OSCE Human Dimension Seminar

STRENGTHENING THE RULE OF LAW IN THE OSCE AREA,

WITH A SPECIAL FOCUS ON THE EFFECTIVE ADMINISTRATION OF JUSTICE

CONSOLIDATED SUMMARY

Warsaw, 12-14 May 2009

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I. OVERVIEW

The Human Dimension Seminar on *Strengthening the rule of law in the OSCE area, with a special focus on the effective administration of justice* (Warsaw 12-14 May 2009) invited representatives of the participating States, experts, and civil society actors to address some of the key issues related to the rule of law in the human dimension, including independence and integrity of the judiciary, judicial review of administrative decisions, and transparency and accountability in the administration of justice, the latter with a specific focus on the prevention of torture at the pre-trial stage. All these elements form part of the foundation for achieving stronger rule of law compliance in the OSCE area. Seminar participants shared their experiences, discussed many challenges, and proposed solutions to help address these challenges. The keynote speaker, introducers and moderators of the working group sessions made particularly valuable contributions to the discussions.

The Seminar topic responded to the tasking contained in the Helsinki Ministerial Council Decision No. 7/08 on *Further strengthening the rule of law in the OSCE area* (MC.DEC/7/08). Decision No. 7/08 underlined the importance of the rule of law for human rights and democracy, security and stability, good governance, mutual economic and trade relations, investment security and a favorable business climate, as well as the fight against corruption and all kinds of illegal trafficking. This Decision encouraged the participating States to strengthen the rule of law, *inter alia*, in the following areas: independence of the judiciary, effective administration of justice, right to a fair trial, access to a court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention; prevention of torture and other cruel, inhuman or degrading treatment or punishment; awareness-raising and education on the rule of law for the legal professions and the public; provision of effective legal remedies and access to the same; adherence to rule of law standards and practices in the criminal justice system; and the fight against corruption.

While many issues raised at the Seminar were not new for the OSCE rule of law agenda, many participants emphasized that achieving greater compliance with OSCE commitments in such areas as independence of the judiciary, transparency and integrity of justice administration, and the prevention of torture requires further concerted efforts. Civil society activists called for more rigorous debate on the progress of implementing these commitments.

The Seminar agenda included a session on administrative justice – an area which hitherto has received limited attention in human dimension meetings. Availability of effective remedies – administrative and judicial – was repeatedly stressed as a crucial condition for good administration and the rule of law.

The Seminar was not mandated to produce a negotiated text. Main conclusions and recommendations of the Seminar are included in Section II of this Summary. Recommendations, put forward by delegations of OSCE

participating States and Partners for Co-operation, international organizations, and NGOs, are wide-ranging and addressed to various actors including OSCE institutions and field operations, governments, courts and civil society. Seminar recommendations have no official status and are not based on consensus, however they should serve as useful indicator for the OSCE in setting priorities and planning its programmes aimed at strengthening the rule of law. Documents from the Seminar are available at: http://www.osce.org/conferences/hds_2009.html.

II. CONCLUSIONS AND KEY RECOMMENDATIONS

The Human Dimension Seminar was chaired by Ambassador Janez Lenarčič, Director of ODIHR. The Chairman addressed the opening and the closing plenary sessions (see Annex II) and expressed appreciation to all participants for their contributions to the Seminar. The Chairman also stressed the need to ensure follow-up on the Seminar discussions. The following conclusions and key recommendations emerged from the plenary and working group sessions.

Conclusions

Justice is attainable only when judges apply laws fairly and with integrity, the precondition for which is that the judiciary is independent and impartial. It is clear that democratic states cannot function without independent judiciaries. ODIHR should make an additional effort to find ways to better assist the participating States in achieving greater compliance with their commitments in this area.

Administrative justice systems need to ensure legal redress for citizens whose rights are infringed by the actions of public administration. Judicial remedies in the administrative field should be accessible, timely, and include effective review of the challenged administrative decisions.

Transparency in justice administration is the key to maintaining public trust. Execution of court decisions is essential for any administration of justice, national, as well as international, to be effective.

The rule of law needs to uphold fundamental human rights, otherwise it will fail to deliver justice and risks turning into a tool of oppression. Seminar discussions again highlighted the absolute prohibition of torture and other inhuman and degrading treatment and punishment.

Key recommendations

To the participating States:

- Give real effect to the principle of judicial independence, by introducing and applying fair and transparent procedures for selecting, appointing and promoting judges;

- Ensure that judges have the right to a fair hearing in disciplinary proceedings and can effectively appeal disciplinary measures taken against them;

- Ensure that judges are suspended or removed only for reasons of incapacity or behaviour that renders them unfit to discharge their duties;

- Introduce case assignment systems that exclude opportunities for individual preferences and abuses, for example those based on alphabetical order or date of registration;

- Ensure the independence of courts dealing with administrative cases as a key pre-requisite for the effectiveness of judicial remedies;

- Encourage administrative judges to make full use of the constitutional provisions and principles, and give due regard to the existing international standards on administrative justice; facilitate judicial training that promotes this approach;

- In consultation with the legal profession, take steps to improve legal representation in administrative justice systems;

- Facilitate the equipment of courtrooms with appropriate technical means to ensure accurate and reliable records of court proceedings;

- Establish an efficient system for the publication of judicial decisions and ensure easy access by the public;

- Ensure access to open court hearings for the public and the media;

- Build and maintain respect and trust in the justice system through timely and efficient enforcement of judgments; where necessary, reinforce the enforcement offices to assure timely execution of judicial decisions;

- Consider acceding to and fully implementing the Optional Protocol to the UN Convention against Torture (OPCAT), especially by establishing National Preventive Mechanisms based on an inclusive consultation process with all relevant actors, including NGOs;

- Encourage courts to declare inadmissible evidence obtained through torture or other unlawful means.

To the OSCE, its institutions and field operations:

- Continue to build the capacity of judicial training institutions and facilitate exchanges of practices and contacts between the judiciaries of participating States;

- Develop, promote and support activities that strengthen the rule of law in the participating States, with a specific focus on areas outlined in Ministerial Council decision No. 7/08 on *Further strengthening the rule of law in the OSCE area,* including judicial independence, administrative justice reform and torture prevention;

- Develop tools to improve the implementation of international standards and principles of administrative justice in domestic legal systems;

- Continue promoting the OSCE human dimension commitments in the area of the rule of law.

III. AGENDA AND ORGANIZATIONAL ASPECTS

The Seminar on *Strengthening the rule of law in the OSCE area, with a special focus on the effective administration of justice* was organized in Warsaw on 12-14 May 2009 by the ODIHR in co-operation with the Chairmanship of the OSCE in accordance with PC Decisions No. 887 of 6 March 2009 (PC.DEC/887) and No. 892 of 2 April 2009 (PC.DEC/892).

This was the 25th event in a series of specialized Human Dimension Seminars organized by the ODIHR further to the decisions of the CSCE Follow-up Meetings in Helsinki in 1992 and in Budapest in 1994. The previous Human Dimension Seminars were devoted to: Tolerance (November 1992); Migration, including Refugees and Displaced Persons (April 1993); Case Studies on National Minorities Issues: Positive Results (May 1993); Free Media (November 1993); Migrant Workers (March 1994); Local Democracy (May 1994); Roma in the CSCE Region (September 1994); Building Blocks for Civic Society: Freedom of Association and NGOs (April 1995); Drafting of Human Rights Legislation (September 1995); Rule of Law (November /December 1995); Constitutional, Legal and Administrative Aspects of the Freedom of Religion (April 1996); Administration and Observation of Elections (April 1997); the Promotion of Women's Participation in Society (October 1997); Ombudsman and National Human Rights Protection Institutions (May 1998); Human Rights: the Role of Field Missions (April 1999); Children and Armed Conflict (May 2000); Election Processes (May 2001); Judicial Systems and Human Rights (April 2002); Participation of Women in Public and Economic Life (May 2003); Democratic Institutions and Democratic Governance (May 2004); Migration and Integration (May 2005); Upholding the Rule of Law in Criminal Justice Systems (May 2006); Effective Participation and Representation in Democratic Societies (May 2007); and Constitutional Justice (May 2008).

The Annotated Agenda of the Seminar is supplied in Annex I. The Seminar was opened on Tuesday 12 May 2009 at 9:00 and closed on Thursday 14 May 2009 at 16:30. All plenary and working-group sessions were open to all participants. The closing plenary session in the afternoon of 14 May focused on practical recommendations emerging from the four working group sessions. The plenary and working group meetings took place in accordance with the Work Programme. Ambassador Janez Lenarčič, Director of ODIHR, chaired the plenary sessions. The Rules of Procedure of the OSCE and the modalities for OSCE meetings on human dimension issues (PC.DEC/476) were followed, *mutatis mutandis*, at the Seminar. Also, the Guidelines for organizing OSCE meetings (PC.DEC/762) were taken into account. Discussions were interpreted into all six working languages of the OSCE.[1]

IV. PARTICIPATION

The Seminar was attended by 142 participants, among them 86 representatives of 38 OSCE participating States, two participants of two Mediterranean Partners for Co-operation (Algeria and Egypt), and two representatives of two international organizations (Council of Europe and the International Criminal Tribunal for the former Yugoslavia).

The Seminar was also attended by two representatives from the OSCE Secretariat and 18 representatives from 13 OSCE field operations (Presence in Albania, Centre in Ashgabad, Centre in Astana, Office in Baku, Centre in Bishkek, Mission to Bosnia and Herzegovina, Centre in Dushanbe, Mission in Kosovo, Office in Minsk, Mission to Moldova, Mission to Serbia, Spillover Monitor Mission to Skopje and Office in Yerevan). 32 representatives of 30 NGOs took part in the Seminar.

