rule of law and human rights, because they overlap substantially. The rule of law goes in many ways to questions of basic institutional design, and less so to the substance of law, whereas human rights law goes more towards setting substantive standards. However, the two are mutually reinforcing, and it makes sense to make them the subject of a combined set of principle and guidelines as it is necessary for parliaments to consider both of them. Professor Jowell agreed, and ended on an optimistic note, outlining how the concept of legal aid in order to help people access justice has spread from the UK to be considered by parliaments around the world, and even finding its way into the Charter of Fundamental Rights of the European Union. This was noteworthy because parliaments were considering laws and policies designed to constrain the executive, by enabling people to challenge government decision-makers.

Session 4: Process: how to get from here to international agreement?

Michael Addo (Professor of International Law, University of Exeter, Member of the UN Working Group on Business and Human Rights and Chair of the Co-ordination Committee of UN Special Procedure Mandate Holders), chair of the session, began with a number of questions and observations.

Firstly, we need to bear in mind the question of the identity of the subject of the debate, because each of the mechanisms talked about had a very different identity. Some are very proactive, while others are rather reactive. For example, the Guiding Principles on Business and Human Rights was a reaction by corporate bodies to pressure on them. Similarly, the development of the Paris Principles was reactive, which meant that it had to be approached differently from how we would approach a proactive regime.

The second question to bear in mind, is who is going to promote this, given the bodies who have to be brought on board, including parliaments, governments, and civil society? Should it be the Inter-Parliamentary Office of the High Commissioner for Human Rights, an independent academic, or a special rapporteur?

Thirdly, we must be very clear of the trajectory of the process. Should it be top-down from the United Nations, or bottom-up from parliamentarians? Related to this question, should Governments be involved in negotiating the content of the principles and guidelines and, if so, how?

Fourthly, we also need to take cultural diversity seriously, in order to understand how to integrate the key indicators and sell it to differing parliamentary institutions. Finally, we need to think about the political process leading to adoption, and how to sell the principles and guidelines to the public. He concluded by saying that we need to be very clear about what we want, and how we are going to achieve it.

Gianni Magazzeni started the panel by expressing the desirability of MPs being informed of and debating their government's legal obligations because of its ratification of international human rights treaties and/or its political commitments, as a means of helping to address the implementation or knowledge gaps discussed earlier.

Mr Magazzeni explained that the UN Human Rights Council (UNHRC) has a very complex international human rights machinery that is not easy to understand and decipher, even for experts in Geneva. To put it simply, the UNHRC has a peer review mechanism [the Universal Periodic Review mechanism] that identifies gaps in the implementation of ratified treaties, in the laws and practices of countries under review, and makes recommendations. This is complemented by recommendations made by international human rights treaty bodies and UN special procedures. These recommendations are essential to help identify where the gaps are in the country's implementation of human rights treaty bodies, and could be followed up on by parliamentarians. Because of the sheer number of recommendations, OHCHR has a practice of prioritising 25 or so recommendations for follow-up.

Mr Magazzeni emphasised that one important element to take into account when thinking of the role of MPs, is the question of conformity with international human rights obligations. Rule of law without

respect for international human rights norms is rule by law. MPs should ensure that new legislation should be in compliance with international norms and standards, since this would prevent violations from occurring in the first place, and address the implementation gap. He also emphasised that MPs should also exercise oversight of government responsibility for meeting international human rights obligations.

Turning to the question of how to get from here to international agreement, Mr Magazzeni cited the experience of the Paris Principles relating to the Status of National Human Rights Institutions (NHRI) as an experience that could be learnt from. The first step towards the Paris Principles was for the then-UN Human Rights Commission adopting a resolution commissioning the OHCHR to organise a workshop, which was held in Paris, in Oct 1991. This workshop assembled practitioners, NHRI representatives and UN entities to work together to define a comprehensive series of recommendations on the role, composition, status and functions of NHRIs. The Paris Principles were then annexed to a UN General Assembly Resolution in December 1993 which was passed unanimously. Subsequent references to the Paris Principles in multiple HR conventions and resolutions elevated them significantly, and have led to changes allowing NHRIs to connect with and contribute to the international human rights machinery, such as the work of the HRC, UN treaty bodies and special procedures, in effect becoming part of the international human rights system. Mr Magazzeni said that there are now proposals being brought forward to enable NHRIs to play a similar role in the General Assembly.

Mr Magazzeni concluded by noting that all of these positive developments on NHRIs wouldn't have been possible without the Paris Principles, and that there could be a number of relevant lessons to be learnt in the context of a set of principles and guidelines for parliamentarians. OHCHR thinks that this could be a good idea, but that its success will depend on the involvement of Member States, similar to how Member States were involved in the second stage of the development of the Paris Principles.

Rashida Manjoo (Professor in the Department of Public Law, University of Cape Town and former UN Special Rapporteur on Violence Against Women) began by stressing the importance of guidelines in the context of adjudication, citing the example of South Africa's experience of legislating for non-discrimination. It was important that not only the content of the law was correct, but the interpretation of the law as well, and one of the means by which South Africa's parliament secured effective redress for discrimination was to develop, in conjunction with the judiciary, a set of guidelines for adjudicating the new law.

