OSCE/ODIHR

HUMAN DIMENSION SEMINAR ON THE RULE OF LAW

CONSOLIDATED SUMMARY

Warsaw, 28 November - 1 December 1995

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I. INTRODUCTION

The Human Dimension Seminar on the Rule of Law was held in Warsaw on 28 November - 1 December 1995. The Seminar was organised by the Office for Democratic Institutions and Human Rights (ODIHR).

The Seminar was the tenth in a series of specialized Human Dimension Meetings organised by the ODHIR in accordance with the decision of the CSCE Follow-up Meetings in Helsinki 1992 and in Budapest 1994. The previous 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) and Drafting of Human Rights Legislation (September 1995).

The main theme of the Seminar was the Rule of Law, including its constitutional foundations, implementation and practical measures.

The Seminar was not mandated to produce any negotiated texts, but summary reports prepared by the Rapporteurs of the two Discussion Groups were presented in the final Plenary Meeting.

II. AGENDA

1. Opening of the Seminar by the Director of the ODIHR.

2. Keynote speech.

3. Discussion on the Rule of Law, including its constitutional foundations, implementation and practical measures.

4. Summing up and closure of the Seminar.

TIMETABLE AND OTHER ORGANIZATIONAL MODALITIES

1. The Seminar was opened on Tuesday, 28 November 1995 at 3 p.m. in Warsaw. It was closed on Friday, 1 December 1995.

2. All Plenaries and Discussion Groups were open.

3. Agenda items 1,2,3 and 4 were dealt with in the Plenary. In addition, the closing Plenary, scheduled for Friday morning, focused on practical suggestions for dealing with the issues and problems raised during the Discussion Groups.

4. Agenda item 3 was dealt with in the Plenary, as well as in the two Discussion Groups:

DG1: The Rule of Law - The Constitutional Foundations

Topics included:

- the independence of the judiciary;
- the relationship between the court and the legislature;
- the competence of the court to test the legality of decisions made by the administrative authority.

DG2: The Rule of Law - Implementation and Practical Measures

Topics included:
- modalities governing conditions for an independent body of lawyers;
- the issue of free legal aid; including its possible sources, such as public defenders, legal clinics and NGOs;
- the role of legal and judicial bodies in combating organised crime and corruption.

5. Meetings of the Plenary and Discussion Groups took place according to the work programme.

6. An ODIHR representative chaired the Plenary Meetings.

7. The ODIHR invited the Moderators to guide discussion in the Discussion Groups. They were assisted by ODIHR representatives.

8. Standard OSCE rules of procedure and working methods were applied at the Seminar.

III. PARTICIPATION

The Seminar was attended by a total of 166 participants. Representatives of 38 participating States took part. The delegations of two Mediterranean Non-participating States, Egypt and Tunisia, were also present.

In addition, 6 international organisations were represented: The Council of Europe, Commissioner on Democratic Institutions and Human Rights, including the Rights of Persons belonging to Minorities of the Council of the Baltic Sea States, European Court of Human Rights, International Committee of the Red Cross, U.N. Centre for Human Rights and U.N. High Commissioner for Refugees.

Additionally, 28 representatives of 25 non-governmental organisations were present.

IV. REPORT ON RULE OF LAW SEMINAR

Mr. Robert Buergenthal, Rule of Law Adviser

Introduction:

The OSCE Office for Democratic Institutions and Human Rights hosted the Human Dimension Seminar on the Rule of Law in Warsaw, November 28-December 1. The objective of the meeting was two-fold: to discuss the constitutional foundations of the Rule of Law and to examine implementation and practical measures.

The Seminar was attended by a total of 166 participants from thirty-eight participating States as well as two non-participating States, Egypt and Tunisia. In keeping with the OSCE's objective of including representatives from civil society in such events, twenty-five non-governmental organizations were also present and participated in all Seminar activities. Additionally, several international organizations were also represented including the Council of Europe, the European Court of Human Rights, the UN High Commissioner for Refugees, the UN International Criminal Tribunal for the Former Yugoslavia and the International Committee of the Red Cross. The Council of Europe presented the keynote address. Speaking on behalf of the Council were Madame Marie-Odile Wiederkehr, Deputy Director of Legal Affairs and Dr. Godert W. Maas Geesteranus of the Venice Commission.

Delegations met in plenary sessions for opening and closing statements and discussed a series of topics in two informal working groups led by two moderators, Ambassador Per Tresselt of Norway and Jerry Prus-Butwilowicz, of the United Kingdom; and two rapporteurs, Mr. Matthias Weckerling of Germany and Mr. Robert Allan McChesney of Canada. Specific topics included the independence of the judiciary, the relationship between courts and legislatures, the competence of courts to test the legality of administrative decisions, the conditions for an independent body of lawyers, the issue of legal aid and the role of legal and judicial bodies in combating organized crime and corruption.

Parallel Events:

The Seminar included several important and innovative parallel events which were designed to incorporate ongoing ODIHR activities. The first parallel event was the Second Training Seminar for the Federation of Bosnia-Herzegovina Ombudsmen which was prepared and implemented by the Human Rights Unit. This Training Seminar featured a series of special events for the Ombudsmen including presentations by several international organizations including the ICRC, the UNHCR and the UN Centre for Human Rights as well as the Austrian Ombudsman Office, the International Conference on the Former Yugoslavia and the University of Leiden Department of Public International Law. The Training Seminar featured sessions to discuss problems faced by the three Ombudsmen which included freedom of movement questions, citizenship, restitution of property and issues relating to international humanitarian law. The Seminar also sought to assist in the development of possible solutions to the problems raised and to examine the role of international cooperation agencies.

Additionally, the NGO Liaison Unit prepared and implemented a training workshop for fifteen new Rule of Law NGOs from NIS countries in coordination with the Open Society East-East Programme and the International Helsinki Federation for Human Rights. The workshop divided its activities into three sessions which provided an in-depth orientation to the philosophy, history and structure of the OSCE and ODIHR, NGO management issues and active participation in the Rule of Law Seminar. During the workshop, the Executive Director of the IHF, Dr. Aaron Rhodes presented the guests with a bilingual, Russian-English, edition of the Handbook for Helsinki Committees and hosted a discussion session with Mr. Marek Nowicki, Director of the Polish Helsinki Foundation for Human Rights.

A final feature of the Seminar was the sponsorship of several special guests from throughout the region who also held bilateral meetings with the ODIHR Director, Rule of Law Programme Adviser and Legal Expert on the development of new project initiatives. Among these guests were two judges from the Russian Federation Supreme Court, a judge from the Court of Appeal of Lithuania, the Minister of Justice and Presidential Adviser of Tajikistan, and the Deputy Prosecutor of the UN International Criminal Tribunal for the Former Yugoslavia.

Working Group Reports:

The conclusions of both working groups are summarized in two rapporteurs' reports which highlighted the broad range of issues and problems discussed throughout the Seminar. The principal issues of concern raised in Working Group One include the danger of constitutional provisions referring to a state of emergency, the necessity of continuing education for judges, the concept of judicial recruitment to include women and minority groups, the concept of limited appointments and the role of the judiciary with respect to the legislature and president. In Working Group Two a series of practical issues was discussed including the contents of voluntary and statutory codes of conduct, the membership, roles and advantages of lawyers' independent associations, legal and practical models in participating states, and the need for balance between human rights and the fight against corruption and organized crime.

Both working groups proposed a series of issues that should be examined in the future and follow-up activities for ODIHR. Of principal interest to the groups was the need for police oversight bodies and the balanced application of investigation and law enforcement procedures. In particular, the groups called on the OSCE and ODIHR to examine ways to enhance the protection of human rights defenders, to exchange modalities on legal aid, to develop a comparative study on codes of ethics and conduct for lawyers in OSCE participating countries, for exchanges of information concerning the death penalty and legal aid for capital offenses, and for the possibility of increasing the sponsorship of technical exchanges.

Conclusion:

Both working groups were useful forums to examine both theoretical and practical Rule of Law issues given the Seminar's informal two track format and parallel events. Several delegations requested that the Rule of Law Seminar be incorporated into the annual calendar of ODIHR activities, and we will take the necessary steps to prepare a Seminar for the coming year as well as develop a new series of parallel events.