V. SUMMARY OF THE PROCEEDINGS

Ambassador Janez Lenarčič, Director of ODIHR, opened the seminar. Welcoming remarks were made by **Ambassador Louis-Alkiviadis Abatis**, Director of the OSCE and Council of Europe Department of the Ministry of Foreign Affairs of Greece, on behalf of the Greek OSCE Chairmanship, and **Mr. Jan Borkowski**, Secretary of State, Ministry of Foreign Affairs of Poland.

The keynote address was made by **H.E. Judge Patrick Lipton Robinson**, President of the International Criminal Tribunal for the former Yugoslavia (ICTY). Judge Robinson pointed out that judicial independence is a means by which courts are made fair and impartial. It does not mean that judges are free to decide cases according to their own whims or prejudices: judges are constrained by the law and have a responsibility to apply the law to the facts

[1] According to paragraph IV.1(B)1. of the OSCE Rules of Procedure (MC.DOC/1/06), working languages of the OSCE are English, French, German, Italian, Russian, and Spanish.

that have been established before them. The maintenance of judicial independence is a necessary pre-condition for the protection of all the other values considered to be fundamental. Judicial review gives concrete contours to constitutional and statutory rights.

Judge Robinson emphasized that a central tenet of a healthy judiciary is its independence from the law-making functions of the legislature and the enforcement functions of the executive. The doctrine of the separation of powers does not exist in a pure form, and one often finds overlaps in the functions of the legislative and executive branches. But the judiciary can never be subjected to direction by the executive or the legislature.

The keynote speaker made it clear that judges must be free to make decisions without fear of political reprisal or without the hope that they will benefit from political favour through their decisions. He pointed out that judges can be a powerful counter-majoritarian force in a society, making unpopular decisions at sensitive moments in history in order to protect the rights not only of individuals in the present, but the rights of future generations as well.

Judge Robinson also discussed the application of these principles in the operation of the ICTY, and briefly described the rule of law situation in the former Yugoslavia and the efforts made by the ICTY to improve it. (The full text of the keynote speech is attached in Annex IV.)

After the opening plenary session of the Seminar, discussions took place in four consecutive working groups. The following reports are prepared on the basis of notes taken by ODIHR staff and presentations of the rapporteurs, who summarized the working group discussions at the closing plenary session. These reports cannot exhaustively convey the details of the working group discussions but rather aim to identify their common salient points. The recommendations from working groups were not formally adopted by the Seminar participants and do not necessarily reflect the views of any participating State.

Working Group I

Working Group I:
Independence of the judiciary

Moderator: The Right Honourable Lord McCluskey, QC LL.D

Introducer: Justice Teresa Romer, Supreme Court of Poland (retired)

Rapporteur: Dr. Lorenz Barth, Counsellor, Permanent Mission of the Federal Republic of Germany to the OSCE

The moderator pointed out that independence of the judiciary is a basic concept shared by all participating States despite their different legal traditions. The rationale for judicial independence and its underlying purpose

is to maintain the separation of powers – especially between the executive power and the judiciary. This is widely recognized as a precondition for the rule of law and democracy. This principle must be supported by the institutional framework which includes the prosecutors, police, court system, defence lawyers, and others. The moderator listed important aspects of judicial independence: appointment procedures, promotions, discipline and removal of judges, and allocation of cases. He highlighted security of tenure as a key element to the achievement of independence.

The moderator drew attention to important related issues. These included the need for adequate support for judges by administrative and clerical staff; personal security of judges and their families; and the independence of prosecutors, especially from political parties. Finally, the moderator suggested that judges must refrain from law-making and should respect the role of legislators.

The introducer emphasized the importance of both the individual independence of the judge as a person and the general independence of the judiciary as an institution. She suggested that while the institutional framework must be in place, judges themselves should have appropriate character and values to maintain their independence. She highlighted the importance of recruitment and training in that regard. She also noted the need for a political culture in other branches of power which respects judicial independence.

In the discussion following the introduction several representatives of delegations of participating States cited their legislation aimed to protect judicial independence. A number of NGO representatives referred to shortcomings and to challenges both for the rule of law in general, and for the independence, transparency and accountability of the judiciary in some OSCE participating States.

The role of the executive and the legislative branches of government in the appointment process was discussed. It was suggested that such role should be limited to confirmation of nominations made by an independent body. This body should be sufficiently inclusive and transparent, and follow a competitive and merit-based process for the selection of nominees. It was emphasized that the appointment process should result in a representative and pluralistic composition of the judiciary, and not be dominated by a single political or interest group.

It was also suggested that where judges are initially appointed on a probationary basis for a fixed term, criteria and procedures used to assess their performance should not jeopardize their independence.

The introducer raised the issue of membership of judges in political parties and participation in political life. This is prohibited in many, but not all, participating States. International standards make it clear that judges enjoy freedoms of expression, assembly and association, but should exercise them in a manner that ensures respect for their profession and preserves their impartiality and independence.

Several participants discussed the issue of judicial immunity from prosecution. It was emphasized that any privileges and immunities are granted to judges to uphold their independence and integrity and should never be used to shield them from responsibility for misconduct.

Attention was drawn to the systems of case assignment. Several participants pointed out that cases should not be assigned to judges at the discretion of court chairs or other officials, but rather through a system that excludes opportunities for individual preferences and abuses – such as random distribution systems. A participant from the former Yugoslav Republic of Macedonia cited a positive example of reforms in this area.

In his final remarks, the moderator emphasized the importance of exchanging experiences and good practices through contacts between the judiciaries of the participating States.

Specific recommendations included:

To the participating States

- Introduce and/or apply objective criteria for the selection and promotion of judges and employ a fair and transparent process when selecting candidates for judicial posts;
- Ensure adequate remuneration for judges and measures to guarantee personal safety of judges and their families;
- Establish national training institutions for judges and public prosecutors and ensure that they undergo in-service training to improve their knowledge and skills;
- Introduce case assignment systems that exclude opportunities for individual preferences and abuses, for example those based on alphabetical order or date of registration;
- Strengthen judicial self-governance;
- Ensure that judges have the right to a fair hearing in disciplinary proceedings and can effectively appeal disciplinary measures taken against them;
- Ensure that judges are suspended or removed only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

To the OSCE, its institutions and field operations

- Continue to build the capacity of judicial training institutions and facilitate exchanges of practices and contacts between the judiciaries of participating States.

Working Group II

Working Group II:

Administrative justice: Judicial review of administrative decisions, administrative offences and due process of law

Moderator: Mr. Ihor Koliushko, Director, Centre for Political and Legal Reforms, Ukraine

Introducer: Dr. Denis Galligan, Professor, Centre for Socio-Legal Studies, University of Oxford, United Kingdom

Rapporteur: Mr. Usen Suleimenov, Deputy Head of Mission, Permanent Mission of the Republic of Kazakhstan to the OSCE

The moderator provided a brief overview of the issues on the session's agenda. He suggested that administrative law comprises at least four distinct areas: administrative institutions (public administration), provision of services (administrative acts), oversight (administrative offences and responsibility), and appeal of administrative acts (administrative justice). The last two areas would be addressed in this Working Group. The moderator stressed the importance of these issues for countries in transition, pointing out that administrative justice is an indicator of democratic governance. He then gave the floor to the introducer, Dr. Galligan.

The introducer suggested that administrative justice could be defined as an application of "justice ideas" to the actions of government authorities and other bodies exercising governmental power. The main source of administrative justice, and justice generally, is the constitutional tradition of the participating States. But international standards also provide significant guidance. As a sign of the increasing importance of this area, the right to good administration was included in the European Charter of Human Rights.

Treatment of ordinary persons by the administration, he said, can serve as a key test of the effectiveness of administrative justice systems.

The introducer highlighted some of the main elements of administrative justice. The availability of judicial remedies is clearly a key element although these remedies should be used as last resort. Administrative remedies should also be effective. Whether judicial remedies are available either through general or specialized courts, these courts should be independent from the government and the administration. The introducer also emphasized the importance of due process, availability of qualified lawyers for representation, accessibility of courts, and the adequacy of remedies. Courts should be authorised not only to pronounce on the legality of administrative decisions, but also require administrations to act. The timeliness of judicial remedies is vitally important and delays are, regrettably, a common problem in the OSCE region.

The introducer then discussed the progress in reforming administrative justice systems in transitional states. He noted that "legal transplants" – copying of models from other states – have a mixed record of success. The evolution of domestic systems should be supported, with the emphasis not

only on laws and institutions, but also the values and attitudes conducive to the rule of law and human rights protection.

The introduction was followed by an active discussion. Participants drew attention to the existing framework of international standards on administrative justice, including *inter alia* Council of Europe recommendations, but noted the need for more tools to implement these standards in the domestic legal systems.

Several participants pointed out that one of the key challenges to reforming administrative justice systems in post-Soviet states is the attitude of judges. The Soviet doctrine focused on the responsibility of individuals before the state for breach of administrative rules. By contrast, the European legal tradition of administrative law revolves around the administration's responsibility to individuals. Hence, proper judicial review of administrative decisions, it was suggested, requires a change in judicial mentality. Another participant added that judges in transitional countries often take a formalistic approach in their review and fail to apply the broader principles of constitutional and international law.

Participants mentioned other challenges for transitional administrative justice systems: political interference and pressure on judges, especially in electoral disputes; insufficient number of judges; lack of appropriate legislation; and inadequate enforcement of court judgments. On this final point, it was pointed out that the attitude of governments plays a key role and that they need to recognize authority of administrative courts and follow their decisions.

The introducer remarked that administrative courts are often reluctant to review decisions based on the exercise of discretionary powers by administrative authorities. For a system of administrative justice to be effective, courts need to overcome this reluctance and examine whether such decisions were in compliance with the principles of good administration.

