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SUPPLEMENTARY MEETING

ROLE OF DEFENCE LAWYERS IN GUARANTEEING A FAIR TRIAL

Final Report

Tbilisi, 3 – 4 November 2005

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I. EXECUTIVE SUMMARY

The Supplementary Human Dimension Implementation Meeting (SHDM) was held in Tbilisi, Georgia on 3-4 November 2005, on "The Role of Defence Lawyers in Guaranteeing a Fair Trial." This was the first SHDM ever held outside of Vienna. It was attended by over 270 participants, which included over 200 non-governmental representatives, most of whom were practicing defence lawyers in their own countries. Present were 24 governmental delegations. Seventeen of these included diplomatic representatives, five of which were from their respective diplomatic missions in Tbilisi. In addition to this vibrant participation, there was also a distinguished group of Introducers and a Keynote Speaker. Included in the Appendix of this Report are the text of the Keynote Speech, text and summaries of introductions given in each Session, and biographies of the Introducers and the Keynote Speaker.

This was the first time the OSCE had held a Supplementary Human Dimension Meeting devoted to the topic of defence lawyers. This meeting successfully acknowledged the fundamentally important role of defence lawyers in criminal proceedings. There was lively discussion throughout the meeting and a series of recommendations were made. The Meeting was divided into three Sessions: Access to Legal Counsel; Admission to and Regulation of the Bar; and Equality of Parties in Criminal Proceedings.

Discussions in Session One on Access to Legal Counsel focused on the fact that in many participating States those who are arrested or detained do not have easy or quick access to a lawyer and often have no access to legal counsel at all. This situation is prevalent often despite guarantees to the contrary existing in law. Individual examples were given by numerous speakers of the consequences when those arrested or detained are denied access to a lawyer. These included instances of ill treatment and torture in addition to denial of a fair trial, as defendants without legal training or background are inadequately prepared to represent themselves in court.

Issues that influence the quality of legal services include whether or not lawyers are paid adequately to handle cases where the state is paying the legal fees because the defendant is unable to afford a lawyer. There was much discussion on different models of providing legal aid and their relative advantages and disadvantages. The related problem of incompetent defence counsel or those who collude with the police and prosecution was also discussed.

Many participants discussed the fact that they are often unable to have confidential conversations with their clients. Talking in private to one's lawyer is a fundamental right and one that affects the lawyer's ability to competently represent their client. In some participating States the physical facilities in many detention centres preclude the possibility of confidential communications. Often there are no separate interview rooms so conversations take place in the presence of police and prosecutors. Another serious problem discussed was breaches of confidentiality due to direct acts by the government. Some participants discussed instances when conversations between lawyers and their clients were subjected to electronic surveillance.

A related problem impacting on the right to legal counsel is when lawyers have to petition the police or the prosecution for permission to see their clients. This presents serious structural impediments to the right to legal counsel as it delays when lawyers can see their clients and often has the effect of preventing these meetings from taking place at all.

Session II was devoted to Admission to and Regulation of the Bar and discussed a range of complex issues and challenges that lawyers and policy makers confront in reform of the legal profession. Many of the participants discussed the need for a bar which is independent, particularly from state control.

It was pointed out that many participating States suffer from a shortage of defence lawyers who can represent clients in criminal cases. This shortage can in some instances be traced to the absence of an open, transparent and fair procedure for bar admission, resulting in few new lawyers being admitted to practice. The participants discussed some of the problems contributing to overly restrictive bar admission procedures including nepotism, the desire to limit competition, and discriminatory practices. In some participating States limiting these excesses can be difficult if bar admission is left entirely to the discretion of the bar. The participants therefore noted the strong public interest in ensuring fair, objective, transparent and non-discriminatory bar admission policies.

The role of bar associations was also discussed. One important function of the bar identified by many of the participants was that of defending individual lawyers from pressure and persecution by the authorities, particularly when lawyers are handling politically unpopular cases. Another important function of the bar is maintaining high professional standards among its members. Participants discussed how this can be done through rules of professional ethics and conduct and through disciplinary procedures. Also discussed was the need for continuing legal education for all lawyers and the need to assist young lawyers in developing their skills.

Session III dealt with Equality of Parties in Criminal Proceedings. Discussions during this Session focused on practical problems that defence lawyers face, as well as laws which are unequal to the defence and in favour of the prosecution. The participants discussed restraints on lawyers during the pre-trial stage of proceedings including the fact that in parts of the OSCE region lawyers are prevented from investigating a case on behalf of their client, or arranging for independent forensic expertise. They are required under the law to rely only on what is presented by the police and prosecuting agencies.

Some participating States still allow the prosecutor to decide if a person should remain in custody. Participants noted many illegal results from this practice including increased instances of ill treatment, pressure to confess, and torture. Transferring the power to authorize arrest to the judiciary was discussed as an element of reform needed to improve equality of parties in criminal proceedings.

Under law in virtually all participating States, defence lawyers have the right to access court files and prosecution files. This right is often restricted, with the reason given that there are no facilities for lawyers to read the files or make copies, or by limiting the amount of time a defence lawyer may spend reviewing the documents in a particular file.

During the trial itself defence lawyers are often unable to present evidence in the same manner as the prosecution, and they are often treated fundamentally differently. Many participants noted the close social relationship between judges and prosecutors, which contributes to favouritism in court towards the prosecutors. Participants discussed how defendants are treated in court and the impact this has on fundamental principles such as the presumption of innocence. One example given was the use of a cage in many courtrooms, obliging defendants to sit in this restricted area. The impact of the use of the cage is that visually it makes the defendant appear guilty and dangerous, thus eroding presumption of innocence, and it also prevents lawyers having free communication with their clients in court. The participants discussed the value of limiting the use of restraining devices on defendants (such as the cage, handcuffs or other visible restraints) only to instances in which the court makes a finding that the particular defendant poses a particular risk.

The participants also noted that the type of trial record-keeping system has a serious impact on the equality of the proceedings. In many participating States the court record is maintained by handwritten notes made by a court secretary. Participants discussed the value of electronic and verbatim recording to ensure an accurate and unbiased record of court proceedings. This is particularly important for the record on appeal so that it is not slanted towards the view of the prosecution or the judge, but rather is an accurate record of the actual proceedings.

The participants also discussed the fact that achieving equality between the parties can be more difficult in politically unpopular cases including cases of alleged terrorism.

The SHDM resulted in a number of recommendations.

II. RECOMMENDATIONS

Recommendations to the OSCE participating States:

- Ensure that existing legislation providing for the right of access to legal counsel is effectively implemented in practice. This should include, where laws exist, prosecution for illegally denying lawyers' access to their clients.

- Create or encourage the creation of monitoring institutions including NGOs and civil society to ensure adherence to the right of access to legal counsel in practice.

- Ensure that defence lawyers are adequately paid for their services when they are rendered as mandatory appointed counsel or as a part of a legal aid programme.

- Ensure that defence lawyers serve their clients without inappropriate pressure or intimidation from governmental authorities.

- Ensure that lawyers' communication with their clients is confidential and in complete privacy.

- Ensure that the personal security of lawyers is not compromised by searches, investigations, interrogations or prosecution for crimes due to their actions in representing a client in a particular case.

- Ensure that fair and transparent procedures exist to investigate and sanction misconduct by defence lawyers including failure to provide competent and ethical legal assistance.

- Consider adopting legislation to require that all questioning of suspects in serious cases is either audio tape recorded or videotaped.

- Those OSCE participating States that do not currently have *habeas corpus* legislation providing for judicial authorization and review of arrest and detention should adopt it, and those that do should ensure its full implementation.

- Ensure that admission to the legal practice is transparent, free of nepotism and corruption, and based on objective and fair criteria. Accordingly, introduce examinations that objectively test the professional knowledge and skills of the prospective lawyers.

- Ensure that admission to the legal practice is non-discriminatory and on an equal footing. In particular, States that have special provisions allowing former judges, prosecutors, and law enforcement officers to become defence lawyers on a privileged basis should ensure that these individuals are admitted to practice on an equal footing with other qualified candidates.

- Create favourable conditions and provide assistance to bar associations in organizing legal education and training programmes to ensure lawyers receive adequate initial and continuing training and regular upgrading of their professional knowledge.

- Ensure that disciplinary bodies for the legal profession are independent and free from political interference. Ensure also that lawyers against whom disciplinary action is taken have recourse to judicial review.

- Ensure a balanced regulation of the legal profession which takes into account public interests and the independence of the bar.

- Take special note of the principles embodied in Recommendation (2000) 21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer.

- Introduce objective quality standards and monitoring mechanisms for the lawyers who provide services to criminal defendants by appointment or through a legal aid programme.

- Take steps to ensure favourable conditions and create special incentives for lawyers practicing in rural areas and other areas where lawyers are in short supply.

- Ensure that legislative and, where appropriate, financial provisions are made equal for defence lawyers in order to enable them to gather evidence, including retaining independent forensic and investigatory expertise, thereby ensuring the equality of parties during the investigation and ultimately during the trial.

- Ensure that the defence is given unimpeded access to all available evidence and information held by the prosecuting or police authorities at the earliest possible stage during the proceedings.

- Ensure that there are mechanisms for complaints against prosecutors allowing for the fair adjudication of alleged violations of legal or disciplinary provisions by prosecutors.

- Ensure finality of criminal proceedings, including that appeals of acquittals are not permitted other than exceptionally in order to prevent gross procedural violations. Prosecutors who fail to adequately prepare the case for trial resulting in an acquittal should not be given the opportunity to try again. Criminal procedure should ensure that prosecutors have the same burden as the defence in preparing each case in a competent and comprehensive fashion at the earliest practicable stage.