The long-term impact of this Seminar will rest largely with the willingness of participating States to invite the ODIHR to develop follow-up activities to address the issues raised. Moreover, the active participation of States to discuss the selected topics during the forthcoming seminar in a frank and substantive manner will be crucial to enable the Human Dimension Seminar on the Rule of Law to act as an annual springboard mechanism for the review of Rule of Law issues, as well as, the design and implementation of practical follow-up activities.

V. RAPPORTEURS' REPORTS

Discussion Group 1: The Constitutional Foundations

Rapporteur's Report: Mr. Matthias Weckerling

The discussion was introduced by the key note speech by Mr. Godert Maas Geesteranus of the Venice Commission who gave a broad depiction of the historical experiences made in this century with dictatorships as the direct opposite of the rule of law and as a complete perversion of the ideas created by enlightenment.

Participants agreed to the moderator s suggestion that the agenda of Discussion Group 1 should consist roughly of the subjects laid down in the invitation to the seminar as:

- the independence of the judiciary;
- the relation between judiciary and legislature;
- the relation between judiciary and executive.

The moderator further suggested that the discussion might follow the "Food for Thought"-elements distributed before the seminar, without regarding them as a formal agenda or a 'strait jacket .

I. General comments

At the outset of the discussion one delegation described the progress that had been achieved by establishing an independent judiciary applying the basic principles of the UN and the OSCE. Other delegations gave information on the present legal situation in their country concerning the independence of the judiciary in particular.

Another delegation referred to two vital aspects in establishing the Rule of Law after reunification in the newly associated part of its country during the past five years: building-up a judiciary and thus transforming an instrument of the state party into an independent system

based on the Rule of Law, with special regard to extreme shortage of personnel, and on the other hand redressing injustice by creating legal claims both in the field of criminal and in the field of administrative and career rehabilitation. However, the process of reunification would still have to be continued.

Some delegations emphasized the historical and philosophical roots of the idea of the rule of law pointing out there were different notions between the common law tradition in Anglo-Saxon countries and in countries following the civil law tradition. Human rights as laid down in various UN covenants and the ECHR were crucial elements of the Rule of Law and of most written constitutions. The principle of the separation of powers going back to Locke and Montesquieu was essential as a safeguard against the misuse of executive power as well as a system of checks and balances.

It was, on the other hand, pointed out that the historical and philosophical approach was of little practical value and that concrete elements of the Rule of Law had already been featured in several CSCE documents. The rule of law should rather be discussed in the contemporary context of the OSCE in more concrete and practical terms considering the Human Rights standards in their interpretation by international organs of jurisdiction on Human Rights.

The importance of taking the existing jurisdiction into consideration, in particular that by the ECHR - organs in Strasbourg, was also stressed by other delegations. On the national level it was pointed out that the application not only of constitution law but also of constitutional jurisprudence was an essential aspect in ensuring the Rule of Law. One delegation observed that it would be a triumph of the Rule of Law if war crimes committed in former Yugoslavia were tried by the domestic courts in Serbia, Croatia and elsewhere before being possibly transferred to the International Tribunal.

It was furthermore observed that earlier constitutions of the former socialist states often contained rather detailed provisions but had never been applied in practice.

In this context attention was drawn to the value-component of the Rule of Law: courts were not mere agencies of law but had to render justice.

Another part of the debate focused on the principle of the separation of powers and the relations between them which one delegate described as a ‘constructive tension . Concern was expressed about various independent commissions and other bodies setting up rules and exercising consultative functions comparable to the judiciary though often lacking judicial control. This could lead to a confusion of powers. Referring to most states in transition it was observed that their constitutions opted for a presidential form of government thereby favouring a very strong role of the executive power. This situation required a strengthening of the other two powers; particularly effective judicial control of the executive branch was crucial.
Attention was drawn to the danger of constitutional provisions referring to a state of emergency: these provisions could be misused and help to overthrow the entire constitutional system of a state. The state of emergency should be very carefully dealt with and its application in individual states be controlled by the international community and its organs.

II. Independence of the judiciary

The general debate centered on the different national systems designed to nominate and appoint judges, a task often performed by the executive power but also by parliamentary institutions. The limited tenure of judges between 5 and 10 years particularly practised countries in transition was considered as problematic especially when linked with further appointment by the executive.

A more specific discussion ensued, dealing with questions of judicial independence under the aspects of:

1. Training of judges / training of trainers

The necessity of a continuous training of judges was regarded as a major issue closely linked with independence of a judiciary. It was also considered important to have judges recruited from many social areas, from minorities and women. The system of recruitment should be open for a broad range of experience, including practical experiences in the political field. The latter was held to be particularly important for judges at constitutional courts.

There was a broad sentiment among participants that it would be a good idea to pursue the idea of continuing the dialogue on the rule of law both in a general and a specific approach and developing positive action in this respect concerning particularly the field of training - also of the trainers. In this context it was considered vital to have an overview of activities already performed in this field by the ODIHR which should also coordinate further activities including bilateral training.

2. Tenure for judicial appointments

Several delegations spoke out in favour of a limited term appointment of 5 or 10 years accompanied by practical legal training while others considered life time appointment as a sound basis for judicial independence, holding 1-2 years of probation to be sufficient. It was stated that life time appointment helps to ‘depoliticise the judiciary and would enhance respect for the Rule of Law. It was acknowledged that an exception from this rule could be valid for judges of constitutional courts. The debate revealed that in this respect various widely differing concepts existed with in the constitutional orders of states. Countries in transition obviously preferred a limited term appointment of judges to start with. One delegation described this problem as secondary with regard to the more urgent need to guarantee judges a reasonable salary thus protecting them against personal influence and protecting their independence.
The task of protecting judges and their families against personal threats also by introducing special legal provisions was touched on in this context.

3. Appointment of judges

It arose from the discussion that strongly differing systems of nomination and appointment of judges existed in various states. Some examples of judicial bodies recruiting judges were given. In most cases, however, judges are appointed by the executive or representative bodies.

One delegation depicted the role of justice in a federal system giving member states of the federation strong administrative competence including the appointment of judges. It was stated that uniform application of law in a federal state did not necessarily mean that a centralist system was to be maintained. Other delegations from federal states added their experiences with federal structures in a court system of a more centralist character.

4. Public access to proceedings

It was reiterated that confidence of the public into the judiciary could be promoted by making judicial proceedings more transparent, though in particular cases e.g. concerning the protection of minors or of sensitive personal data the public could be excluded from court sessions. It was pointed out that specific caution had to be exercised when publishing court decisions containing private data.

III. Judiciary and legislative

At the beginning of this part of the debate, Judge Makarczyk of the European Court of Human Rights addressed the Group, illustrating the role of the Consultative Assembly in elections of judges to that Court, and the direct impact of the Court s Judgments on national legislation.

The discussion then revealed a close link between the relation of the two powers on the one and the question of setting up constitutional courts and defining their powers on the other hand. The question of legitimacy could arise in the case of conflict between constitutional courts and representative bodies. It was also stated that the legislature should have the last word if statutes were declared unconstitutional, bearing in mind the rules for amendment of the constitution itself. Others pointed to the existence of basic principles and values which needed to be upheld in constitutional conflicts.

In the interest of making constitutional jurisprudence transparent the importance of having dissenting votes of judges published was emphasized.

Special attention was paid to the role of constitutional jurisprudence in filling the gaps where the legislator was unable or unwilling to take necessary action.

This functional relationship between legislative and judiciary was thought to be problematic by some delegates since it prevented a clear delimitation of the constitutional functions of both organs. Some delegations rejected the idea of giving the judiciary power to review legislative acts altogether. It was furthermore questioned whether constitutional jurisprudence should be a matter dealt with by special courts or rather be part of the work done by ordinary courts.

IV. Judiciary and executive

At the outset of the debate it was considered an important element of democracy and of the rule of law that citizens may challenge the acts of the executive power. It was, however, doubted if all acts of administration should be subjected to judicial review. Courts had widened their activities of supervision in some countries controlling not only whether the margin of appreciation had been respected but also whether an administrative decision had been sound and reasonable.