Dr Manjoo said that she had spent five years working as a Parliamentary Commissioner on Gender Equality, one of six NHRIs in South Africa. Her job was to engage with parliamentarians through submissions and direct engagement, to give assistance on the laws. Her experience had taught her that, even in a constitutional system which is based around international obligations, the role of NHRIs at national level was important to internalise international human rights obligations within parliaments. There is an implementation and knowledge gap, and her engagement with parliamentarians was important to address this.

Dr Manjoo then spoke about her work as a UN Special Rapporteur, observing that when she and other UN special procedures were invited to visit countries in the West, they were invited to meet with

parliamentarians, as well as NHRIs and civil society. These meetings with parliamentarians were important not only to talk about law reform and challenges observed but also to hear from them.

Turning to the process of obtaining a set of principles and guidelines at the international level, Dr Manjoo stressed the importance of starting at the diplomatic level, to find out who the allies are, which Member States would be willing to support the issue, and which would also convince others. She also stressed the importance of institutional mechanisms. Within the UN, there was a Rule of Law Unit, which together with the OHCHR could go beyond conducting a High Level Workshop, but also work on institution-building after getting a resolution. The UN agencies play an extremely important role in terms of providing technical assistance to achieve internalisation of norms. There were also regional mechanisms which again could be activated by the OHCHR, which has an institutional relationship with these regional mechanisms. At the national level and also the regional level, generating discussions by parliamentarians on their role was important.

In terms of relevant lessons to be learned from the history of international standard-setting, Dr Manjoo reiterated the need for institutional structures. She added that we need to have more depth in terms of knowledge-creation, and that knowledge authors need to be willing to learn. The challenge she was worried about was that adherence to paper standards may not equate to adherence in substance, and standard-setters need to be aware of this and think of ways to overcome this challenge.

Nico Schrijver began by stressing the importance of exchanging best practices on more effective parliamentary oversight if we are to draft a good set of principles and guidelines. This would also address the implementation and knowledge gaps. He endorsed the idea of drawing from the process of creating other principles such as Paris Principles, which had slowly developed from recommendations to yardsticks, though he doubted if we could simply redo the process of obtaining the Paris Principles with respect to parliaments or courts/judicial bodies. It would be difficult to have independent or UN bodies writing this, given parliaments' status as an integral part of the state.

Professor Schrijver stated that he believed that the process of drafting a set of principles and guidelines was a useful exercise, but emphasised that it was important that they have a practical orientation, and not be too abstract. He also emphasised that it was important to involve parliaments themselves in the drafting process, in order to take into account the question of ownership. It was also important to take into account diversity at the regional level, and even within regions, as well as at the national level. Finally, the process of drafting must involve fully-informed members of parliament as well as human rights experts, so that the outcome document was compatible with international human rights law.

In the **discussion** that followed, Michael Addo returned to some of his earlier remarks and questions, and observed that the development of a set of principles and guidelines appeared to be proactive, in the sense that it was not responding to a particular set of stresses, and was free to take its own pace. Turning to the question of trajectory, Professor Addo gathered the impression from Mr Magazzeni and Professor Manjoo that we should start from the international level, and work downwards. He also understood Professor Schrijver's concern that we would lose content in the process of negotiation.

Senator Zappone made a rousing call for action, and asked how we could speed up the process, so that it does not take too many years, while bearing in mind that the process has to be done right. She also asked how we could motivate other parliamentarians to become engaged and involved, and how could parliamentarians who are human rights champions be engaged in this process, pushing governments to adopt a set of principles and guidelines?

David Donat-Cattin said that Parliamentarians for Global Action would support the enactment of a set of principles and guidelines, and that he saw the most legitimate avenue going forward to be the UN in Geneva. He stressed that we need to involve civil society and leading human rights organisations within the drafting process. He suggested that we consider the lesson from the Sustainable Development Goals, where some states that were not willing to accept certain obligations under the label of human rights were willing to accept it under the label of the rule of law, and decide if we want to duplicate this!

On the critical question of where do we go from here, Mr Magazzeni advised that we look to the National Human Rights Institutions, call them in and ask them to report. They have been embedded for the past twenty years, have huge knowledge of their parliamentary systems, and are involved in HRC meetings. OHCHR will be publishing a guide on good models facilitating the participation of parliaments in the work of the HRC. He emphasised that the Paris Principles are only being used as an example of a process that could take forward a set of principles and guidelines, not a recommended model, and that other models could be adopted. He also emphasised that a set of international standards on judiciary had already been approved by the UN General Assembly.

Professor Addo concluded the session by asking whether, if there is clear political appetite for a set of principles and guidelines, will OHCHR be willing and able to help? Mr Magazzeni replied that, the answer was simply: if there was a resolution with a paragraph authorising the OHCHR to organise something, that something will happen.

Final remarks

Professor Andrew Thompson closed the conference, thanking the participants for a full, interesting and engaging discussion. He shared the strong sentiment amongst the participants of the great potential of the idea of increasing the role of parliaments in the protection and realisation of the rule of law human rights, despite the challenges and complexities of realising this. He was encouraged by the wide consensus around the idea, and closed with an appeal to those who are concerned with the rule of law and human rights, to their hearts as well as their heads, to help national parliaments or their human rights committees make these cherished ideas a reality for the people they serve.