- Ensure that presumption of innocence is protected particularly through the treatment of the defendant in court. Specifically, the practice of placing defendants who present no security risk in cages or subjecting them to other physical restraints should be reconsidered, requiring instead a

specific finding by the court that the particular defendant poses a particular risk prior to the use of any physical restraints in court.

- Ensure transparent, unbiased, and accurate record-keeping of trial proceedings through the use of modern verbatim transcript technologies or electronic recording.

- Ensure that legal aid is extended to all cases involving any form of detention or deprivation of liberty, including, as applicable, administrative or disciplinary matters specifically and especially those administrative cases involving persons in detention.

Recommendations to the OSCE, its Institutions and Field Missions:

- The OSCE should assist the participating States in developing indicators to monitor the implementation of *habeas corpus* legislation.

- The OSCE should facilitate exchange of best practices among the participating States in regulation of the legal profession, including admission to the legal practice, disciplinary procedures, and continuing education and training for lawyers.

- The OSCE should develop recommendations to the participating States on regulation of the legal profession, taking into account the need for independent bar associations and balancing them with public interest of access to affordable legal services.

- The OSCE should monitor and address instances of persecution of lawyers by the authorities related to their performance of professional duties.

- The OSCE should provide or facilitate training to assist the participating States in the implementation of new or improved criminal procedural legislation.

- The OSCE should provide assistance to improve legislation allowing lawyers to gather evidence in criminal proceedings.

- The OSCE/ODIHR should provide assistance in the assessment and improvement of criminal procedural legislation where necessary.

- The OSCE/ODIHR should provide assistance in the area of trial monitoring by providing practical information and exchange of best practices including compiling a guide to assist in the improvement of trial monitoring programmes in compliance with the OSCE commitments.

- The OSCE/ODIHR should provide assistance, as requested, to the participating States in legislative reform aimed at providing better protection for clients and access to legal counsel.

- The OSCE should avoid scheduling future Human Dimension Meetings on dates coinciding with major religious holidays.

III. SUMMARIES AND OUTCOME OF THE SESSIONS

Session I: Access to Legal Counsel

Moderator: Ms. Cynthia Alkon, Head of the ODIHR Rule of Law Unit

Introducers: Mr. Michael Judge, Head of the Public Defender Office in Los Angeles County, USA
Mr. Daniyar Kanafin, Lawyer, Kazakhstan

The reports from the introducers provided examples of one model of legal aid from the United States, specifically from the Los Angeles County Public Defender's Office, and discussed some of the concerns and constraints on the right to legal counsel using the example of Kazakhstan. The discussions during this working session identified four major problems relating to access to legal counsel that exist in some OSCE participating States.

Firstly, individual lawyers and NGOs reported that despite domestic legislation and international obligations guaranteeing the right of access to lawyers, this right is not respected in practice. It was noted by various speakers that immediate access to legal counsel in criminal proceedings is the single most effective preventative measure against ill treatment and torture.

Secondly, participants discussed the issues of lawyers' remuneration, independence and qualification. Without adequate pay lawyers have little incentive to provide high-quality legal services and are not in a position to properly prepare their cases. Regarding the independence of lawyers, individual speakers referred to instances where lawyers appeared to be acting under instructions from government officials, such as police officers, rather than their clients.

Thirdly, individual speakers reported that lawyer-client communications are routinely not conducted in private. Specific examples of inadequate interview facilities were discussed, such as when lawyer-client meetings are conducted in rooms with prison staff, police or prosecutors present and able to overhear conversations. Of even greater concern were examples of wiretapping of confidential communications between lawyers and their clients.

Fourthly, lawyers' personal security was discussed. Speakers referred to cases where lawyers' offices were searched and where lawyers were investigated and prosecuted following the representation of particularly controversial clients.

The following specific recommendations were made in Session I:

Recommendations to the OSCE participating States:

- Ensure that existing legislation providing for the right to access legal counsel is effectively implemented in practice. This should include, where laws exist, prosecution for illegally denying lawyers' access to their clients.

- Create or encourage the creation of monitoring institutions including NGOs and civil society to ensure adherence to the right of access to legal counsel in practice.

- Ensure that defence lawyers are adequately paid for their services when they are rendered as mandatory appointed counsel or as a part of a legal aid programme.

- Ensure that defence lawyers are able to serve their clients without inappropriate pressure or intimidation from governmental authorities.

- Ensure that lawyers' communication with their clients is confidential and in complete privacy.

- Ensure that the personal security of lawyers is not compromised by searches, investigations, interrogations or prosecution due to their actions representing a client in a particular case.

- Ensure that fair and transparent procedures exist to investigate and sanction misconduct by defence lawyers including failure to provide competent and ethical legal assistance.

- Consider adopting legislation to require that all questioning of suspects in serious cases is electronically recorded or videotaped.

- The OSCE participating States that do not currently have *habeas corpus* legislation providing for judicial authorization and review of arrest and detention should adopt it, and those that do should ensure its full implementation.

<u>Recommendations to the OSCE, its Institutions and Field Missions:</u>

- The OSCE/ODIHR should provide assistance in the area of trial monitoring by providing practical information and exchange of best practices including compiling a guide to assist in the improvement of trial monitoring programmes in compliance with the OSCE commitments.

- The OSCE/ODIHR should provide assistance, as requested, to the participating States in legislative reform aimed at providing better protection for clients and access to legal counsel.

- The OSCE should assist in developing indicators to monitor the implementation of *habeas corpus* legislation.

- The OSCE should avoid scheduling future Human Dimension Meetings on dates coinciding with major religious holidays.

Session II: Admission to and Regulation of the Bar

Moderator: Ms. Cynthia Alkon, Head of the ODIHR Rule of Law Unit

Introducers: Mr. Leonard Cyrson, Lawyer, Partner of Advocate Office, Poland
Dr. Margarete von Galen, Lawyer, Chair of the Berlin Bar, Germany

Discussions in Session II demonstrated the complexities and challenges faced by the lawyers and by the policy makers involved in reform of the legal profession.

The reports from introducers gave an overview of the bar structure and admission procedures in Germany and Poland. The reports also highlighted the main issues to be considered when regulating and reforming the bar. What transpired as particularly important was the issue of retention of the independence of the bar, in particular, from State control.

Subsequent reports from the floor highlighted the need for a strong and independent bar association. Speakers from several countries, including the Russian Federation and Uzbekistan, cited instances of intimidation and pressure that outspoken defence lawyers may face. They emphasized the need for stronger support first of all from their peers in the legal community. Defending individual lawyers from pressure and persecution by the authorities was mentioned as one of the main goals of the bar.

Another important function of the bar discussed in the Session was maintaining high professional standards among its members. In this regard, several speakers highlighted that this should be achieved through instituting rules of professional ethics and conduct, and policing them through disciplinary procedures. Other speakers also emphasized the need for an effort by the bar to ensure continuing legal education for all its members. Developing the professional skills of young lawyers was deemed particularly important. Recommendations to that effect were made to the bar associations of the participating States.

Issues of admission to legal practice were the subject of a particularly lively debate. Several speakers expressed concern over excessive State involvement in admission to the practice of law and advocated for the bar's complete independence in deciding who should join its ranks. Others, however, pointed to the fact that leaving admissions entirely to the discretion of the bar may lead to nepotism, corruption, and discriminatory admission. They emphasized both the public interest in having access to legal assistance and the interest of qualified young lawyers in joining the profession on a non-discriminatory basis. A recommendation was made to the participating States to balance these interests in regulating admission procedures and to ensure transparent admission based on objective and fair criteria.

Frequent calls from the floor were also made to the lawyers themselves to be more active and engaged in the issues related to their professional activities, including the independence of the bar and the adoption of legislation ensuring fair trial guarantees.

The following specific recommendations were made in Session II:

Recommendations to the OSCE participating States:

- Ensure that admission to the legal practice is transparent, free of nepotism and corruption, and based on objective and fair criteria. Accordingly, introduce examinations that objectively test the professional knowledge and skills of the prospective lawyers.

- Ensure that admission to the legal practice is non-discriminatory and on an equal footing. In particular, States that have special provisions allowing former judges, prosecutors, and law enforcement officers to become defence lawyers on a privileged basis, should repeal these provisions and ensure that these individuals are admitted to practice on an equal footing with other qualified candidates.

- Create favourable conditions and provide assistance to bar associations in organizing legal education and training programmes to ensure lawyers receive adequate initial and continuing training and regular upgrading of their professional knowledge.

- Ensure that disciplinary bodies for the legal profession are independent and free from political interference. Ensure also that lawyers against whom disciplinary action is taken have recourse to judicial review.

- Ensure balanced regulation of the legal profession that takes into account public interests and independence of the bar.

- Take special note of the principles embodied in Recommendation (2000) 21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer.

- Introduce objective quality standards and monitoring mechanisms for the lawyers who provide services to criminal defendants by appointment or through a legal aid programme.

- Take steps to ensure favourable conditions and create special incentives for lawyers practicing in rural areas and other areas where lawyers are in short supply.

Recommendations to the OSCE, its Institutions and Field Missions:

- The OSCE should facilitate exchange of best practices among the participating States in regulation of the legal profession, including admission to the legal practice, disciplinary procedures, and continuing education and training for lawyers.

- The OSCE should develop recommendations to the participating States on regulation of the legal profession, taking into account the need for independent bar associations and balancing them with public interest of access to affordable legal services.

- The OSCE should monitor and address instances of persecution of lawyers by the authorities related to their performance of professional duties.