The responsibility and accountability of judges and the role of the press were further points made during the debate. Whereas one delegate called for restriction of aggressive press activities that might endanger judicial independence other delegations emphasized the importance of the press which also reflected the public opinion and might help the public to understand legal procedures. Generally it was not considered advisable for judges to take part in the public debate e.g. by explaining their judgments in public.

V. Final remarks

As was pointed out at the end of the discussion a broad notion of the Rule of Law - having a value in itself - was a justified and appropriate approach to the topic, as well as the more specific OSCE - approach defined in a series of texts containing commitments by Participating States to put the Rule of Law into practice. Countries would have to answer to those commitments during review proceedings. It was important at the same time to maintain the Rule of Law as a general principle guiding democratic societies. It was a general conclusion that further efforts by the ODIHR to provide opportunities for Judges, lawyers, high government officials and politicians to engage in exchanges of views on the Rule of Law, would be useful in this context. Future seminars would be welcome, either in the present form, or with more specific purpose or participation.

Discussion Group 2: Implementation & Practical Measures

Rapporteur's Report: Mr. Robert Allan McChesney

To assist in focusing discussion, a separate theme was chosen for each of the four sessions of Discussion Group 2: 1. Modalities governing conditions for an independent body of lawyers; 2. Free Legal Aid, including its possible sources, such as public defenders, legal clinics and non-governmental organizations; 3. Role of legal and judicial bodies in combating organized crime and corruption; 4. Other Rule of Law issues. Session 4 allowed participants to reflect further on the topics covered in the first three sessions and to suggest follow-up activities that could be carried out by ODIHR and by state and non-state participants. Annex A to this Report includes citations from a few relevant international texts on the Rule of Law, as well as notes prepared by the Moderator to facilitate discussion.

1. Conditions for an independent body of lawyers

Contents of voluntary or statutory codes of conduct

As described by discussion participants, a legislated code of conduct for lawyers may base itself on existing standards, e.g. by stating that a lawyer must abide by the law, subject to professional ethics and international human rights treaties. It could also refer to the need to pursue equal justice and the right to a fair trial. Examples given as to what an acceptable legislated code of ethics might contain are duties to uphold justice and not to mislead the court. Accountability for breaches of duty would be implemented through the respective professional governing bodies in the legal domain.

Such a statute could also set out the rights of lawyers (e.g. to obtain evidence, and to address courts) and should provide that lawyers' rights be defended. The seminar was informed of two examples of national legislation stating that the legal profession is a public body, and that at least one of these laws adds that lawyers have a responsibility to protect the rights of the individual. The legislation of these two newly admitted states could prove useful as a basis for comparative study.

Membership and roles of lawyers' associations

A number of models were suggested for limiting or extending the membership of lawyers' associations. In some countries, each specialized group has its own associative body, e.g. one for defence advocates, and another for procuratura and judges. In other places, all jurists, whether acting as lawyers, teachers or judges, whether working in the public or private sector, and whether doing criminal, commercial, or another kind of law, join the same association.

In many instances, in order to practice one's profession in the legal field in a particular jurisdiction (country, state, province or territory, respectively) one must be a member in good standing of the relevant professional association. There are other kinds of voluntary lawyers' associations, however, some based on locality (e.g. the bar of a city or district), some on a shared area of subject interest or practice (e.g., immigration lawyers, corporate lawyers, prosecutors, law teachers, government lawyers) or for a special purpose (e.g., promotion of the rule of law and/or human rights). A lawyers' group could work for the economic interests

of its members, pursue particular policy goals, be primarily social, assist with continuing professional education, or have all of these objectives and more. Development of a code of ethical conduct could be done by this type of voluntary lawyers' group or by one for which membership is compulsory to be permitted to practice in the profession. Only in the latter case, however, would the code normally be enforceable through some internal disciplinary procedure.

Other examples given of roles performed by lawyers' associations were publications, public legal education, and work as part of civil society in national referenda.

A number of speakers recommended that regardless of the variety of lawyers' associations present in a jurisdiction, there should ideally be only one body that controls admission to the profession based on objective qualifications, and sets professional standards of ethics and competence. In some jurisdictions, one such body would cover all lawyers. In others, there might be one for each distinct major category of lawyer, e.g. one for advocates or barristers, one for solicitors, and one for notaries.

A few intervenors thought that prosecutors and defence lawyers should be part of different bodies. Others thought there were advantages to both being part of the same standard-setting group (see below). Some thought that judges should not be part of the same association as lawyers.

Advantages to having a unified independent lawyers' association

The following were observations made by participants concerning the benefits to lawyers and/or to the people of a jurisdiction that are related to having a single lawyers' association responsible for professional practice:

An independent unified group can form a strong alliance to lobby governments on behalf of the public interest or of a particular group of clients.

An independent unified group can lobby with governments on behalf of themselves more effectively.

A unified group that holds members to certain standards may have more credibility and influence on justice issues with the government and with the population.

Allowing too wide a latitude for unqualified people to provide legal representation or advice can reduce professionalism and respect for the Rule of Law.

With compulsory membership criteria and standards, there is more incentive for all lawyers to conform to some basic tenets of competence, justice, honesty, respect for the Rule of Law, and duties to the public and to the courts.

Whereas voluntary associations tend to act in the interests of lawyers, compulsory self-governing groups usually have as one of their prominent objectives the upholding of the interests of clients and of the public.

Self-governing lawyers' associations generally provide some form of insurance to protect clients who suffer losses if a lawyer acts negligently or dishonestly.

If there is no self-governing association that sets and enforces standards, there is more likelihood that the government will create standards that may erode the independence of lawyers.

If all lawyers are bound by the same standards, there is a better chance, at least in some jurisdictions, that a lawyer may be able to switch from one side to the other (e.g. from prosecution to defence, or vice versa) during his or her career, thus gaining a broader perspective.

Legislation regarding independent lawyers' associations

Even in jurisdictions with a long uninterrupted tradition of an independent bar, there is often legislation authorizing a particular body (or more than one body) of lawyers to be self-governing in terms of qualifications, competence, ethics, and discipline of members. Such laws may be even more needed where there is no recent tradition of lawyers acting independent of instructions or guidance from the state. A few participants in the discussion group gave examples of the kind of stipulations that might be in such a statute:

- a requirement that each lawyer adhere to certain ethical standards, enforceable by the lawyers' own professional body;

- guarantees of certain professional rights to facilitate the carrying out professional duties. (For example, the seminar was informed that some jurisdictions need to institute requirements: (a) that judges recognize duly qualified independent lawyers in their courts, and allow them to act for clients, and (b) rules that allow people to choose their own legal representation.);

- guarantees of the lawyer's own human rights;

- guarantees of the lawyer's personal safety related to the discharge of professional duties.

Drawing together two themes, one observer noted that The UN Draft Declaration on the Rights of Human Rights Defenders provides that there should be no adverse treatment of someone in retaliation for exercising rights as a defender of human rights. One draft Article addresses the fact that occupational groups who have codes of ethics or conduct, such as lawyers, doctors, and the police, may sometimes be called upon by authoritarian or racist rulers to collaborate in violations of human rights (e.g. a prison doctor cooperating in torture, or a lawyer covering up evidence of human rights violations). The Article's goal is to establish that a person has a duty and a right to obey ethical and human rights standards, and should not be punished for refusing to assist in actions that breach these standards.

Historical factors to consider in Newly Admitted States

More than one participant explained that under the Soviet system, advocates had a very restricted role, and being a lawyer (e.g., representing alleged criminals) was not regarded as prestigious. This was now changing, but there is no long-developed tradition of independence of lawyers, and one or two delegates suggested that change could not come rapidly. Someone from another post-communist country stated that in her nation there had been a tradition of independent lawyers' associations, and that this had been reinstituted in the recent era of more democracy. The experience of this nation could prove helpful to other countries to examine.

2. Legal Aid

The materials provided in advance to participants (see Annex A) included a citation from the European Convention on Human Rights that requires provision of legal aid in serious cases. It was noted in the seminar that these words have been reproduced and adopted in the final statements from both Copenhagen (1990, art. 5.17) and Moscow (1991, art. 23.1). One intervenor recalled that a decision of the European Court of Human Rights had ruled that it may be a violation of court and trial rights for a legal aid not to be available.

The seminar was also reminded that a 1991 Seminar of Experts on the Human Dimension had called for an exchange on modalities for free legal aid, and this had not yet been acted upon.