The moderator introduced the discussion of administrative offences. He noted that the Soviet legal doctrine of "administrative responsibility" focused on responsibility of individuals before the state, grouping many unrelated offenses into one legislative act: the Code of Administrative Offences. Prosecution for these offences was effectively carried out by courts themselves and the process often did not always comply with fair trial standards. The moderator then discussed steps that may inspire participating States to reform their administrative law system, using the example of his home country – Ukraine. He noted that the reform measures proposed there include, *inter alia*, legislative changes to clarify the competencies of different state agencies and to provide effective administrative and judicial remedies to affected individuals. The jurisdiction of administrative courts has been cleared of administrative offences which are criminal in nature.

In the discussion, participants supplied examples of reforms undertaken in their jurisdictions. The need for due process protections for those facing any deprivation of liberty was repeatedly emphasized and participating States were urged to provide these protections if they are not already present in their

legislation on administrative offences. Several participants echoed the introducer's opinion that dealing with criminal offences – even minor ones – should not be the function of administrative courts: offences which are criminal in nature should be dealt with by general criminal courts.

Specific recommendations included:

To the participating States

- Develop effective administrative remedies to provide redress for those who challenge administrative decisions;
- Ensure the independence of courts dealing with administrative cases as a key pre-requisite for the effectiveness of judicial remedies;
- Encourage administrative judges to avoid formalism and make full use of the constitutional provisions and principles, and give due regard to the existing international standards on administrative justice; facilitate judicial training that promotes this approach;
- In consultation with the legal profession, take steps to improve legal representation in administrative justice systems;
- Facilitate access to justice through, *inter alia*, low filing/court fees in administrative cases;
- Take necessary measures to reduce backlogs and encourage the timely resolution of administrative cases;
- Improve public awareness of existing administrative and judicial remedies;
- Improve the enforcement of decisions by administrative courts, promote respect for court decisions by public administrations;
- Introduce and/or make broader use of alternatives to court proceedings – such as mediation and non-judicial methods;
- Provide the necessary fair trial guarantees for individuals facing any deprivation of liberty for administrative offences.

To the OSCE, its institutions and field operations

- Develop tools to improve the implementation of international standards and principles of administrative justice in domestic legal systems.

Working Group III

Working Group III:
Administration of justice: Transparency and enforcement

Moderator: Mr. Christopher Decker, Director, Department of Human Rights and Communities, OSCE Mission in Kosovo

Introducer: Ms. Genevieve Mayer, Head of Department, Execution of Judgements of the European Court of human Rights, Council of Europe

Rapporteur: Mr. Axel Kenes, Counsellor, Permanent Mission of Belgium to the OSCE

The moderator suggested to first address the issues of transparency and share practical experiences with regard to trial monitoring initiatives. He introduced the discussion by sharing the experience of the OSCE Mission in Kosovo – the first OSCE field operation to launch a large legal system monitoring programme. This programme provides data about the functioning of the justice system and its shortcomings, helps build the capacity of the judicial profession, and increases transparency in exercising the right to a public trial. The results of monitoring are analyzed and presented to the relevant authorities with recommendations for improvements.

Following this introduction, representatives of other OSCE field operations shared their experiences in trial monitoring initiatives, including a number of long-running programmes. In addition to monitoring high profile cases, some OSCE field operations select cases randomly to get a real-life picture, while others monitor certain types of criminal and/or civil cases. A participant who had compared the experience of trial monitoring in different participating States, suggested that in-depth trial monitoring programmes, where all stages of proceedings are monitored, had a more positive impact on the judicial system.

These programmes produce important information both for domestic stakeholders and international actors involved in justice reform. Findings and recommendations have been used to develop legislative proposals, design capacity-building activities, and prompt investigation of accusations of ill treatment. Co-operation with NGOs helped expand the scope of monitoring activities and broaden their geographical coverage. Examples of productive co-operation with international bodies were also cited, in particular with the ICTY in relation to war crimes.

Participants also discussed existing obstacles to the transparency of judicial proceedings. Access to trials for the general public and the media is hampered in some participating States, despite existing laws stipulating that trials be public. Several participants pointed out that access to judicial decisions remains a problem and suggested that more efforts should be made to ensure the timely publication of judgments.

The existence of accurate and reliable records of court proceedings was deemed an important safeguard for the rights of all trial participants. It was suggested that the participating States take steps to improve the recording of court proceedings, *inter alia*, by equipping courtrooms with the technical means for court reporting.

The introducer set the framework for the second part of the session devoted to the enforcement of court decisions. The introducer used her experience with

the European Court of Human Rights (ECtHR) to emphasize the danger of delayed enforcement of domestic court decisions. She pointed out that justice cannot be effective without the enforcement of court decisions. The lack of enforcement damages the credibility of the justice system and undermines public trust.

The introducer discussed the measures taken by the Committee of Ministers of the Council of Europe to improve the enforcement of ECtHR decisions. When the Court was flooded with complaints of judgments left unenforced, the Committee of Ministers set a six-month deadline for states to take national measures to comply with their obligations. The Committee of Ministers also functioned as a forum for constructive dialogue, assisting states in finding satisfactory solutions to enable them to execute the Court's decisions. It was remarked that the existing backlog in the enforcement of the ECtHR decisions undermines the credibility of the international commitments of the member States.

Several participants shared their domestic practices with regard to the enforcement of judgments. For example, one judge noted that currently the biggest challenge in this area for his country is the enforcement of judgements in civil cases involving property, as well as compensation awards resulting from civil lawsuits within the framework of criminal trials. He stressed the importance of legal representation and the accessibly of legal aid and noted the efforts of the legal profession and the national authorities in this sphere.

Participants also mentioned problems such as the lack of resources, inadequate legislation and procedures, and inadequate capacity and security of the enforcement personnel (bailiffs). One participant suggested that Ombudsman and similar national human rights institutions could play a greater role in improving the enforcement of judgments.

Specific recommendations included:

To the participating States

- Encourage civil society groups to monitor judicial proceedings and encourage judicial authorities to co-operate with such initiatives by providing unhindered access to public trials and hearings;
- Improve public access to court buildings and courtrooms;
- Encourage the use of monitoring reports in the training of judges, prosecutors and lawyers;
- Facilitate the equipment of courtrooms with appropriate technical means to ensure accurate and reliable records of court proceedings;
- Establish an efficient system for the publication of judicial decisions and ensure easy access by the public;
- Reinforce, where necessary, execution offices and streamline execution procedures.

To the OSCE, its institutions and field operations

- Continue OSCE monitoring programmes for trials and other aspects of the legal systems; ensure continuing exchange of good practices with regard to such programmes and the discussion of their results.

Working Group IV

Working Group IV:
Administration of justice: Accountability

Moderator: Dr. Malcolm Evans, Professor, University of Bristol, United Kingdom

Introducer: Ms. Zhemis Turmagambetova, Director, NGO "Charter for Human Rights"

Rapporteur: Ms. Fausta Simaityte, Adviser, Human Dimension Issues, Permanent Mission of the Republic of Lithuania to the OSCE

The introducer stated that ill-treatment in police custody most frequently occurs in the first hours after the arrest. The detained are most vulnerable during that period and usually do not have access to any assistance. She described some results of the monitoring activities carried out by NGOs in Kazakhstan and stressed the importance of co-operation with civil society in the prevention of torture. Such co-operation is also important in the development of National Preventive Mechanisms (NPM) under the Optional Protocol to the UN Convention against Torture (OPCAT). She expressed concern about an apparent trend to nominate Ombudsman offices as NPMs and exclude civil society organizations from detention monitoring activities, especially in countries where Ombudsman offices do not enjoy sufficient independence from the government. This concern was echoed by NGO representatives in the plenary.

The introduction was followed by a lively debate moderated by Professor Evans.

It was suggested that effective systems of complaint and investigation of torture allegations are of paramount importance. Torture can be reduced by improving criminal investigation techniques. One participant also emphasized that certain models of performance evaluation for law enforcement officers contribute to the demand for torture by placing excessive emphasis on the number of "solved" cases.

Another participant suggested that reducing demand for torture requires a principled stand by the judges and prosecutors to reject unlawful evidence – to deny investigation authorities "the forbidden fruit". He emphasized that the problem is ultimately one of political will.

It was pointed out that high prison populations contribute to the problem of degrading treatment in prisons. Participating States were called upon to review their criminal sentencing policies and make broader use of alternatives to imprisonment. Ombudsman institutions in many participating States have a mandate to monitor places of detention. The OPCAT can give momentum to strengthening their capacity in this area.

Several participants also called on the participating States who have not already done so, to ratify and effectively implement the OPCAT. It was recalled that the participating States were already encouraged to consider early ratification of the OPCAT in the OSCE's 2005 Ljubljana Ministerial Council Decision on the Rule of Law.

It was pointed out that the Subcommittee for the Prevention of Torture created under the OPCAT should be supported, but that the key role in torture prevention is assigned to NPMs. Participants repeatedly emphasized the importance of creating effective NPMs, ensuring their independence, and providing them with sufficient resources for their work. It was specifically mentioned that existing NGO expertise should be fully included in this process and that the nomination of NPMs should not result in decreased monitoring of detention facilities by civil society actors.

Representatives of NGOs repeatedly pointed to the lack of professionalism among the lower ranks of police officers and investigators and called on the participating States to improve their training. The *OSCE Guide on Democratic Policing* was mentioned and the participating States were encouraged to make broader use of this tool.

The moderator reminded the audience that twenty years have passed since the European Committee on the Prevention of Torture began its work. He suggested that there is, regrettably, a failure at the national level of many participating States to take on board the significance of independent monitoring of places of detention. Many CoE countries have been co-operating with this international mechanism, but did not replicate it at the national level. The moderator also pointed out that NPMs should be a preventive mechanism and not only react to received complaints. This implies routine and regular monitoring visits to places of detention. He reminded the audience of three fundamental procedural safeguards which play an important role in torture prevention: the right to be brought before the judicial body promptly after being taken into custody to review the legality of arrest; the right to independent medical examination; and the right to access a lawyer.