Session III: Equality of Parties in Criminal Proceedings

Moderator: Ms. Cynthia Alkon, Head of the ODIHR Rule of Law Unit

Introducers: Ms. Louise Christian, Lawyer, United Kingdom
Mr. Yuri Schmidt, Lawyer, Russian Federation

This session began with introductions from prominent lawyers from the United Kingdom and the Russian Federation who discussed the challenges faced by defence lawyers in the face of inequality between the parties in criminal proceedings. Discussions were very wide-ranging, from the rights of victims, the role of prosecutors, and provision of legal aid to the politically motivated persecution of lawyers against the background of several different systems. However, several consistent lines emerged.

First, participants discussed the difficulties faced by defence lawyers when they are prevented under law from investigating cases independently on behalf of their clients, including lack of access to independent forensic expertise. Many participants discussed the problem of being forced to rely on inadequate investigation by the police who fail to look for exonerating evidence on behalf of their clients. Also discussed was the problem of only having access to court-appointed state forensic experts who are often not impartial in their approach or their findings. Participants discussed the need to change laws responsible for these restrictions, expand the rights of defence lawyers to gather evidence, and to ensure that the State provides adequate funding so that all defendants who need independent investigation or forensic expertise are able to get it. This was discussed in the context of being a prerequisite to a fair trial as access to independent investigation and forensic expertise are crucial elements in trial preparation.

Also discussed was the dependency of fairness of trials not only on what is in the law but also on how fairly the parties are treated in criminal proceedings. If individual prosecutors are unfair, the defence lawyer's job is made doubly difficult. This problem is compounded by serious a systemic imbalance in many participating States. One example given by several participants is the continuing supervisory role of prosecutors in determining whether an individual remains in custody. There are still countries in the OSCE region that have not yet transferred the power to authorize arrest and detention in custody to the judiciary. Participants stressed the inherent unfairness of prosecutors retaining this extraordinary power, as well as the fact that this does not comply with relevant international provisions.

The role of prosecutors in ensuring fairness was repeatedly stressed. The systemic encouragement of excessive closeness between the judicial and prosecutorial authorities was discussed. Similarly, the excessive closeness of the executive and judicial branches in many participating States was noted. The practice in some participating States of prosecutors conferring with judges during their deliberations was severely criticized. In addition, violations by prosecutors of

procedural legislation often go unaddressed and unpunished. The need for appropriate regulation of prosecutors was stressed by several participants as well as the need to change the culture of impunity that allows them to violate the law without any consequences.

The practice of placing accused persons in cages or placing them under any visible restraint (such as handcuffs) was criticized as eroding the presumption of innocence. Such restraints create a clear visual implication that the person is either dangerous or culpable, or both. Some systems do not permit such practices except when there has been a finding by the court that it is necessary due to a particular defendant posing a particular risk.

There was some debate concerning defendants' access to and choice of their counsel when they are indigent and therefore cannot afford to hire a lawyer and are dependent on the state appointing a lawyer. One view was that a well-regulated criminal defence service, such as a public defender office, ensures proper representation. Another view taken was that properly regulated private lawyers funded by legal aid agencies can provide excellent services. All participants agreed on the need for some form of monitoring of the performance of advocates to ensure that clients receive a competent defence.

The interdependency of all parts of the criminal justice system was apparent including the police, judiciary, prosecutors and defence lawyers. Participants emphasized that no meaningful reform of one part of the system can take place without the involvement and co-operation of the other branches.

The following specific recommendations were made in Session III:

Recommendations to the OSCE participating States:

- Ensure that legislative and, where appropriate, financial provisions are made equal for defence lawyers to enable them to gather evidence, including retaining independent forensic and investigatory expertise, thereby ensuring the equality of parties during the investigation and ultimately during the trial.

- Ensure that the defence is given unimpeded access to all available evidence and information held by the prosecuting or police authorities at the earliest possible stage during the proceedings.

- Ensure that there are mechanisms for complaints against prosecutors, allowing for the fair adjudication of alleged violations of procedural legislation by prosecutors.

- Ensure finality of criminal proceedings, including that appeals of acquittals are not permitted other exceptionally in order to prevent gross procedural violations. Prosecutors who fail to adequately prepare the case for the trial resulting in an acquittal should not be given the opportunity to try again. Criminal procedures should ensure that prosecutors have the same burden as the defence in preparing each case in a competent and complete fashion at the earliest practicable stage.

- Ensure that presumption of innocence is protected particularly through the treatment of the defendant in court. Specifically, the practice of placing defendants who present no security risk in cages or subjecting them to other physical restraints should be reconsidered requiring instead a specific finding by the court that the particular defendant poses a particular risk prior to the use of any physical restraints in court.

- Ensure transparent, unbiased, and accurate record-keeping of trial proceedings through the use of modern verbatim transcript technologies or electronic recording.

- Adhere to the existing OSCE commitments as well as other international standards concerning the role of prosecutors. Those systems which still allow the prosecuting body the power to arrest and authorise continuing detention should transfer those powers to the judiciary in accordance with the relevant international standards.

- Ensure that access to legal counsel is provided in all cases involving any form of detention or deprivation of liberty, including as applicable administrative or disciplinary matters.

- Ensure that lawyer-client communications are conducted with complete confidentiality and privacy.

<u>Recommendations to the OSCE, its Institutions and Field Missions:</u>

- The OSCE should monitor States' compliance with their freely undertaken human rights commitments.

- The OSCE should provide or facilitate training to assist the participating States in the implementation of new or improved criminal procedural legislation.

- The OSCE should provide assistance to improve legislation allowing lawyers to gather evidence in criminal proceedings.

- The OSCE/ODIHR should provide assistance in the assessment and improvement of criminal procedural legislation where necessary.

ANNEX I AGENDA

OSCE
SUPPLEMENTARY
M E E T I N G

SUPPLEMENTARY HUMAN DIMENSION MEETING

"ROLE OF DEFENCE LAWYERS IN GUARANTEEING A FAIR TRIAL"

3-4 NOVEMBER 2005
TBILISI, GEORGIA

AGENDA

Day 1 **Thursday, 3 November 2005**

09:00 - 09:45 **Opening Session:**

Opening remarks:
Representative of the Host Country:
Mr. Gela Bezhuashvili, Minister of Foreign Affairs
Mr. Konstantine Kemularia, Minister of Justice

A representative of the OSCE Chairmanship
Amb. Jozica Puhar, Ambassador to Georgia, Head of the Delegation of the Slovenian Chairmanship

OSCE/ ODIHR Director
Amb. Christian Strohal

Keynote speech:
Sir Sydney Kentridge, QC (United Kingdom)

Technical information by the OSCE/ODIHR

09:45 - 10:00 Break

10.00 - 13.00 Session I: Access to Legal Counsel

Introductory speeches:
Mr. Michael Judge (United States of America)
Mr. Daniyar Kanafin (Kazakhstan)

Moderator: ***Ms. Cynthia Alkon (ODIHR)***

Discussion

13:00 - 15:00 Lunch

15.00 - 18.00 Session II: Admission to and Regulation of the Bar

Introductory speeches:

Dr. Margarete von Galen (Germany)
Mr. Leonard Cyrson (Poland)

Moderator: ***Ms. Cynthia Alkon (ODIHR)***

Discussion

18:30 Reception offered by the Host Country

Day 2 Friday, 4 November 2005

10.00 - 13.00 Session III: Equality of Parties in Criminal Proceedings

Introductory speeches:

Ms. Louise Christian (United Kingdom)
Mr. Yury M. Schmidt (Russia)

Moderator: ***Ms. Cynthia Alkon (ODIHR)***

Discussion

13.00 - 14.00 Break

14.00- 15.00 CLOSING PLENARY

Reports by the Working Session Rapporteurs
Comments from the floor

15.00 Close of Day 2

ANNEX II ANNOTATED AGENDA

OSCE
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SUPPLEMENTARY HUMAN DIMENSION MEETING

"ROLE OF DEFENCE LAWYERS IN GUARANTEEING A FAIR TRIAL"

3-4 November 2005
Tbilisi, Georgia

ANNOTATED AGENDA

OVERVIEW

Defence lawyers play a vital role in ensuring the right to a fair trial. Access to legal counsel is one of key fair trial guarantees which is recognized in international human rights law and reiterated in the OSCE commitments. The Vienna Document (1989) reaffirms the commitment of the participating States to the right to a fair and public hearing, including "the right to present legal arguments and to be represented by the legal counsel of one's choice" (para 13.9). The Copenhagen Document (1990) adds that "any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require" (para 5.17).

The UN Basic Principles on the Role of Lawyers (1990) emphasize the importance of the right to access lawyers and legal services, the special safeguards that should exist in criminal cases, and the need to guarantee both training for lawyers and open, non-discriminatory admission to the practice of law.

Availability of lawyers may be viewed as a "threshold" indicator of fair trial standards. A recent study by the Council of Europe's Commission for the Efficiency of Justice reveals that there are States in the OSCE area where fewer than 4 lawyers per 10,000 of the population are admitted to legal practice. This contrasts with an average of 10 lawyers per 10,000 for European Union countries in the same survey. Low numbers of lawyers is rightfully recognized as a problem in some countries and efforts are underway to reform admission to the bar to expand bar membership.

Access to legal counsel must be ensured by appropriate procedural safeguards. Fair trial guarantees apply to all stages of the criminal procedure, not just the court hearing per se. Defence lawyers in many OSCE participating States face obstacles and constraints that inhibit their ability to effectively defend their clients

and ensure that they get a fair trial. Equality of arms of the prosecution and defence is still merely a declaration of intent in some OSCE States, rather than a principle of criminal procedure embodied in appropriate legislative measures and practice.