A number of participants noted that despite the importance of and need for legal aid services, there were impediments to meeting the need in their respective countries, including unreasonable restrictions on who was allowed to provide legal assistance, and on who could become a lawyer.

On the other hand, as a result of greater opportunities being presented to them with the shift to a market economy, not enough lawyers were willing to provide the kind of low cost or free legal aid needed by many. We heard that although there were some community legal aid organizations attempting to fill the gap, they lacked resources. Moreover, some types of human rights cases were quite complicated, and required a knowledgeable advocate, including cases before the European human rights bodies.

Various models for providing legal aid were discussed. In addition to those listed under item 2 in Annex A to this Report, these could include mixed schemes in which serious criminal and civil cases are covered through private lawyers paid (or not) by the state, with many other matters being handled by clinics or NGOs focusing on either a geographic or subject area (e.g. refugee law, people with disabilities, rights of indigenous peoples or of minorities). In at least one country, Canada, there is also a limited form of legal aid available from a public fund to assist people to take certain forms of litigation against governments and public agencies under the Constitution.

According to various speakers, aside from the ever-present need for legal representation in criminal cases, as well as the lack of adequate funding, among the problems to be dealt with in the legal aid field are:

- geographic and subject areas in which lawyers have little chance to be remunerated without a legal aid scheme being present;

- areas requiring expertise in international law (e.g. human rights);

- economic and social rights cases, e.g. vested pension rights of people displaced by the transformation or dissolution of states, and people forced out of their lodgings in situations of political or inter-ethnic conflict;

- the need for training in specialized spheres, such as litigation involving war crimes.

Community-based legal aid organizations

States may sometimes restrict the activities of groups set up to provide legal aid and human rights assistance, and in the view of more than one participant, this restriction is not always done for a purpose within the spirit of OSCE obligations for promoting the Rule of Law. One method of restriction is to deny the opportunity to register as an association for human rights. Or greater restrictions may be placed on such groups than on other types of associations. One innovative method for avoiding many limitations is for a non-governmental group to operate as an enterprise, perhaps as the local representative of a foreign (charitable or profit-making) corporation.

Among the areas in which participants said technical or other assistance would be helpful were advice on how to run an office efficaciously and funding for offices and programs.

The seminar heard that legal aid has become very popular as a theme for foreign donors. While this is good, there is sometimes a pressure for a group to provide legal assistance services, without necessarily having the capacity to do so well.

One suggestion made for enhancing the quality of legal aid and the sustainability of organizations that provide it in a country is to have a central coordinating body. Examples were offered by various speakers of varying degrees of success achieved in attempting to set up such an entity.

One speaker said that NGOs cannot become a substitute for lawyers. They do not have the resources to take on large numbers of individual cases. They should concentrate on "impact cases" or as another speaker said, "test" cases.

One factor that assists in the provision of good legal assistance and in respect for the Rule of Law is the presence of a service that publishes court decisions, and libraries that make these and other legal materials more readily available. Public education, and human rights training for teachers, police, and prison officials are also key elements.
One NGO announced that it had adopted strategies to take into account its lack of resources. To increase efficiency, it tried to undertake standard approaches in similar cases, and provide

people with forms that guide them in handling their own cases. When a lawyer is needed, one is arranged, and the NGO acts as an assistant to the lawyer.

It was pointed out by one observer that although community legal aid staff may not be legally trained, expertise could be acquired in a particular sphere through experience and commitment.

3. Law and human rights issues in the fight against organized crime and corruption

The general theme of this session was the need for balance in the combat against corruption of public officials and institutions in the public domain and also in the fight against organized crime. Some forms of economic crime are so costly, and at the same time so hard to prove, that special measures are needed to deal with them. Yet, said many participants, the human and legal rights of those being investigated and charged must still be protected.

Examples were give of ways that some states had tried to adjust their practices. For example, we heard that one country had recently set up a prosecution service separate from the police. Until 1986, prosecutions in lower courts had been handled by the police. It was decided that it was improper for the persons who had been investigating to make the final decision as to whether to prosecute a suspected person.

Nonetheless, in complex fraud cases, it was determined that it would be too difficult for someone not fully aware of the evidentiary situation and the general picture to make an informed decision about prosecuting. Therefore, a special office involved with fraud cases has more autonomy concerning prosecution. They also can rely on special procedural rules exempting them from certain protections normally given to suspects, concerning the right of suspects to withhold information by refusing to answer some types of questions.

Whether or not particular countries achieve the right balance of protecting the public interest and the rights of the accused in the investigation of serious fraud can be the subject of debate in European human rights bodies.

It was generally agreed that all states in the OSCE face problems of fraud, political corruption and money laundering, sometimes up to the highest levels. One speaker said that a need in his country was for training in how to handle difficult fraud and corruption investigations. One helpful development was a move toward adopting the common law country approach whereby a corporation could be held guilty of an offence.

Other issues raised by one or more participants included:

- the need to pay adequately police, judges, officials and others working in the justice system, to guard against openness to corruption;

- the need for corruption to be punished severely;

- the principle that regardless of the alleged crime, proper civil liberties protections of the accused must be observed;

- the need for all cases to be investigated and resolved in a reasonable time;

- inter-country training and exchanges should be available for the areas covered by this session;

- the emphasis should be on helping law enforcement people, lawyers and judges to do a better job, which is facilitated by respect for civil liberties;

- economic crime knows no borders.

4. Other issues and follow-up suggestions

Some issues suggested for consideration by participants raised in this session included:

- the need to ensure that differentiated application of investigation and enforcement procedures were not applied in criminal matters based on the ethnic group of the alleged perpetrators or victims;

- the need for police forces to have an oversight body that includes representatives of other groups in society (e.g. elected politicians);

- the need for independent investigation (perhaps by a different police force) of allegations of police abuse.

Under the heading of "Rule of Law", the Budapest OSCE document refers to the need to protect the rights of human rights defenders (quoted in Annex A to this Rapporteur's Report). One intervention in Discussion Group 2 reminded participants that at the Human Dimension Implementation Meeting in October 1995 a number of state and NGO delegations recommended that the OSCE consider ways for OSCE mechanisms to be used to protect human rights defenders as well as to enhance their rights. It was explained that the term "human rights defenders" refers not only to lawyers, but also to members of human rights NGOs, teachers of human rights and others who promote human rights goals, such as grassroots legal aid organizations.

Although seminars were seen as valuable, participants urged practical follow-up measures to help attain more concrete progress on the Rule of Law. States were urged to contact ODIHR or other OSCE partners if specific areas of technical exchange or training were desired.

Follow-up measures proposed by some participants included these:

- examination of ways for OSCE institutions to enhance protection of the various types of human rights defenders and to permit them to exercise their human rights without facing reprisal;
- exchanges on modalities for the provision of legal aid, as recommended by the 1991 (Oslo) Experts' Meeting on Implementation - preferably prior to the next Implementation Meeting;

- a comparative study by ODIHR on codes of ethics and conduct for lawyers in OSCE countries;

- exchanges of information concerning the death penalty and on provision of free legal aid for capital offences;

- the possibility of training or technical exchanges on any of the matters covered in the sessions of Discussion Group 2.

VI. PARALLEL EVENTS

The Second Training Seminar for the Ombudsmen of the Federation of Bosnia-Herzegovina

Mr. Jacques E. Roussellier, Human Rights Adviser
and Mr. Martin Alexanderson, Human Rights Assistant

Introduction

The second training seminar for the Ombudsmen of the Federation of Bosnia and Herzegovina, organized by the OSCE Office for Democratic Institutions and Human Rights, took place in Warsaw from 27 November to 1 December 1995. The object of the seminar was to provide lectures on selected topics for the three Ombudsmen, discuss recurrent problems they have been facing, possible solutions to these difficulties, and future cooperation with international agencies. The training seminar also allowed Mr. Esad Muhibi (Muslim), Ms. Branka Raguz (Croat) and Ms. Vera Jovanovi (Serb)[1] to take part in the larger ODIHR Rule of Law Seminar.