One speaker shared the experience of his country with a Human Rights Council, which scrutinises the activities of law enforcement agencies and makes proposals to the Ministry of Interior. Its joint composition (governmental and civil society representatives) has proved to be a workable model to ensure good co-operation with the state authorities.

An issue of legitimacy of national amnesty laws was raised with regard to possible consequences for individuals charged with the use of torture. The moderator suggested that the issue is a complex one and the answer very

much depends on the circumstances. Generally, scope for an amnesty may exist in case of an agreed process of national reconciliation, but there is no scope for specific amnesties which are little more than a shield from justice for particular individuals.

One participant mentioned that the authorities in his country are still reluctant to open their places of detention for visits by the International Committee of the Red Cross (ICRC) and expressed hope that an agreement with the ICRC would be signed in the near future.

Specific recommendations included:

To the participating States

- Encourage joining the OPCAT and ensure its full implementation, *inter alia*, by supporting the work of the SPT and establishing effective National Preventive Mechanisms;
- Establish an efficient system for receiving and handling complaints by citizens regarding police misconduct;
- Develop training programmes and curricula for police officers on international anti-torture standards and mechanisms, and internal disciplinary mechanisms for addressing cases of misconduct;
- Encourage the monitoring of police stations and places of detention by civil society groups;
- Investigate all allegations of torture;
- Review criminal sentencing policies and make broader use of alternatives to imprisonment;
- Encourage courts to declare inadmissible evidence obtained through torture or other unlawful means.

To the OSCE, its institutions and field operations

- Assist the participating States in the development of NPMs through the provision of platforms of discussion and the dissemination of lessons learned and best practices;
- Assist the participating States in the development of training programmes and curricula for police officers on international anti-torture standards and mechanisms, and internal disciplinary mechanisms for addressing cases of misconduct.

ANNEX I: ANNOTATED AGENDA

Strengthening the rule of law in the OSCE area, with a special focus on the effective administration of justice

ANNOTATED AGENDA

I. Introduction

Human Dimension Seminars are organized by the OSCE/ODIHR pursuant to the CSCE Summit decisions in Helsinki (1992) and Budapest (1994). The 2008 Human Dimension Seminar is devoted to *Strengthening the rule of law in the OSCE area, with a special focus on the effective administration of justice* in accordance with PC Decisions No. 887 of 6 March 2009 (PC.DEC/887) and No. 892 of 2 April 2009 (PC.DEC/892).

The participating States most recently reaffirmed their commitment to the rule of law in the Helsinki Ministerial Council Decision No. 7/08 on *Further strengthening the rule of law in the OSCE area* (MC.DEC/7/08).

Current economic and political challenges in the participating States highlight the demand for the rule of law as a core value of the OSCE. The rule of law is rightfully seen as a basis for political, economic, social and environmental development in the participating States. Decision No. 7/08 underlined importance of the rule of law for human rights and democracy, security and stability, good governance, mutual economic and trade relations, investment security and a favorable business climate, as well as the fight against corruption and all kinds of illegal trafficking.

Decision No. 7/08 encourages the participating States to strengthen the rule of law, *inter alia*, in the following areas: independence of the judiciary, effective administration of justice, right to a fair trial, access to a court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention; prevention of torture and other cruel, inhuman or degrading treatment or punishment; awareness-raising and education on the rule of law for the legal professions and the public; provision of effective legal remedies and access to them; observation of the rule of law standards and practices in the criminal justice system; and the fight against corruption.

The 2009 Human Dimension Seminar will address some of the key issues related to the rule of law in the human dimension, including independence and integrity of the judiciary, judicial review of administrative decisions, transparency and accountability in the administration of justice, the latter with a specific focus on the prevention of torture at the pre-trial stage. All these elements form part of the foundation for building stronger rule of law in the OSCE area.

II. Aims

Decision No. 7/08 encourages the OSCE executive structures in co-operation with relevant international organizations to further identify and use synergies in assisting participating States in strengthening the rule of law. Similarly, it encourages the participating States to enhance their efforts to share information and best practices in this area. In line with these goals, the Human Dimension Seminar aims to serve as a platform for exchanging best practices between the participating States on the issues related to the rule of law.

The discussions will be structured in four Working Groups as outlined in the Work Plan below.

III. Participation

Representatives of the OSCE participating States, OSCE institutions and field operations, inter-governmental and non-governmental organizations will take part in the Seminar.

Participation of experts on the rule of law and administration of justice will be particularly encouraged. In this regard, participating States are requested to publicise the Seminar within their rule of law and justice expert community and in academic circles and to include in their delegations, wherever possible, experts on related issues.

The Mediterranean Partners for Co-operation and the Partners for Co-operation are invited to attend and share their views and ideas on the rule of law and administration of justice.

All participants are encouraged to submit in advance written interventions outlining proposals regarding the subject of the Seminar, which will be distributed to the delegates. Participants are also encouraged to make brief oral interventions during the Seminar. While prepared interventions are welcomed during the Plenary sessions, free-flowing discussions and exchanges are encouraged during the Working Group sessions.

IV. Organization

The Seminar venue is the "Novotel Warszawa Centrum" Hotel in Warsaw, ul. Marszałkowska 94/98.

The Seminar will open on Tuesday, 12 May 2009, at 9:00. It will close on Thursday, 14 May 2009, at 16:30.

All Plenary sessions and Working Group sessions will be open to all participants. The Plenary and Working Group sessions will take place according to the Work Programme below.

Four Working Group sessions will be held consecutively. They will focus on the following topics:

1. Independence of the judiciary;

2. Administrative justice: Judicial review of administrative decisions, administrative offences and due process of law;

3. Administration of justice: Transparency and enforcement;

4. Administration of justice: Accountability.

The closing Plenary session, scheduled for the afternoon of 14 May, shall focus on practical suggestions and recommendations for addressing the issues discussed during the Working Group sessions.

An OSCE/ODIHR representative will chair the Plenary sessions.

The Rules of Procedure of the OSCE and the modalities for OSCE meetings on human dimension issues (Permanent Council Decision No. 476) will be followed, *mutatis mutandis*, at the Seminar. Also, the guidelines for organizing OSCE meetings (Permanent Council Decision No. 762) will be taken into account.

Discussions during the Plenary and Working Group sessions will be interpreted from and into the six working languages of the OSCE.

Registration will be possible during the Seminar days from 8:00 until 16:30.

By prior arrangement with the OSCE/ODIHR, facilities may be made available for participants to hold side events at the Seminar venue. A table for display/distribution of publications by participating organizations and institutions will also be available.

WORK PROGRAMME

Lunch break: 12:00 – 13:30

	Tuesday **12 May 2009**	**Wednesday** **13 May 2009**	**Thursday** **14 May 2009**
9:00 – 12:00	Opening plenary session	WG II	WG IV
13:30 – 16:30	WG I	WG III	Closing plenary Session

V. WORK PLAN

12 May 2009, Tuesday

9:00 – 12:00 Opening Plenary Session

Welcome and introduction from the Seminar Chair

Amb. Janez Lenarčič
Director of the OSCE/ODIHR

Welcoming Remarks

Representative of the Greek Chairmanship

Representative of the Polish Government

Keynote Speaker

H.E. Judge Patrick Lipton Robinson
President of the International Criminal Tribunal for the former Yugoslavia

13:30 – 16:30 Working Group I:
Independence of the judiciary

Moderator: **The Right Honourable Lord McCluskey**, QC LL.D

Introducer: **Ms Teresa ROMER**
Justice of the Supreme Court of Poland (retired)

Rapporteur:

An independent judiciary should consist of professional judges who perform their duties with integrity and fairness. This requires *inter alia* adequate education and training, merit-based selection and appointment procedures, and effective disciplinary mechanisms. This Working Group is invited to address contemporary challenges to judicial independence in the participating States.

In many countries judicial councils are heavily involved in the selection and appointment processes. In some countries the executive and legislature play an important role. How does the involvement of these actors affect the selection and appointment of judges? When does this involvement become an obstacle to maintaining an independent judiciary?

Case assignment procedures are vital for good court administration and also have an impact on judicial independence. What practices foster greater judicial independence and public confidence in the justice system? What safeguards should exist to prevent potential abuses?

Charges or complaints against judges in their judicial and professional capacity must be processed expeditiously and fairly under an appropriate procedure. Judges have the right to a fair hearing. What disciplinary procedures and sanctions pose threats to judicial independence?

Maintaining judicial integrity is key to the proper fulfilment of judicial functions. What should be the role of self-government bodies in this regard?

What tools should the judiciary employ to effectively maintain high professional standards?

What are the comparative advantages of different models of judicial education? What contents and methodology of this education help equip the future judges with the knowledge, skills, and values necessary for their profession? The participants are invited to share their views in this regard.

13 May 2009, Wednesday

9:00 – 12:00 Working Group II:
Administrative justice: Judicial review of administrative decisions, administrative offences and due process of law

Moderator: **Mr Ihor Koliushko**
Director, Centre for Political and Legal Reforms, Ukraine

Introducer: **Dr Denis Galligan**
Professor, Centre for Socio-Legal Studies, University of Oxford, United Kingdom

Rapporteur:

The rule of law is strengthened by accountable public administration. The right to effective legal remedies is emphasized in OSCE human dimension commitments. To what extent are these principles upheld in practice? This Working Group invites participants to discuss the availability and effectiveness of legal remedies for the people affected by administrative decisions.