The meeting will focus on three main areas:

- Access to Legal Counsel

- Admission to and Regulation of the Bar

- Equality of Parties in Criminal Proceedings

Recommendations may be addressed to the OSCE as a whole, the participating States, OSCE institutions including the Office for Democratic Institutions and Human Rights and to the OSCE field operations.

THURSDAY, 3 NOVEMBER

10:00 – 13:00	**SESSION ONE**

Access to Legal Counsel

Right to legal counsel is a recognized fair trial guarantee that may be found in legislation of nearly all OSCE States. However, the practical implementation of this right varies, as does the role of defence lawyers at the pre-trial stage of criminal proceedings.

Early access to legal advice in the course of criminal proceedings serves as a preventative measure against illegal treatment and forced confessions. Defence lawyers are often the first to learn about instances of forced confessions obtained through illegal treatment or torture. Their professionalism is essential to the effectiveness of redress for victims and prosecution of perpetrators.

Possible discussion topics for this session:

- Access to a lawyer after arrest or detention and at all stages of criminal proceedings: in law and in practice. Does the legal framework in the OSCE participating States adequately protect this right? Are there problems in practice that deviate from the right guaranteed under law?

- Access to clients by the lawyers and confidentiality of lawyer-client communications. Do defence lawyers have access to their clients at early stages? If a client is in custody, are there adequate safeguards to ensure for lawyer-client meetings to be conducted in privacy? Is the confidentiality of lawyer files and lawyer-client communication protected adequately under law and in practice in the OSCE participating States?

- State interference and restrictions on the right to legal counsel. How can OSCE participating States balance the right to legal counsel with security concerns? Are there OSCE participating States where the legal framework is

insufficient, favouring investigators and the investigative process at the expense of the right to legal counsel?

- Access to legal counsel for the indigent and provision of legal aid. What models are participating States using to ensure indigent citizens' right to legal counsel, particularly in criminal cases?

15:00 - 18:00	**SESSION TWO**

Admission to and Regulation of the Bar

A strong well-functioning bar is more than an important institution of the legal system – it is an influential element of a democratic society. The bar not only upholds high professional standards for its members but also frequently acts as a lobbyist for positive change and provides an independent corrective to proposals for legislation that may compromise international human rights standards.

Bar reform issues are intrinsically intertwined with access to legal counsel and other fair trial guarantees.

Possible discussion topics for this session:

- How to ensure transparent merit-based admission to the bar? In countries with low numbers of practicing lawyers, the problem is often not the lack of law graduates but rather an overly restrictive bar admission procedure that makes it difficult for new lawyers to be admitted to practice based solely on merit. Discussion may also include bar examination models that help to ensure that the process of admission to the bar is transparent and based on merit, not connections or corruption.

- Structure of the bar and forms of legal practice. How are bar associations structured in the participating States? Do these structures create undue restrictions on legal practice?

- Independence and governance of the bar. An independent bar is an essential element to guaranteeing the right the counsel. What are the various working models for independent bar associations in the participating States? How is independence of the bar ensured? How do independent bar associations act to protect the rights of defence lawyers?

- Training and continuing legal education. For lawyers to provide competent legal assistance, they must regularly update their knowledge. How is this ensured in the participating States? How can training and continuing education be improved and made more widely available?

- Professional ethics and disciplinary procedures. How are professional ethics standards set? How are lawyers who fail to meet those standards disciplined? What disciplinary procedures are in place that guarantee the independence of the bar, ensure that lawyers adhere to high professional standards, and protect against targeting lawyers who are outspoken on behalf of their clients?

FRIDAY, 4 NOVEMBER

10:00 – 13:00	**SESSION THREE**

Equality of Parties in Criminal Proceedings

Equality of arms between the prosecution and defence is a fundamental principle for a fair trial. This principle dictates that defence should be in an equal position with the prosecution in criminal trials. In some States of the OSCE area this principle is merely a declaration. Defence lawyers have limited rights and sometimes cannot perform their duties because of interference or harassment.

Possible discussion topics for this session:

- Role of defence lawyers at the pre-trial stages of proceedings. Are there OSCE participating States where the legal framework needs to be improved to strengthen the role of defence lawyers during pre-trial proceedings to insure they are able to adequately represent their clients' interests at all stages of the criminal process?

- Access to the prosecution's files. Both in law and in practice, do defence lawyers have the right to access the files of the prosecution to ensure access to all information gathered by the state against their client?

- Rights of defence lawyers vis-à-vis gathering and presentation of evidence. Can defence lawyers gather evidence and investigate cases for their clients? Are defence lawyers limited in their ability to present evidence in court on behalf of their clients?

- Equality of arms during the trial. Does the legislative framework adequately guarantee that the defence and prosecution are treated equally during trial? If the legislative framework is sufficient, how do the OSCE participating States guarantee the protection of this principle in practice?

ANNEX III: OPENING REMARKS OF AMBASSADOR MS. JOŽICA PUHAR

(on behalf of the OSCE Chairman-in-Office Dr Dimitrij Rupel)

PC.SHDM.DEL/41/05
3 November 2005

OPENING ADDRESS

ENGLISH only

OSCE Supplementary Human Dimension Meeting
"Role of Defence Lawyers in Guaranteeing a Fair Trial"

3-4 November 2005-10-30
Tbilisi, Georgia

Dear Ministers,
Director of the ODIHR,
Ladies and Gentlemen,

(Welcoming remarks)
On behalf of the OSCE Chairman-in-Office Dr Dimitrij Rupel I would like to welcome you here in Tbilisi in Georgia to discuss different aspects of the role of defence lawyers in guaranteeing a fair trial.

This is the third OSCE Supplementary Human Dimension Meeting held this year. The first SHDM was organized in April regarding the issue of election procedures, the second one in July addressed the issue of human rights and the fight against terrorism; both meetings were held in Vienna. I would like to emphasize that this meeting is the first of that kind in the history of the OSCE to be organized out of Vienna, and therefore I would particularly like to thank to Georgia for their generous offer to host this OSCE Supplementary Human Dimension Meeting in Tbilisi.

(Ljubljana and Tbilisi – sister cities)
There is also one more simple fact that is bringing warm feelings to the whole team of the Slovenian Chairmanship and especially to the Chairman-in-Office. This is that the capital of Slovenia Ljubljana and Tbilisi are sister cities already almost for 30 years. Since Chairman-in-Office Dr Rupel is also a former mayor of the city of Ljubljana, please also receive his personal warmest regards.

Ladies and Gentlemen,

(On SHDM)
This two days meeting on the Role of Defense Lawyers in Guaranteeing a Fair Trials will focus on access to legal council, structural issues relating to the defence bar, and equality of parties in criminal proceedings. This meeting should be also seen as part of the OSCE/ODIHR long term main focus on ensuring fair

trials, as well as on reforming criminal justice systems and torture prevention. In this regard one special day of 2005 Human Dimension Implementation Meeting held this September in Warsaw focused on methods to prevent and combat torture.

The Vienna, Copenhagen and Moscow Documents provide guarantees relating to the advocates role. However, none of the previous seminars and meetings conducted in the human dimension has dealt with the first line of reactive human rights professionals; defence lawyers.

While the importance of human rights defenders was acknowledge at SHDM in 2001 and the role of community policing in 2002, and while a seminar on Ombudsman and National Human Rights Protection Institutions was held in 1998 and on judicial systems in 2002, there was no human dimension event addressing the implementation of provisions of defence lawyers as a crucial element in the administration of justice and the effective fulfillment of the principle of the fair trial.

(On bar associations)
Further, in many countries efforts are underway to reform the structure of the bar. Vital questions such as how the bar should be organized, how its independence can be guaranteed, and who should license advocates are the center of discussion. Similarly, issues such as at which stage of the criminal process lawyers should be allowed access to information and their clients and also their role during trial are critical in any democratic state.

(Cross-dimensional approach)
The adharence of the principle of fair trial is crucial not only for the respect for human rights and fundamental freedoms, but also for all other OSCE dimension, particularly the economic dimension since it has been very clear that fair trials contribute to economic growth and encourages investments. In this sense this meeting shows the OSCE support to one of the vital cross-dimensional OSCE commitments, the commitment to ensure a fair trial to everyone.

Ladies and Gentlemen,

(On the role of defence lawyers)
Within human rights circles the perception may be thought to exist that lawyers are somehow outside the normal run of human rights activities. However, it is lawyers who must find means to implement national and international human rights standards in the real world. They do this by means of applying legal remedies to abuse of power and ill treatment.

Defense lawyers play a vital role in ensuring the right to a fair trial. Access to legal councel is one of key fair trial guarantees which is recognized in international human right law and reiterated in the OSCE commitments. As Lawyers Committee for Human Rights stated in its basic guide in 2000, the right to be provided and communicate with defence counsel is the most scrutinized specific fair trial guarantee in fair trial observation practice, because it has been demonstrated to be the one that is most often violated. Principle 1 of the UN Basic Principle on the Role of Lawyers (1990) states that – and I quote - “all persons are entitled to call upon the assistance of the lawyers of their choice to protect and

establish their rights and to defend them in all stages of criminal proceedings." End of quote. Availability of lawyers may be viewed as a "threshold" indicator of fair trial standards.

To conclude,

I hope that this meeting will encourage state representatives as well as lawyers to discuss the implementation of the OSCE commitments in this area as well as possible additional commitments if needed. I believe this is also an opportunity to demonstrate our support for strong independent defence bars.

I wish you every success in your further deliberations and your future work.