1. The opening session

The workshop opened with an introductory statement by Ambassador Audrey Glover who recalled the reasons why the OSCE and not another institution organized the seminar. First of all, in accordance with the Constitution of Bosnia-Herzegovina, the Ombudsmen were appointed by the OSCE in December 1994; they are financially supported by the organization and present their reports to the OSCE. Secondly, the Mission in Sarajevo provides technical support to the three Ombudsmen. Thirdly, the ODIHR has previously organized a training seminar[2] and other forms of assistance, notably through a Network of Experts which was set up earlier this year.

The Moderator, Mr. Jacques Roussellier of the ODIHR, explained that the themes of the second training seminar had been chosen in consultation with the three Ombudsmen. The latter had expressed the wish to discuss problems they have been facing in relation to : freedom of movement; citizenship; reclaiming of abandoned property; treatment of prisoners of war and

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1 In accordance with Section II, article 1 of the Constitution of Bosnia and Herzegovina "there shall be three Ombudsmen, one Bosniac, one Croat and one Other". However, it should be noted that, although the Ombudsmen have been chosen from the three main ethnic groups in the Federation, they do not represent the interests of any particular community.

2 See : *Report on the training seminar for Ombudsmen of Bosnia-Herzegovina, Warsaw, 14-17 February 1995*, Warsaw, OSCE/ODIHR, 1995.

other issues concerning international humanitarian law. For this purpose, the ODIHR had invited legal experts, representatives of relevant international organizations and Ombudsmen with a long-standing experience in order to make full use of the available expertise.

2. Lectures on selected topics

A) Freedom of movement

Professor Hannekke Steenbergen of Leiden University, speaking on behalf of the Council of Europe, noted that the case law of the European Commission and Court of Human Rights deals more with immigration issues than freedom of movement. She recalled that the right to freedom of movement, as laid down in articles 2 and 3 of Protocol No. 4 to the European Convention on Human Rights, consists of the following three aspects :

freedom to enter a country,
freedom to leave a country, and
freedom to circulate within the territory of a state

Concerning freedom to enter a country, it is up to the State to decide whether a foreigner has the right to enter its territory. The European Convention on Human Rights and its Protocol No. 4 do not introduce any changes to this generally accepted principle.[3] However, violations of other rights in the Convention may have certain repercussion on the freedom of entering a country. For instance, if a State interferes with the right to family life - which entails not only residence but also the possibility of visiting relatives for short periods of time -, it must explain why this is "necessary in a democratic society". In other words, whenever no adequate motivation is given for a restriction, there is a violation of the relevant articles in the Convention (*Abdulaziz* case of 28 May 1985 and *Berrehab* case of 23 June 1988).

In another case, where a person had been refused entry to Greece from the Former Yugoslav Republic of Macedonia, the Commission considered that refusal of entry could violate several articles, since it prevented him from visiting the grave of his grandfather (article 8). Furthermore, this person encountered obstacles in his attempts to seek legal assistance (article 6) and had been refused entry because of his political views (article 10).[4] More recently, the European Court of Human Rights has reiterated that refusal of entry to a country or expulsion from it because of political views interferes with article 10 of the ECHR. (*Piermont* case of 27 April 1995).

The freedom of everyone to leave any country, including his own, is also guaranteed in the above mentioned Protocol. The refusal to issue a passport without any valid reason may

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3 This is clearly indicated in article 3 of Protocol No. 4 which provides that "no one shall be deprived of the right to enter the territory of the State of which he is a *national*" [italics added].

4 *Mangov* case of 18 February 1993. The application was however declared non- admissible because local remedies had not been exhausted.

constitute a violation of this particular right, as has been noted by the UN Human Rights Committee in relation to article 12.2 of the International Covenant on Civil and Political Rights (*Pereira Montero versus Uruguay,* 31 March 1983).

Concerning the right to internal freedom of movement, it applies to "everyone lawfully within the territory of a State". Article 2, paragraph 1 of Protocol No. 4 is addressed to *everyone*, that is to say without any distinction as to nationality. The term *lawfully* signifies that the concerned person has to be on the territory with the knowledge of the authorities, but lawful residence is however not required.

Ms. Steenbergen dealt with the restrictions allowed to the freedom of movement under the relevant provisions. She stressed the fact that they have to be "provided by law", which includes publication of it. Pressing authorities to define and publish their policies may be a useful way of slowly encouraging them to respect the human rights concerned.

B) Citizenship

In a comprehensive presentation, Professor Moura-Ramos, Judge at the European Court of Justice, recalled that citizenship can be defined as the legal link between a State and an individual. However, the understanding of this link has changed over time. According to the classical approach, nationals were considered to be an element of the State. It was therefore up to the State to determine solely who would be granted citizenship. The fact that nationality belonged to the *domaine réservé de l'Etat* had two consequences : international law was not concerned with these issues and the wishes of the individual were not taken into account. As all decisions concerning the loss and acquisition of citizenship were taken exclusively by the State, there were many undesired effects related to multiple nationalities and statelessness.

In 1948 this conception began to change with the adoption of the Universal Declaration of Human Rights, which provides that : "Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality" (article 15).

The objective of avoiding statelessness has been pursued consistently ever since, and particularly in the wake of the disintegration of the former Soviet Union. Today it is possible to speak of a modern approach to nationality which takes into account both State interests and the will of the individual. If a State applies *ius sanguinis*, an individual with foreign parents should be able to acquire the citizenship of the State in order to avoid statelessness. On the other hand, if the State applies *ius soli,* measures should be taken to facilitate the acquisition of citizenship for children born abroad of parents who are nationals of the State.

The underlying idea of recent trends is that marriage, family links and the place of birth should not have an automatic effect on the nationality of the individual. In the case of loss of nationality, for instance, the State should also take into consideration the will of the concerned person. These recent trends reflect practices of States and endeavors of international organizations, in particular with regard to Council of Europe's Draft Convention on Nationality.

C) Property rights

Mr. Martin Alexanderson of the ODIHR recalled that property rights is still a rather controversial question as far as international law is concerned. While the right is explicitly mentioned in several international instruments,[5] the issue of compensation and restitution of deprived property is subject to debate. According to the article 1 of Protocol No. 1 to the European Convention on Human Rights, interference with property rights can only be made in the public interest and it must be provided for by the law.

Moreover, no one shall be deprived of his possessions except in conditions provided for by "general principles of international law". This is of particular relevance to the debate concerning compensation. On the one hand, it has been maintained that "general principles of international law" implies that only non-nationals are entitled to compensation (a common practice in cases of nationalization and expropriation). On the other hand, it has been argued that article 1 of the Convention protects the rights of everyone regardless of nationality and that, consequently, the provisions concerning property rights should do so as well.

In the case of *James and others* (21 February 1986), the European Court of Human Rights deemed that the reference to international law implies that only non-nationals are entitled to compensation. The significance of this decision has nevertheless been reduced by those who consider that the principle of proportionality requires that nationals are compensated.[6] Regarding the amount of compensation, the case law of the Commission and Court indicates that compensation less than full value is in line with the relevant provisions of Protocol No. 1.[7]

3. Problems encountered by the three Ombudsmen and possible solutions

A) Freedom of movement

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See for instance the Universal Declaration of Human Rights (art. 17), the American Convention on Human Rights (art. 21) and the African Charter on Human Rights and Peoples' Rights (art. 14). Property rights are also mentioned in the CSCE Bonn Document, the Charter of Paris for a New Europe and the Document of the Copenhagen Meeting of the Conference on the human dimension of the CSCE (Chapter II, paragraph 9.6).

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In relation to interference with property rights, the Court has held that "compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions". Case of *Lithgow and others*, 8 July 1986.

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Case of *James and others*, 21 February 1986. In the case of *Lithgow* (8 July 1986), the Commission of Human Rights noted that the State benefits from a large margin of appreciation when it comes to the practical modalities of compensation.

Problems concerning freedom of movement make up 17.01% of the total number of cases registered by the Ombudsmen in Bosnia-Herzegovina. In their latest report on the human rights situation,[8] the Ombudsmen acknowledged that restrictions may be necessary due to the war situation, but that many transgressions of the law have nevertheless occurred. The authorities have occasionally refused to issue passports, admit claims or grant authorizations to circulate freely. The system of payment at check-points is leading to widespread corruption, and the confidentiality of certain regulations is hampering the investigations of the Ombudsmen.