The rule of law necessitates an effective judicial review over the acts of public administration. Participating States employ different models to carry out this review: ordinary and specialized courts and chambers, as well as quasi-judicial bodies. Scope of judicial review also differs, especially when it comes to decisions made by administrative authorities exercising their discretionary powers. What conditions must be satisfied to ensure effective judicial review of administrative decisions? What reforms proved effective in strengthening the rule of law and accountability of public administrations?

The second part of this Working Group will address the problem of administrative offences and due process of law. Administrative codes in a number of participating contain offences. These offences, in some cases, may be punishable by custodial sentences. Occasionally, fair trial guarantees that must accompany the imposition of such sentences are not in place. Participants of this Working Group are invited to discuss the "criminalization" of administrative law and make recommendations on how to treat administrative offences by respecting internationally accepted fair trial standards.

13:30 – 16:30 Working Group III:
Administration of justice: Transparency and enforcement

Moderator: **Mr Christopher DECKER**
Director, Department of Human Rights and Communities, OSCE Mission in Kosovo

Introducer: **Ms Genevieve MAYER**
Head of Department, Execution of Judgments of the European Court of Human Rights, Council of Europe

Rapporteur:

Public access to trials is not only an important fair trial guarantee, but also an attribute of public confidence in the administration of justice. Recognizing this, OSCE participating States have explicitly undertaken "to accept as a confidence building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law" (1990 Copenhagen Document, para. 12).

OSCE institutions and field operations have accumulated considerable expertise in trial monitoring initiatives. The wealth of these experiences is reflected in ODIHR's *Trial-Monitoring: A Reference Manual for Practitioners*. Participants in this Working Group are invited to share best practices and examples of independent observation initiatives and their contribution to the improvement of justice administration.

The second part of this Working Group will address the importance of enforcement of judgments. Execution of court decisions is essential for an effective administration of justice. It is of particular importance in administrative matters, where authorities may be compelled to enforce decisions that are unfavourable to them. Their compliance with court decisions in such circumstances is imperative for upholding the rule of law.

14 May 2009, Thursday

10:00 – 13:00 Working Group IV:
Administration of justice: Accountability

Moderator: **Dr Malcolm Evans**
Professor, University of Bristol, United Kingdom

Introducer: **Ms Zhemis TURMAGAMBETOVA**
Director, NGO "Charter for Human Rights", Kazakhstan

Rapporteur:

Accountability of all public authorities is a fundamental pillar of the rule of law. This is particularly relevant with regard to law and justice agencies who, by nature of their profession, must adhere to high standards of human rights protection.

This Working Group is invited to examine mechanisms for the investigation of complaints of torture and/or ill-treatment, with a focus on places of detention under police authority. The risk of torture and/or ill-treatment has been shown to be significant during the early stages of detention, when detainees are frequently held in police detention facilities. An added risk at this stage is the use of illegal practices to secure confessions and dispose of cases. What mechanisms should exist for the prevention of torture and ill-treatment in places of police custody?

An increasing number of participating States are now party to the Optional Protocol to the UN Convention against Torture (OPCAT), and currently engaged in its implementation. It requires the creation or designation of National Preventive Mechanisms (NPMs) with specific powers to monitor places of deprivation of liberty and engage in preventive work. This session will also examine how NPMs can most effectively implement their mandate in relation to places of police detention, and how various mechanisms of control can function in a complementary manner to combat torture and ill-treatment.

13:30 – 16:30 Closing Plenary Session

Rapporteurs' summaries from the Working Groups

Statements from Delegations

Closing Remarks

Amb. Janez Lenarčič
Director of the OSCE/ODIHR

Closing of the Seminar

ANNEX II: OPENING AND CLOSING REMARKS

Opening remarks

Ambassador Janez Lenarčič
Director of the Office for Democratic Institutions and Human Rights

Excellencies,

Ladies and Gentlemen,

Allow me to warmly welcome you all to this Human Dimension Seminar devoted to the Rule of Law and Effective Administration of Justice. Let me recall that this is the third Human Dimension Seminar devoted to rule-of-law-related issues in the last four years. It follows last year's Ministerial Council Decision on Strengthening the Rule of Law in the OSCE area, which made the topic of the rule of law a logical choice for this Seminar by the Greek Chairmanship.

In this vein, I would like to thank the Greek OSCE Chairmanship for having chosen this important topic, and in particular Ambassador Louis Abatis, Director of the OSCE Department in the MFA in Athens. A warm welcome also to H.E. Judge Patrick Lipton Robinson, the President of the ICTY and our keynote speaker today.

Before handing over the floor, let me just say that a three-day seminar devoted to the rule of law sends a strong signal that OSCE participating States attach special importance to the rule of law. This signal joins the voices of a rapidly growing movement of rule of law supporters across the globe.

Why do we find our dialogue revolving around the rule of law, time and again? There are many reasons, but let me emphasize three that I find most compelling.

- First, rule of law is the foundation of democratic institutions and is indispensable for the full realization of human rights. Without this foundation, our human dimension of security disintegrates, and we have unfortunately seen that happen in the OSCE region in our living memories.

- Second, the rule of law provides framework for co-operation on other issues. The Helsinki MC Decision on Strengthening the Rule of Law rightly underlines its cross-dimensional character. Our progress in all dimensions relies on the premise that rules will be followed.

- Finally, the rule of law enables us to build and maintain trust. This trust is vital for us as citizens and for the governments represented at

this table. Reform efforts which seek to improve the administration of justice should develop that trust, or risk ultimate failure.

These considerations also guide ODIHR activities in this area. We aim at supplying policy-makers with the information and tools they need to better implement their OSCE commitments on the rule of law. We also work directly with the legal professionals/practitioners and other civil society actors to help them strengthen the rule of law in our region. I will limit myself to only two examples of ODIHR's work here.

- In November last year, we convened an Expert Forum on Criminal Justice in Central Asia, in Kazakhstan. Its participants from all Central Asian states exchanged experiences and discussed the most topical issues on their criminal justice reform agendas. We plan to organize another Forum this year – we believe that this kind of exchange is vital for our joint efforts to strengthen the rule of law.

- My second example refers to a project which aims to assist South-Eastern European justice systems to deal with war crimes cases. I am grateful for the co-operation we enjoyed so far from the OSCE field operations in this region, the United Nations Interregional Crime and Justice Research Institute, and particularly the ICTY – whose President, Judge Robinson, kindly responded to our invitation to be a keynote speaker for this Seminar.

Ladies and Gentlemen,

There is no universal recipe for success in building and maintaining the rule of law. But we do have our joint commitment to uphold its key principles and build a framework for their implementation. I believe the agenda of this Seminar successfully captures many pertinent issues – ranging from the independence of the judiciary, undoubtedly a cornerstone of the rule of law, to administrative justice and then via transparency in justice administration to human rights.

With that, I believe we are set to benefit from this Seminar in the coming days. We look forward to the lively and enriching debate, to the productive exchange of ideas, good practices, and critical reflections.

I am grateful to the moderators and introducers who accepted our invitation – thank you for taking up these important roles. I wish all of us a good and useful seminar.

It is now my pleasure to ask the Host State representative, Secretary of State, H.E. Jan Borkowski, to take the floor.

Closing remarks

Ambassador Janez Lenarčič
Director of the Office for Democratic Institutions and Human Rights

Ladies and Gentlemen,

Another human dimension event has come to a close. The rich discussions we had in the last three days confirm that the issues on our agenda were timely and topical, and they provide good basis for ODIHR to continue our work in the area of rule of law.

Our rapporteurs have already neatly summarized three days of fruitful and interesting discussions. I would only offer to pick up a few recurring themes – threads of conversation that ran through all the sessions in this Seminar.

The first Working Group reminded us that justice is attainable only when judges apply laws fairly and with integrity. They can do so only if they are independent and impartial. It emerged equally clearly that without independent judiciaries our democratic states simply cannot function. This point was convincingly presented to us also by our keynote speaker, Judge Robinson, the President of the ICTY, in the opening session.

We appreciated the ensuing discussion of contemporary challenges to judicial independence in the participating States. ODIHR is making a special effort to address this issue comprehensively and find ways to better assist the States in achieving greater compliance with their commitments in this area.

The topic of administrative law and justice for Working Group 2 is relatively new for our Office, but it seemed that it is of great interest. This was the only Working Group which used up all the time allocated for it. The lively discussion in this session made it clear that we can do more to deliver responsive and accountable public administration to our citizens – and that they should expect no less from any government that is based on the rule of law.

The session indicated that our Office should devote more time and energy to this area. It is noteworthy that the "spillover" discussion of administrative offences we have witnessed at our Criminal Justice Forum in Central Asia last year developed further at this Seminar. This debate reminded us that we should not lose sight of the forest beyond the trees and always bear in mind the fundamental principles on which our human dimension is based and the values it needs to protect.

The third Working Group addressed two important aspects of the administration of justice. It rightfully emphasized that transparency in justice administration is key to maintaining public trust in it. I am particularly grateful to the OSCE field operations who shared their project experiences in

this area. And we also heard that execution of court decisions is essential for any administration of justice – national, as well as international – to be effective.

Finally, the fourth Working Group this morning reminded us that the rule of law needs to uphold fundamental human rights. Otherwise it will fail to deliver justice and risk turning into a tool of oppression. Participants addressed the absolute prohibition of torture and other inhuman and degrading treatment and punishment. We value the insights on effective mechanisms for the prevention and investigation of torture and ill-treatment in places of detention and will use the ideas that emerged from this Group to carry forward ODIHR's work in this field.

Distinguished participants,

It was a pleasure for us to host this Seminar and have you here in Warsaw. I would like to conclude by thanking everyone for their interest and participation. The Chairmanship is to be complimented on the choice of this timely topic.

My words of appreciation go to the speakers – keynote, introducers, moderators – for their stimulating contributions. We were very fortunate to have the benefit of their expertise.