ANNEX IV: OPENING REMARKS OF AMBASSADOR CHRISTIAN STROHAL

Opening Remarks

by Ambassador Christian Strohal

OSCE Supplementary Human Dimension Meeting
»Role of Defence Lawyers in Guaranteeing a Fair Trial«

3-4 November 2005
Tbilisi, Georgia

It is my pleasure to welcome you to the first ever OSCE event devoted to an essential pillar of every criminal justice system: defence lawyers.

I want to start by thanking our hosts, Georgia. This meeting is historic not only because it is the first OSCE meeting devoted to defence lawyers, but also because it is the first time a SHDM has been held outside Vienna. It was the initiative of President Saakashvili, himself a prominent lawyer, to have Georgia host this event. I am sure that everyone here will be impressed with the work of the Georgian Ministry of Foreign Affairs in preparing for this event, and with the strong contributions by the Georgian participants. We are confident that this meeting will also make a positive contribution to the successful transition of our host country to a State fully governed by the rule of law.

I am looking forward to the introductory remarks of the Foreign Minister of Georgia, Gela Bezhuashvili, the Minister of Justice Konstatine Kemularia and of the representative of the Slovenian Chairmanship Ambassador Jozica Puhar.

Before that, let me briefly set the context. The OSCE is governed by a comprehensive security concept. The Office for Democratic Institutions and Human Rights works in the human dimension, where an impressive range of concrete commitments have been developed by the 55 participating States. These commitments include, of course, those of international human rights law. In our activities to support judicial reform in participating States, we have seen clearly the simple fact that the important role that defence lawyers play receives little attention while much international attention and focus go to reform efforts for the judiciary, for the prosecution and for the police. It is clear to us through our work throughout the OSCE region that for rule of law to develop there must be a strong defence bar, as well as independent judiciary, and prosecutors and police who perform their jobs with respect for human rights and law. I want to draw your

attention to the Reference Materials that we prepared for this meeting which include the current OSCE Commitments relating to defence lawyers and guaranteeing the right to a fair trial.

Clearly, defence lawyers are front line human rights defenders in any society. Lawyers are the first people that a person arrested and facing criminal charges turns to. Usually, lawyers are the first people outside law enforcement personnel, who hear complaints of torture and see the evidence of mistreatment. Defence lawyers in every country in the OSCE region represent those who are the least popular in every society: persons accused of committing crimes.

The work of a defence lawyer is made more difficult when the kind of case is one of high emotional impact such as when their clients are accused of acts of terrorism, murder or child molestation. It is the defence lawyer who voices objections to prevent cases being rushed forward to guilty verdicts without respecting the presumption of innocence and procedural protections. The marker of a society that truly respects human rights and freedoms is when it is a society where lawyers can freely and without obstruction represent those who are the most condemned, feared, or hated, to assure that their rights are fully respected. It is these cases which challenge how strongly fundamental human rights protections are guaranteed.

Lawyers play a crucial role in any democratic society. But, to play this role, certain conditions are necessary. First, people who are arrested must have access to a lawyer. This access must include not only speaking to a lawyer, but doing so privately, and without interference from the state. And, lawyers should have unimpeded access to their clients in custody. The first session of this event is devoted to discussing these issues. Primary among these issues is how OSCE participating States are providing legal assistance in criminal cases to those who cannot afford a lawyer. One thing that every OSCE participating State has in common is that the majority of people arrested cannot afford to hire a lawyer. The state therefore has a clear obligation to provide a lawyer under conditions that insure every defendant has a competent legal defence at every stage of the criminal proceedings, including during the investigation stage.

Secondly, the system for admission to and regulation of the bar must be one that allows for sufficient numbers of lawyers to enter the practice of law each year. In some OSCE participating States the number of lawyers admitted to criminal law practice remains far too low to be able to realistically provide an adequate defence to every citizen arrested in those countries in any given year. Session two of this meeting is devoted to these topics.

In addition to the question of who is admitted to practice law, there are related and serious questions of how to guarantee that lawyers are independent. Lawyers should not face being disbarred or being threatened with it for doing their jobs of providing strong representation for their clients, regardless of the charge or politically unpopular stand their clients may represent. If lawyers can have their licenses to practice easily taken away for representing unpopular clients then there are serious implications to whether lawyers will take unpopular cases. So the topic of admission to the bar is closely tied to disciplinary procedures and ethical standards.

The third topic for this SHDM which we will be discussing tomorrow is the Equality of Parties in Criminal Proceedings. This is a key area and one that we could have devoted the entire meeting to. In many countries of the OSCE region defence lawyers are not allowed under their codes of criminal procedure to investigate cases or to present evidence in court in the same manner and with the same protections as the prosecution.

Beyond the procedural problems, defence lawyers routinely face a range of practical problems. For example, they have a right under law to have access to all evidence in a court file. However, in practice they are not allowed to receive it because there are no copy machines and they are not allowed sufficient time with the file to fully read and copy down all relevant information.

I am of course, only briefly touching on the issues that we will be discussing in more detail in the next two days. I am very pleased with the high quality of experts that we have for this meeting. You are truly leaders in the legal communities in your countries and it is an honor that so many defence lawyers have agreed to join us here for this meeting. It is indeed an honor to welcome you here. I look forward to the discussion that we will have with not only our Keynote Speaker, and our introducers, but with the vibrant group of defence lawyers who are participating in this event. For many here today it is your first opportunity to attend an OSCE meeting, and my staff has worked hard to insure that this meeting, as a first OSCE Meeting on defence lawyers, reached beyond our "usual" community of participants and identified practicing lawyers from a diverse group of OSCE countries.

In this effort, I want to thank the strong assistance and co-operation that we have received from the OSCE field Missions, the American Bar Association Central European and Eurasian Law Initiative, and the Open Society Institute. I also would like to thank those participating States that included representatives of Bar associations and defence lawyers in their official delegations. This event represents a model example of co-operative work both within the OSCE and between the OSCE and other organizations devoted to work in this area.

I hope that this SHDM can provide a forum for an exchange of experiences regarding how to meet the challenges faced by defence lawyers in every OSCE country. In addition, I hope that the discussion can bring together concrete recommendations for OSCE participating States, the OSCE field missions, and the OSCE institutions, including the ODIHR, on what can be done to improve the situation for defence lawyers. And, I hope that this meeting will give strong impulses for many more years of work and attention to defence lawyers.

We look forward to your continued involvement.

ANNEX V: BIOGRAPHICAL INFORMATION ON THE KEYNOTE SPEAKER AND INTRODUCERS

Key Note Speaker

Sir Sydney Kentridge, QC (United Kingdom):

Sir Sydney Kentridge is acknowledged as one of the greatest advocates in the common law world. Called to the Johannesburg Bar in 1949 he became Senior Counsel in 1965. He was appointed an English Queen's Counsel in 1984. In 1964 Sir Sydney was a member of the team that successfully defended another young lawyer on treason charges in South Africa, Nelson Mandela.

He was again in the defence legal team at the 1960s Rivonia trial when the African National Congress leader was given a life sentence that was to last until 1990. In 1998 Mr. Mandela, paid tribute to Sir Sydney, describing him as "brilliant".

Years later Sir Sydney acted on behalf of the family of another South African legend, the late student leader, Steve Biko, whose story inspired the film *Cry Freedom*. His role then, at the inquest which took place in a special courtroom in Pretoria in 1978, was to attempt to investigate and expose the circumstances in which the young student leader had died in police custody.

His skill played a major part in exposing the horrific way in which Biko had been treated by the authorities, both police and medical, although the initial verdict returned was one of accidental death.

After the end of apartheid Sir Sydney served as a Judge of the South African Constitutional Court. Then, in his 50s, Sir Sydney came to London and launched himself on what has been an equally successful legal career. He was knighted in 1999 for his international human rights work over the years. He continues to practice as an advocate in several jurisdictions and fields of law.

Introducers

Session I: Access to Legal Counsel

Mr. Michael P. Judge (United States):

Mr. Judge, the Public Defender for Los Angeles County, manages the oldest and largest public defender office in the United States. The Office was established in 1914 and currently employs over eleven hundred people including over seven hundred lawyers and over seventy investigators in thirty-eight offices. The Office of the Public Defender is charged with providing free legal services to all those accused of crimes in Los Angeles County who cannot afford to hire a lawyer. The lawyers of the Public Defender's Office handle a full range of criminal cases including juvenile cases and serious felonies including murder and cases where the prosecutor is seeking the death penalty. Mr. Judge began his career as a trial lawyer within the Office of the Public Defender in 1969. He was appointed Public Defender in 1994.

Mr. Daniyar Kanafin (Kazakhstan):

Mr Kanafin is a practicing lawyer, law professor, and leading figure in criminal justice reform in Kazakhstan. Mr Kanafin has taught criminal procedure at several leading Kazakhstani universities. He has also held a range of administrative positions including being one of the youngest deans of a legal department in the country. He authored numerous publications on current issues in criminal procedure. His research focuses on securing human rights safeguards in criminal proceedings.

In addition to his devotion to the legal profession, for which he was recently commended by the Minister of Justice, he is also actively involved in advocating for changes in law and policy and is a leading national advocate for criminal justice reform. He is also at the forefront of bar reform in the Republic of Kazakhstan and is currently part of a working group devoted to drafting a new law on the bar in Kazakhstan.

Session II: Admission to and Regulation of the Bar

Dr. Margarete von Galen (Germany):

Dr von Galen began practicing law in 1983. Her focus is on criminal, labour and anti-discrimination cases. Her work in these fields is well known and has been covered in various publications. Dr von Galen is member of the German *Republican Lawyers Association (RAV)* and chaired the German *Organisational Office of the Criminal Lawyers Association* in 2000-2004. Since 2004 she has been the Chair of Berlin's Chamber of Attorneys.