Professor Steenbergen noted that in some cases it is preferable that the Ombudsmen inquire about procedural aspects rather than accuse the authorities. For instance, the Dutch Ombudsman sometimes formulates a Code of Conduct in which he restates certain procedural rules which may seem evident. The more these codes are requested and published, the more it will be difficult for the authorities to disregard them.

Dr. Walter Dohr, Director of the Austrian Ombudsman Office approached the problem by citing his own experience concerning an expulsion case, and the role the intervention of the Ombudsman played in the development of a new Austrian Aliens Law.

B) Citizenship

Cases relating to citizenship account for 4.95% of the total number of those submitted to the three Ombudsmen. This figure is however likely to rise with the return of refugees and expelled persons. Until now, the main cases have concerned alleged forced imposition of citizenship, enabling the authorities to enlist as many persons as possible in the army of the Federation of Bosnia-Herzegovina. In the future, however, the nature of the claims may change if peaceful conditions will prevail.

Mr. Philippe Leclerc of the UNHCR explained that his organization is currently preparing a study on nationality laws in the Former Yugoslavia. In most of the countries, the nationality of the former republic determines whether a person may acquire the citizenship of the successor State. Current trends also indicate that most States in the region exclude dual citizenship, or only accept it in exceptional cases. There are still many unresolved problems concerning persons who formerly declared themselves "Yugoslav" (i.e. without referring to any of the ethnic groups).

Dr Dohr spoke of the means available to an Ombudsman if the law is unclear with respect to citizenship. The Ombudsman may first of all recommend the parliament to adopt a law on nationality. He may also refer to the relevant international standards - whether confidentially or in public by using the media as a recourse - and develop criteria in view of helping the government to solve the problems. The aim should always be to avoid statelessness or prevent that a person has to serve in two different armies.

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8 *Report on the Human Rights Situation on the Territory of the Federation of Bosnia and Herzegovina for the Period of January and June 1995*, Sarajevo, Ombudsman Office of the Federation of Bosnia and Herzegovina, 1995.

C) Property rights

Among the cases registered by the Ombudsmen, 25.17% concern possible arbitrary termination of apartment rights or confiscation of private property. Persons who have abandoned their apartments due to the war have occasionally been prevented to move back or from recovering their personal belongings. The issue of property rights appears particularly important in the light of certain provisions of the Dayton Agreement concerning the establishment of a Refugees and Displaced Persons Property Fund.

Mr. Piotr Przybysz, representative of the Polish Commissioner for Civil Rights Protection, mentioned some interesting precedents in his country, notably those related to victims of Nazism and involuntary displacements due to the war or border changes. But these precedents remain comparatively few in history (compensation to victims of the Gulf War, restitution of property to the Jewish population by Germany and other countries or to deported communities in the former Soviet Union...).

A working paper, written specifically for the training seminar by the International Organization for Migration, was distributed to the participants. Apart from the investigation of historical precedents, it enumerates other elements for consideration when developing compensation programs for Bosnia and Herzegovina, such as : the profile of claimants; types of losses; priorities of claimants; types of compensation; possible legislation; funding arrangements as well as monitoring of program funds.[9]

D) Prisoners of war and other issues of international humanitarian law

The fate of prisoners of war has also attracted the attention of the three Ombudsmen, the main problem being the occasional refusal of the authorities to recognize certain persons as former POWs. As a consequence the civil rights of the concerned persons may be affected. These problems call for a closer cooperation between the Ombudsmen and organizations such as the International Committee of the Red Cross.

Mr. Paul Bonard of the ICRC presented an overview of the status of prisoners of war under the Geneva Conventions and the Protocols Additional. He recalled that - although opinions may differ - the armed conflict in Bosnia-Herzegovina is generally viewed as an internal conflict. Accordingly, the Geneva Convention Relative to the Treatment of Prisoners of War of August 12 1949 may not seem applicable at first glance, since it deals with armed conflicts of an international character. However, in May-June 1992 the concerned parties in Bosnia-Herzegovina concluded three agreements under the auspices of the Red Cross by which they agreed to apply certain provisions of the Geneva Conventions and Protocols Additional in the conflict. On the basis of these and other documents, the ICRC has been able to visit detention centers, issue certificates to POWs, secure family reunification and undertake other actions for the protection of prisoners of war and their relief. Nevertheless, these actions have been hampered by difficulties in distinguishing civilians from combatants and the uncooperative attitude of some combating factions.

4. International cooperation to assist the Ombudsmen

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Thoughts on a Compensation Program for Bosnia and Herzegovina : A Broad Framework, Geneva, International Organization for Migration, 25 September 1995.

A special session of the training seminar was devoted to future cooperation between the three Ombudsmen and relevant international agencies. Present at the meeting were representatives of international organizations (ICRC, UNHCR, European Union, UN Centre for Human Rights, the International Crime Tribunal for Former Yugoslavia) and several non-governmental organizations from the region. The Ombudsmen gave a lively account of concrete and dramatic situations that may occur in the not so distant future, particularly in relation to the return of refugees and the Serbian sector of Sarajevo. All of the participants extended their support to the three Ombudsmen in various ways.

The OSCE will undoubtedly continue to assist the Ombudsmen through its Mission in Sarajevo and the Office for Democratic Institutions and Human Rights. Mr. Roussellier noted that, in addition, the Ombudsmen may consider bringing information on human rights problems to the attention of the participating States through the Permanent Council, the Chairman-in-Office and at Human Dimension Implementation Meetings.

Concerning the modalities of cooperation, the representative of the ICRC considered that it should be based on a two-tier approach. While cooperation should primarily be bilateral, practical, efficient and conducted on a day-to-day basis, this does not necessarily exclude regular meetings between several international organizations and the Ombudsmen. Mr. Bonard added that it would be greatly appreciated if the Ombudsmen could refer missing persons to the International Committee of the Red Cross and assist the organization in identifying such cases.

Mr. Graham T. Blewitt, Deputy Prosecutor of the International Criminal Tribunal for Former Yugoslavia, explained that cooperation will most probably increase following the conclusion of the Dayton Agreement. The Hague Tribunal has several teams which travel throughout the Federation. It would be useful if the Ombudsmen could meet with these teams,

provide them with information and give advise concerning witnesses who are willing to testify before the Tribunal.

Ms. Asmita Naik mentioned that Field Operations for Former Yugoslavia of the UN Centre for Human Rights is able to offer its assistance in several ways. The Special Rapporteur on Former Yugoslavia may raise human rights problems in reports and make personal interventions. Similar procedures exist for the Working Group on Enforced or Involuntary Disappearances. In addition, the High Commissioner for Human Rights is coordinating human rights activities and developing training programs. Field operations also supports the Secretary-General in drafting reports addressed to the Security Council. Other available mechanisms include the Special Rapporteur on Torture and the Rapporteur on Summary or Arbitrary Executions.

Conclusion and recommendations

Theoretical and practical aspects of problems encountered by the Ombudsmen of Bosnia and Herzegovina are, in many respects, radically different from those faced by mediators in countries where peaceful conditions exist. Indeed, it should be remembered that the institution of Ombudsmen in extreme situations is a new phenomena, and that in many fields the mediators of Bosnia and Herzegovina are breaking new ground. The discussions provided a useful starting point for an analysis of mediators in situations of latent or open conflict. It should also be recalled that an important function of the three Ombudsmen is to lay the foundations of democratic society at an early stage. In this manner, they are contributing to the establishment of conditions for a lasting peace in their country.

A number of recommendations based on the discussions of the second training seminar follow below:

The Ombudsmen may consider developing Codes of Conduct and other systems of criteria to secure human rights in fields such as freedom of movement.

It is important that the reports of the Ombudsmen are as detailed as possible, since these reports constitute one of the principal tools of attracting attention to human rights problems - both within and outside the country.[10]

In relation to citizenship issues, the Ombudsmen may refer to international standards and to the recent trends reflected notably in the Draft European Convention on Nationality.

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As one of the participants noted, reports specifying both the quantity and the exact nature of human rights violations may be used by EU-States (partly under pressure of the public opinion and NGOs) to add human rights conditions to the measures under the Second Pillar as well as treaties and measures under the Third Pillar relating to Bosnia-Herzegovina.