I will also want to use this opportunity to thank the rapporteurs who have gone into much greater detail regarding each session than I was able to do here. As always, the Report from this Seminar will be posted on our website.

Let me finally give extra credit to the staff in ODIHR's rule of law unit who, under punishing timelines, worked very hard to make this event a success.

Thank you.

ANNEX III: INFORMATION ABOUT THE SPEAKERS

Patrick Lipton ROBINSON, President of ICTY

Judge Patrick Lipton Robinson of Jamaica is the Tribunal's current President, elected to this position by his fellow judges on 4 November 2008.

Judge Robinson began his long and distinguished career in public service working as a graduate teacher of English from 1964 to 1966, after which he spent three decades working for the Jamaican government. From 1968 to 1971, he served as a Crown Counsel in the Office of the Director of the Public Prosecutions. Between 1972 and 1998, he served briefly as Legal Adviser to the Ministry of Foreign Affairs, and subsequently in the Attorney General's Department as Crown Counsel, Senior Assistant Attorney-General, Director of the Division of International Law, and Deputy Solicitor-General.

Judge Robinson's long-standing experience in UN affairs dates back to 1972, when he became Jamaica's Representative to the Sixth (Legal) Committee of the United Nations General Assembly, a position that he held for 26 years. He played a leadership role on several items in the Committee, including the definition of aggression and the draft statute for an international criminal court. From 1981 to 1998, he led Jamaica's delegations for the negotiation of treaties on several subjects, including extradition, mutual legal assistance, maritime delimitation and investment promotion and protection.

Judge Robinson has been a member of numerous international bodies. As a member of the Inter-American Commission on Human Rights from 1988 to 1995, and its Chairman in 1991, he contributed to the development of a corpus of human rights laws for the Inter-American System. As a member of the International Law Commission from 1991 to 1996, he served on the Working Group that elaborated the draft statute for an international criminal court. Judge Robinson also served as a member of the Haiti Truth and Justice Commission from 1995 to 1996, was a member of the International Bio-ethics Committee of UNESCO from 1996 to 2005, serving as its Vice-Chairman from 2002 to 2005, and represented Jamaica at the United Nations Commission on Transnational Corporations (UNCTAD), serving as its Chairman at its 12th Session in 1986. He represented Jamaica at all sessions of the Third United Nations Conference on the Law of the Sea and was accredited as an ambassador to that conference in 1982.

Judge Robinson is a Barrister of Law, Middle Temple, United Kingdom. He holds a B.A. in English, Latin, and Economics from University College of the West Indies (London), an LLB with honours from London University, and an LL.M. in International Law from King's College, University of London, in the areas of the Law of the Sea, the Law of the Air, Treaties, and Armed Conflict. He also holds a Certificate of International Law from The Hague Academy of International Law.

John MCCLUSKEY, former Solicitor General and retired Supreme Court Justice, Scotland

Lord McCluskey graduated M.A. from Edinburgh University in 1950 and LL.B in 1952.

After service in the Royal Air Force, he was admitted to the Scottish Bar in 1955. He became a Queen's Counsel (QC) in 1967 and was appointed Solicitor General for Scotland in 1974. He became a life peer in 1976 and a judge in 1984. He retired from the Supreme Court of Scotland in 2004.

Lord McCluskey was a founding member and Vice-Chairman of the Human Rights Institute of the International Bar Association. He frequently speaks, writes, and lectures on the rule of law and the independence of the judiciary. He is also active in a charitable organization John Smith Memorial Trust, which promotes democracy and the rule of law through fellowship programmes and other activities.

Teresa ROMER , retired Justice of the Supreme Court of Poland

Maria Teresa Romer was a judge for civil, social insurance and labour matters until 1990 when she was appointed to the Supreme Court of Poland. She served on the Supreme Court for 12 years until her retirement.

Justice Romer was President of the Association of Polish Judges IUSTITIA from 1990 until 2008. She was Member of the Bureau of European Association of Judges and Public Prosecutors MEDEL (1992-1997) and vice–president of MEDEL (1997-2002).

Justice Romer has published extensively on judicial ethics, labour law, mediation in civil proceedings, and human rights. She was a co-author of the European Charter on the Statute of Judges (Council of Europe), national expert of the European Commission's PHARE Programme on Justice and Home Affairs "Reinforcement of the Rule of Law". She also lectured at Warsaw University and Helsinki Foundation's Human Rights School.

Denis GALLIGAN, Professor, University of Oxford, UK

Denis Galligan is professor of Socio-Legal Studies. He is a Professorial Fellow of Wolfson College Oxford. He is also Jean Monnet Professor of European Public Law at the Universita' degli Studi di Siena and is a Visiting Professor at the Woodrow Wilson School of Public and International Affairs at Princeton University. His previous posts include a Tutorial Fellow at Jesus College Oxford and chairs at Southampton University and Sydney University. For several years he was a Visiting Professor at the Central European University in Budapest.

Professor Galligan is a member of the Board of Directors of the Foundation for Law, Justice, and Society, an independent institution affiliated with the Centre

for Socio-Legal Studies and based at Wolfson College Oxford, whose objective is to study the role of law in contemporary societies and bring the fruits of academic research to a wider professional audience.

Professor Galligan has considerable experience of constitutions, public law, government, and public administration in the new democracies of east Europe and has worked with the OECD, the Open Society, and the World Bank.

Ihor KOLIUSHKO, Director, Centre for Political and Legal Reforms, Ukraine

Mr. Koliushko is a several-term member of the Ukrainian parliament, where he was first elected in 1994. He founded the Centre for Political and Legal Reforms in 1996. The Centre is now one of Ukraine's leading think-tanks. Mr. Koliushko is a co-author of over 40 legislative drafts submitted to the parliament. He has published extensively on legal reform issues, especially on judicial reform and administrative justice. He was an adviser to the President of Ukraine (2005-2006). He is also an associate professor at Kyiv-Mohyla Academy – one of Ukraine's leading law faculties.

Christopher DECKER, Director, Department of Human Rights and Communities, OSCE Mission in Kosovo

Mr. Christopher Decker is the Director of the Department of Human Rights and Communities for the Organization for Security and Co-operation in Europe's (OSCE) Mission in Kosovo. Previously he was the Deputy Director of the department and the Chief of the Security Issues Section. He was also a Senior Research Associate at the European Centre for Minority Issues. Mr. Decker is also an occasional lecturer at the International Institute of Humanitarian Law in San Remo, Italy. He received an LL.M. in International Human Rights Law from the University of Essex, a JD from State University of New York at Buffalo.

Geneviève MAYER, Head of the Department for the execution of judgments of the European Court of Human Rights, Council of Europe

Ms. Geneviève Mayer is currently Head of the Department for Execution of judgements of the European Court of Human Rights, Council of Europe.

She started her professional career as assistant Professor at the University of Haute Alsace, Department of Legal and Judicial carriers, then joined the Council of Europe in 1986 as Administrator for the Directorate of Economic and Social Affaires, the European Social Charter Division.

From 1989 to 2006 she functioned as Administrator at the Secretariat, then as Deputy Executive Secretary for the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

Malcolm EVANS, Professor, University of Bristol, UK

Malcolm Evans OBE, current Dean of the Faculty of Social Sciences and Law, was previously Head of the School from 2003-2005. He studied law at Oxford (1979-82; 1983-87). He was appointed to a lectureship at Bristol in 1988 and in 1999 was appointed Professor of Public International Law. His areas of research interest include the law of the sea and the international protection of human rights, with particular focus on the freedom of religion and the prevention of torture. He is a member of the OSCE Advisory Panel on Freedom of Religion and Belief; the ILA Human Rights Law and Practice Committee; and the Board of Management of the Association for the Prevention of Torture.

Zhemis TURMAGAMBETOVA, Executive Director, NGO "Charter for Human Rights"

Ms. Turmagambetova is a human rights advocate with over 20 years of experience. Since 2005, Ms. Turmagambetova leads the Charter for Human Rights Foundation, an NGO which focuses on the monitoring of prisoners' rights, the protection of civil and political freedoms, reporting on human rights issues, as well as the promotion of the moratorium on the death penalty and its full abolition in Kazakhstan. Previously, she was the Deputy Head of the NGO International Bureau for Human Rights and the Rule of Law in Kazakhstan.

In addition, since 2006, Ms. Turmagambetova has been a member of the Commission on Pardon under the President's office. She is also member of the National Council on Legal Policy under the President and member of the Commission on the monitoring of police activities and of a Working Group for abolition of the death penalty. In 2005, she was awarded a prize by the European Commission for her contribution to human rights promotion in Kazakhstan.

ANNEX IV: KEYNOTE ADDRESS

Address of Judge Patrick Robinson, ICTY President

Your Excellencies,

Ladies and Gentlemen,

[**Introduction**]

It is a pleasure and an honour to appear before you today, and I would like to extend my sincere gratitude to the Organisation for Security and Cooperation in Europe, and especially to Ambassador Lenarčič, Director of the Office for Democratic Institutions and Human Rights, for the invitation to address you. Let me say how much I regret that I have to leave immediately after lunch, as I have to travel to New York for important consultations with the Security Council.

[**Judicial independence**]

[King Cambyses II and Judge Sisamnes]

Last month, the judges of the United Nations International Criminal Tribunal for the former Yugoslavia, of which I am President, spent a weekend in Bruges, Belgium, discussing ways to enhance the fairness and expeditiousness of our proceedings. It was a weekend of critical reflection upon the progress that we have made in the last 15 years since the inception of the Tribunal, and also upon methods of making our procedures even better.