Dr von Galen has in-depth experience representing defendants facing terrorist charges. Among other important trials, Dr von Galen participated in the "La Belle" trial in the early 1990s. More recently she acted as the defence lawyer in a well-publicized trial in Berlin with terrorist charges. These charges were later dropped by the court.

Mr. Leonard Cyrson (Poland):

Mr Cyrson is a prominent defence lawyer in Poland. He practices law through his own law firm in Poznan, Poland. Mr Cyrson is a Member of the Executive Board of the Poznan Bar. In 2003, he was nominated to the Committee of Human Rights of the National Bar Association.

Mr Cyrson’s main area of practice is criminal law, including economic crimes. He represents individual claimants in front of the European Court of Human Rights, mainly concerning the right to liberty and security, the right to a fair trial and protection of property rights. Mr Cyrson also represents refugees seeking asylum in Poland and persons who have been issued with deportation orders based on suspicion of terrorism.

His experience includes work in the Legal and Treaties Department, Human Rights and Minorities Division of the Ministry of Foreign Affairs in Poland. In addition to running his own legal practice, he has provided his expertise to the Council of Europe, the ICRC, and the OSCE. He also devotes time to training

future defence lawyers seeking to be admitted to the bar and is a member of the examination board for the Poznan Bar Association. Mr. Cyrson also lectures at universities in Poland on the role of defence lawyers in protecting human rights.

Session III: Equality of Parties in Criminal Proceedings

Yury M. Schmidt (Russia):

Mr Yuri Schmidt is one of the most renowned and respected Russian lawyers. He was admitted to practice law in the Leningrad Collegium of Advocates in 1960. Over the years, Mr Schmidt has fearlessly represented hundreds of clients, some of whom were very unpopular with the Soviet authorities. His reputation as a principled lawyer resulted in his being subjected to considerable pressure from the government. He was disbarred in 1987 but reinstated his membership in the Collegium of Advocates through court proceedings.

He was outspoken and represented politically controversial figures in the 1990s, including Arkady Manucharov, one of Armenian leaders in Nagorny Karabakh, and Torez Kulumbekov, a South Ossetian leader tried in Georgia. He defended Navy captain Alexander Nikitin, charged in 1995 with espionage by the Russian security services.

A friend and associate of many prominent Russian human rights defenders, including Andrei Sakharov, Sergei Kovalev, and Galina Starovoitova, Yuri Schmidt also became a founder and Chair of the Russian Committee of Lawyers for Human Rights in 1991.

Mr Schmidt is currently a member of the St. Petersburg City Chamber of Advocates and remains an active defence lawyer. Most recently, he was part of the defence counsel of Mikhail Khodorkovsky, the largest shareholder of the Yukos oil company.

Mr Schmidt was a recipient of the Highest Russian Legal Award ("Themis") in 1997. He has also received numerous honorary awards and titles from Human Rights Watch, International League of Human Rights, the International Helsinki Federation and other organizations.

Ms. Louise Christian (United Kingdom):

Ms. Louise Christian, a founding partner of the London Solicitors firm Christian Khan, has an extensive practice in domestic civil law, notably in representing litigants in high-profile inquiries and cases involving the review of governmental decisions. Ms. Christian, who qualified as a solicitor in 1978, is particularly well known for her human rights work. She acts for many people accused under terrorism legislation.

She has dealt with many significant human rights cases including a leading ECHR case of Osman v UK. She has also represented and continues to represent the UK detainees in Guantanamo Bay. Ms. Christian has also conducted delegations to the Kurdish areas of Iraq and Turkey for, amongst others, the English Law Society, the International Commission of Jurists, the International Human Rights

Group, and the International Federation of Human Rights. She writes extensively on human rights matters in the UK national press.

ANNEX VI: KEYNOTE SPEECH OF SIR SYDNEY KENTRIDGE

It is a great honour to address this great gathering of lawyers in this historic city. I speak to you in my personal capacity, but I bring you warm greetings from the Bar Council of England and Wales, and a message from its Chairman.

It is especially a privilege for me to be addressing so many private lawyers, in particular defence lawyers. I have been a lawyer in private practice, and a defence lawyer, for more than 50 years. So I believe that I am speaking to colleagues. Some may ask why it is necessary, in the year 2005, for the OSCE to hold a major conference attended by lawyers from some 40 countries, on the Role of the Defence Lawyers in Guaranteeing a Fair Trial. Should not this be obvious? Ambassador Strohal succinctly and forcefully described the vital role of the defence lawyer in the criminal justice system in any country that is, or aspires to be, democratic. The defence lawyer, he said, was an essential pillar of the system. Who would disagree? In the reference materials for this conference you will find repeated declarations, accepted by the states participating in the OSCE, asserting the role and the importance of the defence lawyer. Thus in Copenhagen in 1990 the participating states solemnly declared that an essential element of justice was that

"the independence of legal practitioners will be recognised and protected":

and that

"any person prosecuted will have the right … to prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free".

A United Nations Congress on Prevention of Crime in the same year resolved that

"Governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference",

and that

"Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".

A Committee of Ministers of the Council of Europe said much the same thing ten years later.

Yet we all know that these principles, which few governments would openly reject, only too often do not accord with reality.

In a recent case the European Court of Human Rights in Strasbourg heard and upheld the complaints of lawyers whose premises had been searched and whose files had been seized when they were acting professionally for persons rightly or wrongly considered to be dangerous enemies of the state. The Court found the searches and seizures were unlawful and an infringement of the rights of the

lawyer under the European Convention on Human Rights. In the course of its judgment the Court felt compelled to say this –

"The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trials and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system."

One scarcely needs to emphasise that the infringement of the rights of the lawyers was also an infringement of the rights of their clients.

What this means, I suggest, is that all of us in our own countries must be vigilant to ensure, as far as it lies within our power, that the great principles started in the international Declarations and Conventions are in fact respected and carried into effect. I deliberately say *"in all our countries"* because in no country can we take those principles for granted. In some (if, fortunately, only a few) countries of the OSCE, it seems, the defence lawyer is for practical purposes dependent on the goodwill of the government and the prosecuting authorities. Equality of arms between prosecution and defence does not exist. Even admission to the Bar may depend on favour rather than objective qualifications. In some countries, again happily only a few, the lawyer defending an unpopular client may find himself or herself harassed or intimidated. Most of us are fortunate enough to be free of such excesses. But in even the more fortunate countries, defence lawyers face problems.

In the United Kingdom the independence of the Bar has been has been recognised and generally respected for well over 200 years. So has the right of an accused person to a legal defence. At the end of the Second World War it was recognised that the right to be defended by a lawyer was of little value to those who could not afford to pay a lawyer, so an Act of Parliament created a comprehensive system of legal aid – a system which ensured that any person facing a criminal charge of any seriousness but unable to afford the fees of a lawyer, could obtain a lawyer of his own choice at the expense of the state. (I emphasise "*a lawyer of his own choice*" – not a nominee of the state.) This system has worked well, but – there is always a "*but*" – it has become a very expensive system for the state. The government's method of meeting this financial burden on the taxpayer has been to reduce the fees paid to the lawyers. This has caused real hardship, and very recently some lawyers who practise in the criminal courts threatened to go on strike. Fortunately, the strike has not in fact come about. A strike of criminal lawyers would be a national disaster. But if defence lawyers are not to be adequately remunerated they will gradually be driven from the profession. What would then become of the commitment to ensure legal assistance to persons charged with criminal offences? So we all have problems and difficulties of our own to contend with.

I have mentioned the independence of the Bar. I should like to say something more about that. The independence of the defence lawyer means more than independence from the government. It means that in defending his client he must

not be influenced by any other person or organisation, whether it be another, perhaps more important client, a trade union, a political party, the press or a religious body. The positive side of a lawyer's independence is that his whole duty should be to his client and no other. Of course a lawyer must not deliberately mislead the court, nor can he connive in any attempt to do so. But other than that he must act to the best of his ability in the interests of his client and in no other interest – not in what others might think of as the interests of the state or the community.

In the year 1820, England was fascinated by a remarkable case. The King of England was suing his Queen for adultery. The Queen was represented by a lawyer who was to rise to great heights. The Queen was unpopular and her lawyer was subjected to strong pressures to give up her case, including indications that he was putting his own professional advancement at risk. He refused to be intimidated. In his address to the court he stated what he conceived to be the duty of an advocate. The language is more rhetorical than we are likely to use today, but the substance still holds good. He said this –

"An advocate, by the sacred duty which he owes his client, knows in the discharge of that duty but one person in the world – that client and none other. To save that client by all expedient means, to protect that client and all hazards and costs to all others, and amongst other to himself, is the highest and most unquestioned of his duties".

Note these words "*amongst others to himself*". What this advocate was saying was that when acting for our clients we must put aside all consideration of pleasing or displeasing others, or of benefitting or harming ourselves. What you say or do may displease the government. It may offend your friends or colleagues. All that we must put aside.

You may say that that noble precept is easy enough to state but very hard to live up to when acting for an unpopular client, in the face of a hostile government, an unsympathetic public and a critical press. I would entirely agree. I know from my experience in South Africa where I practised for over 30 years in the era of apartheid how difficult it can be to live up to that ideal. But if it is an ideal that we cannot always attain, it is still one we should keep before us as an ideal for which we should strive.