Whenever relevant, they may also refer to the "jurisprudence" of the OSCE High Commissioner on National Minorities, i.e. the various recommendations addressed to participating States with respect to citizenship.[11]

It would seem appropriate to develop closer ties between international organizations concerned with the somewhat "gray area" of property rights and compensation. Preliminary contacts have been established between representatives of the ODIHR, IOM, UNHCR and the Compensation Commission of the United Nations.

More generally, there is a need for increased exchange of information and cooperation between international agencies and the three Ombudsmen. The ODIHR welcomes the various proposals made by international organizations and independent actors at the training seminar.

The ODIHR invites the three Ombudsmen to make full use of the network of experts, known as "Friends of the Ombudsmen of Bosnia-Herzegovina", which was established earlier this year. The Ombudsmen may also consider publishing important news concerning their work in the ODIHR Bulletin.

NGO Workshop at the ODIHR's Human Dimension Seminar on Rule of Law 27 November - 1 December 1995

Ms. Elizabeth L. Winship, NGO Liaison Adviser

The ODIHR NGO Liaison Advisor organized and coordinated a Workshop for NGOs that ran parallel to the Human Dimension Seminar on Rule of Law. A core group of twenty representatives from non-governmental organizations concerned with Rule of Law issues was selected from the region (Central and Eastern Europe, the Baltics and the former Soviet Union). A final group of fifteen convened for discussions and presentations prepared especially on their behalf over the course of the week, from 27 November to 1 December. The Workshop, divided into three sessions, served several purposes. First, ODIHR staff provided an in-depth orientation to the philosophy, history, structure and work of the OSCE and ODIHR, including a review of procedures and practice for NGO participation and contributions. Informational materials on the OSCE and ODIHR were distributed and discussed. NGO representatives already familiar with the OSCE shared their experiences and impressions from previous contact with the ODIHR and the OSCE. Next, in a morning session focussed on management issues for NGOs, workshop participants received the English and Russian editions of the Handbook for Helsinki Committees, prepared by the International Helsinki Federation for Human Rights (IHF). The Executive Director of IHF, Dr. Aaron Rhodes, led a review and discussion of the Handbook. Mr. Marek Nowicki, Director of the Polish Helsinki Foundation for Human Rights, provided commentary on the Handbook and offered his own first-hand experiences of running a human rights NGO over the course of a twenty year period, witnessing and coping with political tides that have shifted from the imposition of martial law to the blossoming of a democratic state.

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Although these recommendations are neither politically nor legally binding, they tend to confirm the recent trends in international law concerning citizenship. For further information, see : *Bibliography on the OSCE High Commissioner on National Minorities : Documents, Speeches and Related Publications*, The Hague, Foundation on Inter-Ethnic Relations, August 1995.

Together, Dr. Rhodes and Mr. Nowicki led discussions (in Russian and English) on organizational and management questions of relevance to this particular group of NGOs, all of whom shared their experiences and learned from one another during the workshop. Given the geographical distribution of these NGOs, and the various stages of democratic development in which they find their respective countries, this particular part of the Workshop proved very successful and revealed an obvious need for more exchange of information between NGOs in the various sub-regions (Baltics, Central Asia, Caucasus, etc.).

The third part of the Workshop was the Rule of Law Seminar itself, where these and other NGO representatives - many for the first time- had an opportunity to contribute to discussions formally, in the Discussion Groups, and informally in conversations with OSCE delegates. The Workshop participants assembled on Thursday for a meeting with ODIHR Director Audrey Glover and Rule of Law Advisor Robert Buergenthal to raise again many of the same questions that had been discussed in the earlier Workshop sessions.

All of the participants remarked upon the Workshop's significance and value for their activities. Having benefited from a thorough review of the OSCE, from direct contact with OSCE and ODIHR personnel, and from the managerial/organizational instruction provided by the IHF, these NGO representatives are now in a position to have a greater impact through their work in their own communities and to engage ever more effectively the ODIHR and OSCE on issues of the Human Dimension.

The Open Society East-East Programme generously provided support for the 15 Workshop participants, and has expressed an interest in co-operating with the ODIHR toward the convening of future NGO Workshops of similar nature.

VII. ANNEXES

ANNEX A - Excerpts from the Moderator's Discussion Notes by Mr. Robert Allan McChesney

Selected Rule of Law Provisions in International Law

The Budapest Declaration (1994)

1. "The participating States emphasise that all action by public authorities must be consistent with the rule of law, thus guaranteeing legal security for the individual".

2. "They also emphasise the need for protection of human rights defenders and look forward to the completion and adoption, in the framework of the United Nations of the draft declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms"

European Convention on Human Rights, Article 6

1. In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

International Covenant on Civil and Political Rights, Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order *(ordre public)* or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

f) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

g) To be tried without undue delay;

h) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

I) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

j) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

k) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequent his conviction has been reversed or he has been pardoned on the ground that a new

or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which be has already been finally convicted or acquitted in accordance with the law and penal procedure or each country.

Moderator's Notes on the Discussion Group Themes

1. MODALITIES GOVERNING CONDITIONS FOR AN INDEPENDENT BODY OF LAWYERS.

The existence of an independent body of lawyers is an essential requirement to any practical implementation of the Rule of Law.

In order for such an association to be effective it must have the confidence and respect of its membership, the public and the government. Accordingly conducting their work in a professional manner, accountability, transparency and responsiveness are crucial factors which contribute to the overall success.

Purpose/Core Objective

What should be the purpose and objectives of an association of lawyers?

Legal Provisions (Rights, obligations and legal limitations of association)

What legal provisions are required to guarantee the existence and autonomy of an independent legal profession, and ensure that profession may freely pursue its objectives and provide its individual members with legal protection from arbitrary interference by the state?

Should an independent body of lawyers be self governing and regulating, or should their autonomy be limited, perhaps self limited?

Where should the line be drawn between government interference and regulation?

What should the government's involvement be with regard to protecting the interests of the public, and how should those obligations find expression in regulatory policies?

What laws and internal regulations are required to facilitate independence and professionalism, and should these:

Control the admission to its membership in accordance with qualifying requirements?

Provide ongoing education in order to maintain high standards?

Provide a code, setting out minimum acceptable standards of practice and conduct?

Enforce the code through properly established disciplinary procedure?

Membership Composition

Should membership of an organisation include all practising members of the legal profession? (i.e.; lawyers in independent practice, lawyers in non governmental employment, lawyers in government employment such as judges, prosecutors) If not, why not?

Organizational Models

Which current models of lawyers associations have proven effective and successful?

What is their organizational structure?

What functions do they perform well and why?

Are their views taken into account before the government implements any legislative changes?

In what form do these associations participate in this process of ensuring that the justice system is of high quality and complies with the established human rights standards?

How do they ensure that their members provide a high standard of service to the public?

2. THE ISSUE OF FREE LEGAL AID; INCLUDING ITS POSSIBLE SOURCES, SUCH AS PUBLIC DEFENDERS, LEGAL CLINICS AND NON-GOVERNMENTAL ORGANISATIONS.

Article 6 .3 © of the *European Convention on Human Rights* provides that:

"Every one charged with a criminal offence has the following minimum rights : to defend himself in person or through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require"

Article 11 of the *United Nations "International Bill of Human Rights"* provides that:

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

When an individual comes into conflict with the state, or another individual whether he is charged with a crime or simply fighting for the observance of his civil rights, it is in the interest of justice that both parties before the court be equal. As the state is always represented the individual must be as competently represented.

Although state resources are limited too, in most instances the individual is financially no match against the state and, quite frequently this results in substantial prejudice to the individual and subsequently to public confidence in the rule of law. The provision of free (or supplemented) legal assistance and representation is therefore paramount to maintaining the Rule of Law in a democratic society.

The question of what makes a legal aid scheme successful will depend primarily on the possibilities of forming and allowing the organisation to operate independently. Secondly, success will depend on how the organizational model meets the core objectives, and thirdly the ability to obtain financial support to realise the programmes.

A legal aid scheme s level of transparency affects its credibility. Transparency means that the organisations budgets, statutes etc. are public and that gaining access to these is possible for anyone connected to the organisation, the government and others. Establishing routines for reporting their activities simplifies the organisations work and increases the level of credibility and transparency.