In Bruges, in the Groeninge Museum, there is a diptych by Gerard David painted in 1498. It is called the "Judgement of Cambyses", and it depicts a story from Herodotus, the famous Greek historian. Cambyses the Second was a Persian king who lived in the sixth century B.C., who took harsh measures to combat corruption among his administrators. When he caught the judge Sisamnes taking a bribe in a lawsuit and then rendering an unjust judgement, he condemned him to be flayed alive. Cambyses then appointed the son of Sisamnes in his stead, and made him sit upon a chair that had been re-upholstered with his father's skin, when deciding his cases. These paintings were commissioned by the City of Bruges in the 15th century and were displayed in the Town Hall as a stern warning to the judges of that city.

I thought these paintings were a potent reminder of the importance of judicial integrity and independence. Perhaps the remedies for a lack of independence are not as stringent today as they were back in the sixth and 15th centuries, but the principle is just as important today as it was then.

This is a convenient introduction to the question of judicial independence, which I will be addressing here today.

[Definition of judicial independence]

The United Nations High Commissioner for Human Rights has defined "judicial independence" in the following manner:

> "The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without restrictions, improper influences, inducements, pressures, threats or interferences—direct or indirect—from any quarter or for any reason."[2]

Judicial independence is a means by which courts are made fair and impartial.[3] What judicial independence does not mean is that judges are free to decide cases according to their own whims or prejudices. Judges are constrained by the law and have a responsibility to apply the law to the facts that have been established before them.

The maintenance of judicial independence is a necessary pre-condition for the protection of all the other values that we consider to be fundamental. It is the medium within which these values exist. It is often only when a constitutional or statutory right is tested in court that its contours are really defined in concrete terms.

For example, the universal right against unlawful searches and seizures is, in principle, relatively straightforward. However, in practice, it has almost infinite applications. It has been applied not only to a traditional police search of a suspected criminal's place of residence, but also to a person's bodily integrity and the expectation of privacy during telephone conversations. These are situations that arose only when people challenged the actions of the executive and legislative branches in court. The courts interpret and apply the law, and in doing so give meaning to important legal norms. The impact of judges' decisions on the lives of people therefore makes it critically important that they make their decisions without fear or favour.

Many new democracies have emerged in recent years. The concept of a system of governmental checks and balances has been re-affirmed, in order to distribute power so that it cannot be arbitrarily wielded by the few. These checks and balances are often expressed in the organisation of a government into three branches: the executive, the legislature, and the judiciary. A central tenet of a healthy judiciary is its independence from the law-making functions of the legislature and the enforcement functions of the executive.

Although there are overlaps in the functions of the three branches of government, the inviolability of the independent decision-making powers of the judicial branch must always be preserved. The way the courts decide a case before them can never be dictated by the legislature or the executive. The

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[2] United Nations Office of the High Commissioner for Human Rights, Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly in 1985.

[3] *See* The Honorable Stephen G. Breyer, Comment: Liberty, Prosperity, and a Strong Judicial Institution, *Judicial Independence and Accountability, Law and Contemporary Problems*, Volume 61, Number 3 (Summer 1998) ("We must keep in mind that judicial independence is a means toward a strong judicial institution. The strong judicial institution is a means toward securing the basic goals of people: human liberty and a reasonable level of prosperity.").

doctrine of the separation of powers does not exist in a pure form, and one often finds overlaps in the functions of the legislative and executive branches. But the judiciary can never be subjected to direction by the executive or the legislature.[4]

It is this independence that I would like to focus on today.

Judges must be permitted to work without being subject to political pressure. This does not mean that judges live in a hermetically sealed bubble or never read the newspaper. It means, rather, that judges must be free to make decisions without fear of political reprisal or without the hope that they will benefit from political favour through their decisions. The need for judicial independence is most evident when the majority is bearing down upon the minority, or even an individual. Judges can be a powerful counter-majoritarian force in a society, making unpopular decisions at sensitive moments in history in order to protect the rights not only of individuals in the present, but the rights of future generations as well.

In short, Judges must do what is right, not what is popular.

[Accountability]

"But who watches the watchers?" You may ask. Independence does not mean a lack of accountability. Precisely the opposite. And the accountability of judges is effected in several ways.

1. Decisions can be appealed and reversed if there are errors in law or facts.

2. It is important in a judicial institution to have recourse to an effective judicial code of ethics and a disciplinary system, in the event that judges engage in professional misconduct.

3. Judges, in their personal capacity, are of course subject to the same rules as the rest of us and can be punished for criminal wrong-doing.

4. If the legislature does not agree with the manner in which the courts have interpreted the law, it can change the law, provided that the alteration does not run afoul of the constitutional norms of society.

5. Finally, judges' decisions must be reasoned and are subject to the scrutiny of the interested parties, legal scholars, and segments of civil society that may have an interest in the matter being decided by the judge.

I will now turn to some more precise aspects of the independence of the judiciary, with specific reference to our experience at ICTY. These important issues will be discussed during this seminar's Working Group Number One.

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[4] See *DPP v. Mollison* (2003) 64 WIR 140, at 152; *R (Anderson) v. Secretary of State for the Home Department* (2002) 3 WLR 1800, at 1821–1822, para. 50.

[Selection and appointment of Judges – procedures and safeguards to ensure selection of the most qualified candidates for the judicial profession]

The Statute of the Tribunal provides that the judges are elected by the Member States of the United Nations in the General Assembly. Those nominated and elected must be persons of high moral character, impartiality, and integrity. And they must possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the judges of the Tribunal, due account must be taken of the experience of the judges in criminal law and international law, including human rights law and humanitarian law.[5]

The Security Council of the United Nations therefore has placed into the hands of the Member States of the United Nations the responsibility of electing judges who are qualified for the job. But these judges do not serve their countries while they are judges at the Tribunal, but rather exercise their judicial functions independently of any instructions or influence from their home states. This principle is essential to the impartiality of the judges and the independence of the judiciary.

[Judicial tenure, promotion, and remuneration]

In respect of judicial tenure, promotion, and remuneration, the permanent judges of the Tribunal serve for fixed terms, and this enables them to exercise their impartial judgement in the cases before them without concern that their decisions will impact upon their holding of the judicial office. Moreover, the non-permanent ad litem judges, who serve only for the duration of the specific case to which they are assigned, are secure in the fact that, once they have begun a trial, they will be permitted to finish it. The judges therefore exercise their duties in an atmosphere where their judicial tenure is never in any way dependent upon the approval of political forces.

Another way in which the independence of the judiciary is secured is the prohibition against any reduction in the salary of judges. Moreover, the funding of the Tribunal comes from the regular budget of the United Nations. And the Tribunal's budget is regularly renewed so that the judges can continue their work without fear that they will not have the necessary financial support to carry out their duties.

The question of the independence of the judges of the Tribunal was raised in a case in which I was involved in 2005. In 2003, the Security Council adopted a Completion Strategy for the Tribunal, requiring all investigations to be completed by the end of 2004, all trials to be completed by the end of 2008, and all work by 2010.[6] An application was made for the joinder of seven accused's cases into one of our multi-accused trials. One of the accused, in opposing the joinder of his case with the other six accused, argued that the

[5] ICTY Statute, Article 13; *see also Tadić* Jurisdiction Decision, para. 46 (citing Article 13 as example of fair trial guarantee in ICTY Statute).
[6] Resolution 1503.

Completion Strategy of ICTY should not influence the Trial Chamber in its determination of the joinder motion or be allowed to influence his right to a speedy trial.

The Trial Chamber granted the motion to join the cases together into a single trial, but I considered it necessary to draft a separate opinion making it clear that the Completion Strategy in no way affected the decision I made and that I would have decided the motion in the same way, had it come before me before the Completion Strategy had been adopted by the Security Council and the Tribunal.[7] I think that this is an example of how political and administrative forces can co-exist alongside judicial decision making, without the former having any influence upon the latter.

> *[Case assignment procedures – practices that foster greater independence and public confidence in justice administration]*

The Tribunal's internal procedures for the assignment of cases can also serve to demonstrate the concept of judicial independence.

The Rules of Procedure and Evidence of the Tribunal provide that one of the functions of the President is to co-ordinate the work of the Chambers and supervise the work of the Registry.[8] This is a relatively straightforward task, but requires a great deal of organisation within the Office of the President. When a chamber of judges must be assigned, routine checks are conducted in order to ensure that no judges have conflicts in the case.

For example, it goes without saying that a judge who was on the trial bench cannot also sit on the appeal of that case. However, it is also the case that a judge who worked on the pre-trial phase of a case cannot sit on the appeal. This is to avoid placing a judge in the position of determining issues on appeal, in relation to which he was required to make findings of fact or law during an earlier phase of the case.

> *[Complaint mechanisms for judicial misconduct, review, and investigation of complaints]*

Although there is no express code of professional conduct for the judges at ICTY, in my view, we have not suffered from its absence. As I discussed above, the General Assembly carefully selects the judges for service at the Tribunal, and so it is not surprising that the judges display a high degree of professionalism in their work.

However, I would support, in principle, an international model code of judicial conduct, which all international tribunals could adapt to their specific needs. There may always be cases where things go wrong, and in those cases, it is prudent to have in place objective and established standards that can be applied, when necessary.

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[7] *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Motion for Joinder, 21 September 2005, Separate Opinion of Judge Patrick Robinson.
[8] Rule 19(A).

Such a code would also contribute to the perception of the parties and the public that the judges are willing to subject themselves not only to self-governance, but also to an external code of principles to which they need to conform their behaviour.

I note that not all international courts have judicial codes of conduct. The International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia have such a code, but the international criminal tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone do not. With the increase in the number of matters being dealt with by international courts, the time is ripe for an international model code of judicial conduct that can be adapted by each and every judicial institution. And I make this proposal in the hope that every international tribunal will adopt such a code.