South Africa in the years of apartheid is a setting which illustrates both the vital role of defence counsel, and the difficulties they may face. Under apartheid the vast black majority were ruled, and ruled with an iron hand, by a white minority government. Blacks had no vote and government policy was that they should never have the vote. Apartheid, that is enforced segregation, governed every walk of life. Needless to say the black population did not acquiesce in their own oppression. A vast array of laws was passed to keep them in subjection. Black political activists constantly found themselves in conflict with the law. There were frequent trials on charges ranging from high treason, terrorism (a broadly defined concept under the South African statute) and sabotage, to such offences as being in possession of the badge of a prohibited organisation. The accused persons were regarded by the apartheid government, by the police and by a large section of the white population as enemies of the state. Yet in nearly every case persons accused of such crimes were able to obtain a legal defence.

The defence lawyers were often leading members of the Bar. Their experiences as defence lawyers in political prosecutions were varied. Many of them, although they often appeared in such cases, were left alone by the government and the police. I am relieved to be able to say that I myself was never subjected to either formal penalties or informal harassment. Others were not so lucky. The government had various ways of dealing with those they considered to be political enemies. That included some of the defence lawyers who acted in political cases. Some of them were detained under police powers, without judicial warrant, without charge and without recourse to a court. Others were subjected to Ministerial banning orders which prohibited them from entering a courthouse – thus depriving them of their professional existence. Another somewhat less drastic device, but nonetheless serious, was depriving the lawyer of his or her passport – and to attempt to leave the country without a passport was a criminal offence. As to informal harassment, I knew at least one colleague whose motor car was set on fire by the security police. In the result some of the best of those lawyers felt forced to leave the country. And even those who were not directly affected were conscious of an unspoken threat.

Nevertheless, the defence lawyers in South Africa were able to make a difference. One instance – in a trial lasting from 1958 to 1961 ninety leaders of the African National Congress and its allies (including Mr. Nelson Mandela) were charged with high treason before three judges of the High Court. At the end of that lengthy trial all the accused persons were acquitted, entirely because of the compelling legal arguments of the defence lawyers. Another instance – in 1964 Mr. Mandela and some of his associates were again on trial, this time on a charge of sabotage which, like treason, was potentially a capital crime. This was the case commonly knows as the Rivonia trial.

The evidence of a conspiracy to commit sabotage was strong and could not be denied, but the prosecutor asserted that the accused had also plotted to launch a country-wide guerrilla war campaign. That allegation was denied by the accused but vigorously pursued by the prosecutors. If that had been proved Mr. Mandela as leader of the anti-government activists on trial would certainly have been sentenced to death. And the apartheid government did not reprieve political prisoners. But the team of defence lawyers were able to destroy the prosecution's case on guerrilla warfare. Mr. Mandela was not hanged. He was sentenced to life imprisonment. And as we all know he survived to lead his country into an era of democracy and equality before the law. I go so far as to say that but for the courage and skill of his defence lawyers the history of South Africa would have been very different.

(I must say at once that I was not one of those defence counsel.) After the Rivonia trial had ended, one of those defence lawyers was barred by ministerial order from continuing to practise law – an order generally seen as a vindictive punishment for his professional role.

How do I sum up those long past South African happenings? I would say that they bear out forcefully Ambassador Strohal's statement that the front line human rights defenders in any society are the defence lawyers. They also show that even when acting against a determined government equally determined lawyers can

still do much to protect their clients. The other less happy lesson is that under some regimes the lawyer may have a heavy price to pay.

There is another aspect of my South African experience which is, I think, relevant to this Conference. Earlier I quoted from the Basic Principles stated by the United Nations Congress on Prevention of Crime the principle that "Lawyers should not be identified with their clients or their clients' causes". Even in apartheid South Africa that principle was recognised by the judges, by the lawyers themselves, and even by members of the public. This principle certainly makes it easier for lawyers to take on cases for clients who are unpopular with the government or sections of the public. But if this principle is to have real meaning it places an additional duty on defence lawyers – they must be prepared to defend clients whose political or religious or social views they do not share, indeed with which they strongly disagree. That is inherent in the concept of the independence of the lawyer.

I am sure that little that I have said will be unfamiliar to you. What you may be thinking is that what I have said should be addressed not to defence lawyers who understand it well enough but to governments, especially to those governments who may make life difficult for defence lawyers. That thought leads on to a basic question. Why should a government wish to support or encourage defence lawyers, who after all are trying to defend persons whom the government through its prosecutors wishes to convict? But then one might go on to ask, why should a government be concerned that criminal trials should be fair? The only answer is that it depends on what sort of country you want to be. If you wish to belong to the community of nations who believe in democracy and in respect for the rights of the individual citizen then you must accept that government itself must be subject to the rule of law. And the rule of law cannot exist unless every effort is made to ensure that all trials, large and small, are fair. To achieve that, the state must ensure that there are not only independent judges, but also fair prosecutors and competent and independent defence lawyers. Without this last element nothing else would count.

In a message to this Conference the Chairman of the Bar Council of England and Wales has said this:

"It is impossible to have fair criminal trial where the liberty of an individual is at stake unless that person has access to proper legal representation.
Defendants in criminal cases have been brought to court by the organs of the state, namely the police and prosecuting authorities. In relative terms the resources of the state are limitless compared with those of the criminal defendant. Bitter experience has shown that miscarriages of justice occur in even the best systems. It is vital to the health of society that every reasonable step is taken to minimise that risk. People must have confidence in their system of justice if they are not to feel and become detached from the society which provides it."

One thing more about the rule of law and the defence of individual rights. These great objectives are pursued not only in the great cases that go to the Supreme Courts and the Constitutional Courts. The rule of law and the rights of the citizen are vindicated every time a defence lawyer goes into court to defend a client to the best of his or her ability, whoever the client is and whatever the charge.

That is why there is no more honourable calling than to be a defence lawyer, and I am proud, together with so many of you here, to have followed that calling.

ANNEX VII: INTRODUCTORY SPEECHES

Session I: Access to Legal Counsel

Introducers: **Mr. Michael Judge,** Head of the Public Defender's Office in Los Angeles County (United States of America)

Mr. Danyar Kanafin, Lawyer (Kazakhstan)

Summary of the Introductory Speech of Mr. Judge

The Public Defender's Office of Los Angeles County is the oldest and largest office in the United States. Mr. Judge presented the structure of the Public Defender's Office and how it approaches its duty to provide a competent defence to its clients. Mr. Judge began with a summary of the role of a public defender in general. Public defenders in the United States are either elected or contracted. Mr. Judge then explained the specific circumstances regarding the Los Angeles Public Defender. His office manages a caseload of more than 500,000 cases every year. The Los Angeles County Public Defender's Office represents indigent defendants in criminal cases ranging from misdemeanours to felonies, including death penalty cases. Included in the cases handled by the Public Defender are juvenile cases and cases involving involuntary commitment of the mentally ill.

The Los Angeles County Public Defender has approximately 1,100 staff members, more than 70% of whom are lawyers. Also on staff are 80 investigators who are mostly former police officers. The investigators assist the lawyers in the Public Defender's Office in conducting investigations that are entirely independent of the prosecutor. In addition, the Office has six full- time trainers, also lawyers, who provide training for new Deputy Public Defenders (lawyers). The Office also provides continuing legal education through a training programme for all lawyers on its staff. The California Bar requires a minimum number of hours of continuing legal education training every year and the LA County Public Defender's Office training programme has been certified by the California Bar to provide the required training. Los Angeles County is ethnically diverse and that diversity is reflected in the staff of the Public Defender's Office with approximately 30 % of the staff being ethnic minorities.

Mr. Judge reported that Public Defender Offices, if properly staffed and funded, deliver a high standard of legal representation and ensure that suspects and defendants get a proper defence, which is as important as being properly prosecuted. The Public Defender has access to files, forensic experts, notes and motions. Therefore, he or she can take corrective action if the authorities make mistakes or in cases of misconduct. As an institution, the Public Defender can address these problems on a higher level than is often possible on a case-by-case basis, and the Los Angeles County Public Defender's Office has often raised issues of systemic violations reaching beyond individual cases.

In individual cases law enforcement authorities and prosecutors often jump to conclusions as they tend to see only the evidence which might incriminate the suspect. The Public Defender is vital as a check and balance in relation to the investigations. And the fact that there are frequently errors reinforces the need for

the Public Defender to have investigators as part of the staff to investigate cases separately from the investigations conducted by the prosecution or the police.

Lawyers in the Public Defender's Office in LA County receive the same salaries as prosecutors. Mr. Judge stated that equal pay is crucial both to insuring quality lawyers and in recognizing that defence lawyers perform work of equal value and importance to society as prosecutors do.

The Public Defender's Office supports the independence of the judiciary and makes efforts to protect judges from outside pressure. However, if a judge commits a violation then the Public Defender will address the judge's conduct with the judge himself, or with his supervisor or, in extreme cases, bring a complaint before the judicial commission that can result in the judge's removal from office.

Similarly, the Public Defender's Office reports individual police officers or prosecutors for misconduct. Private defence attorneys are reported to the California Bar for investigation and possible sanction if the Public Defender sees or reasonably suspects a violation of ethical standards.

The Public Defender's Office is also involved in legislative work to improve the criminal justice legislation in California. The Los Angeles County Public Defender has a seat on the California Criminal Justice Legislative Commission. The California legislature has an active law-making agenda. In 2004 alone, over 500 changes were made to criminal laws in California. The office provides valuable input to ongoing efforts of legal reform in various areas. Due to this proactive involvement in legislative work the Los Angeles County Public Defender has been successful in preventing many legislative changes that would have adversely affected defendants' rights in California.