The provision of legal assistance and representation, by its very nature, is costly. The major question is; what model best achieves the necessary balance between the individual and the state in the interest of justice, in a world of limited resources?

There are several possible models functioning in different jurisdictions that we ought to consider :

11. State funded public defenders office
12. Independent lawyers paid by state in accordance with a scale of costs
13. Pro-bono legal representation arranged by lawyer s associations
14. Legal insurance funded in a similar way to medical services (NHS)
15. Legal Profession organised funding such as interest payments from Solicitor s Trust Accounts
16. Law centres, Citizen Advice Bureau
17. A variation or combination of the above.

The above need to be considered in detail bringing into account the following aspects:

18. independence from control and interference by the state
19. method of financial control
20. determination of qualification for aid; means test and merit test
21. appeal procedure against decision
22. value for money and standard of quality of service
23. accountability.

3. ROLE OF LEGAL AND JUDICIAL BODIES IN COMBATING ORGANISED CRIME AND CORRUPTION.

A number of OSCE member states have recently undergone, and may still be undergoing political and economic changes. These changes and more acutely the transition period when these changes are occurring frequently facilitate an environment in which their societies are in danger of becoming victims of organised crime, corruption and new types of economic criminal activities often defined as serious and complex frauds. These criminal activities frequently target major financial institutions, major investors and other important institutions of a free market economy. The seriousness and magnitude of such criminal activity is often very difficult to combat and may significantly effect the stability and very foundation of a fragile political and economic state.

When this occurs there is frequently a tendency by the governments to a *"knee jerk reaction"* resulting in increased police and prosecution powers in order to combat effectively the perceived new threat. These measures can often be at great expense to the newly acquired civil liberties and human rights.

In order to preserve these rights the threat must be met by a balanced approach which takes into account and focuses on the improvement of methodologies used in the administration of the criminal justice system rather than legislating draconian powers which interfere with civil liberties.

OSCE has reiterated the basic principles of Rule of Law as follows : ***"The State must secure law and order while respecting them; the legal examination of its acts must be guaranteed; the judiciary is subject to the law, not the government".***

Rule of Law has been defined as : ***"independence of the judiciary, including judicial review; fair trials, including due process, habeas corpus and defendants rights".***

What provisions have been used successfully in states which have been dealing with these problems?

Are the currently existing organisations capable of dealing with the problem or is there a need for specialisation by police prosecutors and judges?

Before a need to increase investigative powers is considered, what provisions should be considered to guarantee that civil liberties and human rights are protected?

Should the use of increased powers be overseen and controlled by independent judiciary that has no involvement in the investigative process?

Should there be a totally independent organisation established to investigate and prosecute cases of corruption and abuse of power by politicians, government officials and police?

What effective lessons can be learned from the experiences of authorities in jurisdictions where there has been recognised success with particular emphasis on the role played by the judiciary and prosecution services?

Should there be a separation of the investigatory powers from the prosecutory powers and an increase in specialisation?

Should the positions of key officials be considered to determine whether there is an environment in which they can easily be corrupted?

ANNEX B - Index of Documents Distributed During the Seminar

PARTICIPATING STATES

GERMANY	1.	Opening Statement
	2.	"The Establishment of a Constitutional System in the New Lander"
ARMENIA	1.	Constitution of the Republic of Armenia
	2.	The New Judicial System of the Republic of Armenia (Independence of Judiciary)
	3.	"Zakonotvortsheskiy Protsess v Respublike Armeniya"
AZERBAIJAN	1.	"Vstupitelnoye Zayavlienye Delgatsyi Azerbaidjanskoy Respubliki"
	2.	Vystuplieniye Tshlena Azerbaidzhanskoy Respubliki - T. Musayeva; Discussion Group 2, 29/12/1995
	3.	Vystuplieniye Tshlena Azerbaidzhanskoy Respubliki - T. Musayeva; Discussion Group 1, 29/12/1995
SPAIN/ EUROPEAN UNION		"Intervention de la Presidence au Nom de L'UE au Seminaire OSCE sur l'Etat de Droit"
ITALY		"Supremacy of the Constitution and Quasi-Judicial Administration from Rule of Law State to Rights' State" by Antonio Zorzi Giustiniani
LITHUANIA	1.	"Republic of Lithuania Law on the Constitutional Court"
	2.	"Law on Courts of the Republic of Lithuania", 31 May 1994
NORWAY		Opening Statement by the Supreme Court Judge, Trond Dolva
UZBEKISTAN	1.	Verfassung der Republik Usbekistan
	2.	Vystuplieniye Tshlena Delegacyi Respubliki Uzbekistan - Sh. Hakimova
	3.	Vystuplieniye na Plenarnom Zasiedanyi Sh. Hakimova, 1/12/1995
POLAND		Presentation delivered by the Minister of Justice, Mr. Jerzy Jaskiernia, at the inauguration
PORTUGAL	1.	"Les principes de base de l'independence du pouvoir judiciaire au Portugal"
	2.	Constitution de la Republique Portugaise

INTERNATIONAL ORGANISATIONS

COMMISSIONER OF CBSS ON DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, INCLUDING THE RIGHTS OF PERSONS BELONGING TO MINORITIES

1. "Legal Training and Assistance Programmes in the Baltic Sea Region Countries (Estonia, Latvia, Lithuania, Poland, Russia) sponsored by the Council of Europe and the European Commission (1994-1995)"

2. Contribution of the Office of the Comissioner on Democratic Institutions and Human Rights, including the Rights of Persons belonging to Minorities, to the Process the Rule of Law in the Council of the Baltic Sea States Area

COUNCIL OF EUROPE

1. "Independence, Efficiency and Role of Judges"; Recommendation No. R (94) 12 and explanatory memorandum

2. "Le Conseil de l'Europe et la Preeminence du Droit" by Marie-Odile Wiederkehr; Conference d'Examen de la CSCE, Budapest 10/10-02/12/1994

NON-GOVERNMENTAL ORGANISATIONS

CROATIAN LAW CENTER

"Croatian Law Center: Activities 1995-96"

HUMANITARIAN LAW CENTER

1. Leaflet
2. "Political Trials"
3. Document about the massive conscription by force of refugees in Serbia.
4. "Spotlight on Human Rights Violations in Times of Armed Conflict", Belgrade 1995
5. Spotlight Report No 16 - "Kosovo Albanians II", February 1995
6. Spotlight Report No 17 - "The Trial of General Trifunovic", March 1995
7. Spotlight Report No 18 - "The Conscription of Refugees in Serbia"
8. Spotlight Report No 19 - "The Trial of General Trifunovic II", June 1995
9. Spotlight Report No 20 - "Kosovo Albanians II", October 1995

KYRGYZ-AMERICAN BUREAU ON HUMAN RIGHTS AND RULE OF LAW

"Towards Global Human Rights" by Natalia Ablova; 10 September 1995

LATVIAN HUMAN RIGHTS COMMITTEE

"On Human Rights in Latvia"

SOROS HUMANITARIAN FOUNDATION

"Exposition of the Proposed Statute of the Croatian Legal Center"

OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

1. "Food for Thought" by Moderator of DG 1 - Per Tresselt
2. "Food for Thought" by Moderator of DG 2 - Jerry Prus-Butwilowicz
3. "Etat de Droit et independance du pouvoir judiciaire" by Marie-Odile Wiederkehr, Directrice Adjointe des Affaires Juridiques (Keynote speech)
4. "The Rule of Law" by Godert W. Maas Geesteranus (Keynote speech)
5. Seminar on Drafting of Human Rights Legislation - Consolidated Summary; Ashgabat, 19-21 September 1995
6. Implementation Meeting on Human Dimension Issues - Consolidated Summary; Warsaw, 2-19 October 1995
7. Human Dimension Seminar on the Rule of Law - Selected Materials
8. Provisional List of Participants as of 28 November 1995.
9. List of Participants
10. Rapporteur's Report of Discussion Group 1 - "The Constitutional Foundation" by Matthias Weckerling
11. Rapporteur's Report of Discussion Group 2 - "Implementation & Practical Measures" by Robert Allan McChesney
12. Annex A to Rapporteur's Report of Discussion Group 2 - "Implementation & Practical Measures" by Robert Allan McChesney