[The role of the judicial self-government in ensuring integrity]

On the issue of self-governance, pursuant to the Rules of Procedure and Evidence of the Tribunal, a judge may not sit in a trial or appeal in any case in which he or she has a personal interest or concerning which the judge has, or has had, any association that might affect his or her impartiality. In such circumstances, the judge is required to recuse him- or herself, and the President must assign a new judge to the case.[9] Moreover, this rule extends not only to cases where an actual conflict exists, but also where the mere appearance of partiality could exist in relation to an objective and informed observer of the proceedings.

This rule is used not infrequently. I have recused myself from proceedings at the Tribunal, where I have thought it necessary in the interests of justice. It is a basic function of a judge, in the exercise of his or her judicial responsibilities.

This rule also allows a party to the proceedings to request the disqualification of a judge in a case. These motions are treated as very serious matters at the Tribunal, and judges have granted requests for the disqualification of their fellow judges, where it has been necessary to avoid a conflict of interest – or even the appearance of a conflict.

For example, recently, in the high-profile contempt case involving the former spokesperson of the ICTY Prosecutor, Ms. Florence Hartmann, I appointed a special chamber in order to decide a motion by Ms. Hartmann for the disqualification of two of the judges who were to try her case. The judges who were the subject of the motion for disqualification were two of our most experienced judges, who preside over two of our trial chambers. The specially appointed chamber ultimately decided that the two judges did not have any actual bias that would adversely affect their impartiality in the case.

However, due to their involvement in the investigative stage of the contempt proceedings, the specially appointed chamber was of the view that there was an appearance of bias and thus disqualified the two judges and asked me to appoint others to take their place. I have now done so, and the case is moving

[9] Rule 15.

forward once again with a new bench. I think this is a splendid example of the tribunal's healthy and robust self-governance.

[Dual role of the ICTY President]

I wanted to briefly allude to the dual nature of my duties as President of the ICTY, in order to illustrate further the principle of judicial independence.

The President of the ICTY serves not only in a judicial capacity as the Presiding Judge of the Appeals Chambers of the tribunals for the former Yugoslavia and Rwanda, but also serves in an administrative and quasi-judicial capacity as the President of the ICTY.

As a judge of the Appeals Chambers, I exercise my judicial functions with the full panoply of judicial independence and judicial accountability. I make my determinations on the matters before me without any external influence from third-parties, including states.

However, I also have the responsibility of managing ICTY as an institution. In this respect, I – very much like a chief judge of a domestic court – am responsible for much of the day to day management of the Tribunal, such as assignment of judges to cases and the staffing needs of the institution. I also interact with the Security Council and Member States of the United Nations. In fact, I am directly accountable to the Security Council, which is the political body that created the Tribunal and that has given it its mandate.

This relationship is also similar to a domestic setting whereby the funding of courts comes from the legislature. However, it is of crucial importance that the discharge of these administrative and diplomatic functions in no way affects the President's independence in his judicial functions or indeed the independence of any judge.

In this respect, I note the responsibility that I have, as President of the Tribunal, to regularly report to the Security Council and the General Assembly upon the progress of the work of the Tribunal. This is a somewhat unique situation. As I noted above, in most domestic systems with which I am familiar, the relationship between a chief judge of a court and the legislature that funds that court is not so direct, and there is more of an established – even routine – procedure by which the legislature adopts the budget of the court each annum.

However, it must be kept in mind that the Tribunal, and its sister court for Rwanda, are nothing short of bold new experiments in the realm of international criminal law, and that the entrenched and established procedures of a domestic judiciary are therefore not necessarily present.

Suffice it to say that the dual role of the ICTY President – that of judge and that of President – is a dynamic and challenging one. The President threads a thin line, balancing his own independence, as well as that of the Tribunal, with accountability to the political directorate.

[**Rule of law in the former Yugoslavia**]

Prompted by the theme of this seminar and the work of those of you here today, permit me to change course for a brief span and talk about the rule of law in relation to the former Yugoslavia.

The former Yugoslavia is, of course, the region where the United Nations Security Council, in 1993, perceived a threat to international peace and security. The Security Council thought it necessary and appropriate to create a criminal tribunal in order to try those responsible for serious violations of international humanitarian law in order to restore peace and security to the region. One essential means by which this restoration was to be achieved was through the re-establishment of the rule of law in the former Yugoslavia, following the devastating armed conflicts there in the 1990s.

An essential element of the Completion Strategy is the referral of cases from the Tribunal's docket back to the states of the former Yugoslavia. For the Tribunal is not able – and was never intended – to address all serious violations of international humanitarian law committed during the wars in the former Yugoslavia in the 1990s, and the Tribunal is merely one of a variety of tools to address the post-conflict challenges in the area of international criminal justice. It is for all of these reasons that the Security Council used its foresight in 2003 and 2004 to enlarge the mission of the ICTY. It called upon the donor community to support the development of the War Crimes Chamber of the Court of Bosnia and Herzegovina. And it did so based upon the stated proposition that the strengthening of competent national judicial systems was crucially important to the rule of law, in general, and to the implementation of the ICTY Completion Strategy, in particular.[10]

The ICTY was called upon to participate in this effort, and many concrete steps have been initiated and successfully completed along these lines, including the referral of 13 persons for trial to Bosnia and Herzegovina, Croatia, and Serbia. In the case of Bosnia, the Tribunal has been a close partner in the establishment of a specialised chamber to try war crimes within Bosnia's own court system. The referral of these 13 cases to national jurisdictions has not only greatly facilitated the ability of the Tribunal to bring to trial at the earliest possible date less senior leaders indicted by the Tribunal, but has also strengthened the capacity of national court systems in the former Yugoslavia for the adjudication of serious violations of international humanitarian law, both presently and in the years ahead.

Finally, the Tribunal is working tirelessly in other ways to ensure that the rule of law takes root in the post-conflict societies of the former Yugoslavia. I will mention a few examples of these efforts:

1. We have adopted procedures by which parties to proceedings in Bosnia, Croatia, and Serbia can request confidential information from ICTY cases. And the Tribunal has transferred this information to them for use in their war crimes cases.

[10] Resolutions 1503 and 1534.

2. We are actively working to develop partnerships with other agencies to ensure the effective and useful transfer of knowledge and materials to other institutions. Just as we at the Tribunal have learned from our predecessors at Nuremberg and Tokyo, it is essential that others are given the opportunity to benefit from our experience at ICTY. This is part of the inexorable progression of international criminal law.

    a. One such project involves our partnership with the United Nations Inter-regional Crime and Justice Research Institute – called UNICRI – to compile our expertise into a "best practices" manual – from investigations to trials to appellate proceedings.

    b. Another project, carried out in partnership with UNICRI and the OSCE's Office for Democratic Institutions and Human Rights[11] – one of the sponsors of this conference – involves an assessment of the capacity of the judiciaries of the former Yugoslavia to conduct war crimes cases and identifies ways in which the needs of those judicial institutions can be met.

3. But perhaps the best way that the Tribunal can support and promote the rule of law in the region is by the example it sets of meeting the highest standards of international humanitarian law and human rights law in its proceedings.

[**Conclusion**]

In conclusion, I would like to return to my starting point – the independence of the judiciary, which is essential for the promotion and maintenance of the rule of law.

The United Nations General Assembly has adopted "Basic Principles on the Independence of the Judiciary".[12] There are seven of these principles. I will not discuss all seven of them here today, but I would like to focus on two of them, which provide the following:

- First – Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

- Second – It is the duty of each Member State [of the United Nations] to provide adequate resources to enable the judiciary to properly perform its functions.

It is essential in a free society for these principles to be put into practice – by the executive, legislative, and judicial branches – as well as by an informed

[11] ODIHR.

[12] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

citizenry. The courts and judges cannot, all by themselves, ensure that the rights of citizens are protected. This is the job of all three branches working both together and, sometimes, in opposition to each other.

Even where courts are fulfilling their role, namely the interpretation and application of the laws of the state, threats to the independence of the judiciary can come in many forms:

1. A recalcitrant executive not enforcing the laws as interpreted by the courts.

2. The creation of special tribunals for areas sensitive to government policy.

3. Attacks on judges in retaliation for the exercise of their independent judicial decision making.

4. Reduction in the funding for courts.

In relation to this last point, Judge Ninian Stephen, a former Judge on the High Court of Australia and of ICTY, has referred to the courts as "a formidable protector of individual liberty" but at the same time as "a very vulnerable institution" and "a fragile bastion". And this is because of their dependence upon the other branches of government for financial and material support. In the view of Judge Stephen,

> "what ultimately protects the independence of the judiciary is a community consensus that that independence is a quality worth protecting".[13]

Judge Stephen's comments – in today's global financial crisis – are more apt than ever.

It is therefore the responsibility not only of judges, but of all of us here in this room today, to adhere to the principles of judicial independence, which I have outlined in my remarks, and to support at all times the independence of the judiciary. And this means even when we do not necessarily agree with the outcome of those men and women entrusted with this most sacred duty.

In fact, it is precisely when we don't agree with a judge's decision that our responsibility is both the most difficult and the most essential.

To quote Justice Kennedy of the United States Supreme Court:

> "The law makes a promise – neutrality. If the promise gets broken, the law as we know it ceases to exist. All that's left is the dictate of a tyrant, or perhaps a mob."[14]

[13] Sir Ninian Stephen, Judicial Independence – a Fragile Bastion, Ch. 49, Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: the Contemporary Debate*, Martinus Nijhoff, 1985.

All of us here today must make sure this never happens. We can all play a role in protecting the independence of the judiciary, both in the states of Europe and beyond.

And in return for this trust bestowed upon Judges, they must always keep in the forefront of their minds the "Judgement of Cambyses", so that they do not suffer the fate of judge Sisamnes.

[14] The Honorable Anthony M. Kennedy, Address to American Bar Association Symposium, Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice, held 4–5 December 1998, Philadelphia, Pennsylvania.