The Public Defender is immediately informed when a person is arrested. The detainee is allowed by law to "complete" three phone calls and the Public Defender's Office telephone number is displayed in all detention facilities in LA County. The Public Defender has someone on duty 24 hours a day, and has lawyers available during weekends and holidays. As a rule, people who have been detained or arrested have no problem making contact with a lawyer with the Public Defender's Office. However, if the police deny the detainee the right to legal counsel this is a crime and the police officer can be criminally prosecuted.

The Head of the Public Defender's Office is in regular contact with the heads of the various police agencies that operate in Los Angeles County. Through these working relations misconduct on the part of individual police officers regarding access to legal counsel can usually be avoided or addressed quickly.

Mr. Judge concluded with the remark that a justice system with a public defender system has an excellent structure to provide effective legal counsel in all criminal cases.

Introductory Speech of Mr. Daniyar Kanafin

Each person is guaranteed the right to legal counsel by Article 14 of the International Covenant on Civil and Political Rights. Since it is in the sphere of

criminal legal proceedings that the state most severely limits the basic personal rights and freedoms, it is clear that someone who found herself under criminal prosecution has to have real opportunity to protect her rights by all legal means available.

Due to the complexity of corresponding legislation and legal practice itself and, therefore, the fact that someone who is unaware of her rights and corresponding ways of protecting them might fall victim to the arbitrariness of the police and the court, it is in the absolute majority of cases that such protection cannot be secured without timely and qualified assistance by a professional lawyer.

In my presentation I will be referring to the legislation and the legal practice of the Republic of Kazakhstan. Issues arising within the scope of the right to legal counsel, though, are, to a certain extent, universal and exist in many OSCE participating States. For most of the former Soviet republics these issues are most critical and acute since we were brought up within the same legal tradition and the speed of legal reform in our countries is similar. In this regard, it might be speculated that today's discussion and exchange of opinions will be interesting for all representatives of the OSCE participating States.

Since the main function of the introductory speaker is to introduce the topic and invite participants for discussion, in the course of my speech I will try to draw your attention to the most serious problems related to the issue of observance of the right to legal counsel arising before various subjects of the criminal law, including the following:

1. Restriction of the lawyer's access to client after detention and violation of confidentiality of the client-lawyer communication;

2. Issues related to the compensation for services rendered by the state-appointed defense counsel;

3. Limitation of the powers of defense lawyers in the procedure which prevents adherence to the principle of adversarial criminal proceedings;

4. Lack of independence and personal safety guarantees for professional defense lawyers.

I would like to discuss these and other topical issues of legal reality and to attempt to find ways to address them appropriately.

We may note with satisfaction that during the recent years legal systems in most post-Soviet states have been moving towards securing access to legal assistance at earlier stages of criminal proceedings. During the Soviet times, the defense lawyer had the right to enter the proceedings at the trial stage or, at best, when charges were brought, i.e. at the time when most of the evidence had been already collected, questionings and witness confrontations already done, detention imposed, other principal procedural steps already taken. Today people may receive legal counsel before the first questioning takes place and, subsequently, may testify and participate in investigatory activities in the presence of a defense attorney. It should be acknowledged that post-Soviet reforms and the

humanization of criminal law led to the expansion of rights of the person under criminal prosecution and to certain extension of the lawyer's rights as well.
Nonetheless, the situation with the observance of the right to legal counsel is far from ideal. Repressive rudiments of criminal procedure remain today. Unfortunately, the lawyer has not yet become a representative of one of equal parties in criminal proceedings in the majority of former Soviet states. Criminal procedure, especially at pre-trial stages, is still by far inquisitorial. The extremely low percentage of acquittals in criminal cases – which last year did not exceed 1% of the overall number of cases – may serve as an indirect proof of that.

Effective observance of the right to legal counsel is curbed by a number of reasons, including inter alia the lack of defense attorneys per se and the lack of desire on the side of agencies responsible for pre-trial investigation to allow timely participation of a lawyer in the proceedings. The investigator realizes that appropriate advice by a qualified lawyer to the accused may simply "destroy the edifice" of state prosecution so often unstable at early stages of investigation.

In accordance with current legislation (art. 68, part 2 of the Code of Criminal Procedure (CCP) of the Republic of Kazakhstan), a citizen suspected of committing a crime and detained on this basis has the right to receive confidential advice of a lawyer before the first questioning takes place. This makes sense because the person whose freedom has been restricted, as a rule, is under great stress, and cannot adequately analyze the legal situation in which she found herself and is most vulnerable to self-incriminating testimonies given under influence of fear, due to confusion or as a result of illegal methods of obtaining evidence, such as direct threat, blackmailing or torture. In such cases, assistance of a lawyer is vital and essential as it, first of all, excludes the possibility of physical violence against the detainee and, second of all, fosters critical analysis of the situation and possible ways and means of protecting his rights.

In reality, though, this humane legal norm is by no means always implemented and not effectively as it should be. Due to inaccuracy of some CCP provisions and the repressive tradition brought over from the Soviet times, investigators sometimes do not duly explain this norm to the detained persons. In some instances, investigators by way of deception or open pressure force the detainees to waive their right to legal assistance. Even if the detained person insists on his desire to discuss the matter with the lawyer and the latter appears to fulfill his professional function, the investigation officers do not ensure full observance of this right.

Throughout my personal professional experience there were several cases when after a lengthy argument with the police officers regarding the possibility of my conversation with the detained person, I was finally allowed to have a meeting but only in the presence of an investigator or a police officer. They basically monitored our conversation and could, of course, hear everything that was said between us – clearly, no confidentiality was observed in those cases. Such actions of the police or the investigation were justified on the basis of not allowing the defense attorney to transfer any prohibited objects to the detained. The allegations seemed quite illogical for the police could simply search the detained right after the conversation with the lawyer.

In Kazakhstan there have been several widely-known cases when a defense attorney's conversations with the client were illegally recorded by the investigators and the content of the conversation served as the basis for suspending the lawyer in question from the case. Even today it cannot be guaranteed that the specially designated rooms in pre-trial detention facilities and other criminal investigation agencies are not bugged, and that conversations of the lawyer and the client will not be observed and recorded at the discretion of law-enforcement officers.

On the one hand, in accordance with the current legislation the lawyer has the right to consult with his detained client without any limitation of the number of such meetings and their duration. In reality, on the other hand, the procedure of getting the necessary detention facility entrance permit is transformed into asking for a favor instead of getting what one is entitled to and is to a certain degree humiliating for the lawyer. In order to be able to meet with the client in a pre-trial detention facility the lawyer has to, first of all, write a request addressing the corresponding investigation officer asking for the permission to see his client during the time of investigation, then second, receive a permission from the above mentioned officer and, third, get the approved request registered by the chancellor officer or by the officer on duty at the corresponding investigation agency. Only after that the lawyer will be able to exercise his right. When the case is transferred to court, the only difference in the procedure is that the corresponding permission has to be received not from the investigator but from the judge.

The procedure of exercising the same right when the person is kept in a temporary detention facility, i.e. detained or transported to the facility for the purposes of carrying out certain investigatory activities, is not regulated by any law and it is even harder to get permission for a meeting with the client in such circumstances than in cases described above. Sometimes the lawyer is not even allowed to enter the building of a given law-enforcement agency without the special invitation of one of the officers. Such a situation may hardly be considered satisfactory. The issue of timely access of a lawyer to the client and the issue of lawyer-client communication confidentiality must be addressed not only at the legislative level but also resolved in real life.
Problems related to the right to legal counsel are not limited to the issue of access of lawyer to the client. The issue of compensation for the services of state appointed defender should be touched upon as well.

Unfortunately, the fact that there is a defense attorney working on a given case does not always mean that the person charged with a crime will receive qualified legal assistance. The procedure of assigning defenders to cases where the accused cannot independently bear the costs of professional legal assistance has not changed since the Soviet times. The services of such lawyers are remunerated at a comparatively low rate (at present, in Kazakhstan this rate does not exceed $4/hour). In addition to that, accounting for the time spent during the pre-trial proceedings as well as the final count of time and the corresponding remuneration is done by the criminal investigation agency, i.e. by the procedural opponent of the defense. In some instances, the lawyer's position in the course of defending the client, the professional conflict between the investigator and the lawyer due to violation of the client's rights by the investigation, and initiation of motions and appeals by the lawyer may serve an informal reasons for lowering the amount of service time and, thus, may lead to the decrease in the amount of remuneration for

the lawyer. At the trial stage of the proceedings it is the court who approves the appointed lawyer's "pay check" and, quite often, the court may not be really interested in the lawyer's active participation in the proceedings. Thus, we have an odd, illogical and humiliating for the lawyer situation when having legally assisted the charged citizen for an extremely low fee, the lawyer has to ask his procedural opponents to pay for his work. Undoubtedly, such state of things does not promote the quality of legal assistance by state appointed defense attorneys paid from the state budget and it should be changed. This situation is a part of Soviet inheritance and, as far as I know, is still the case in many OSCE participating States. It is necessary to find ways to deal with the above problem.

In accordance with the current criminal procedure law, the defender in a case may not be a professional one and the defense may be represented by relatives (e.g. spouse) of the accused. In some cases this provision allows the investigation bodies to invite persons who are not professional lawyers to act as representatives of the defense. It is obvious, that relatives or spouses without special qualifications are not able to provide the accused with qualified legal counsel. Formally, though, it is considered that a defender is taking part in the proceedings and the right of the accused to legal counsel is observed. It is also obvious, that the described situation contradicts the essence of this fundamental right which is that the assistance must be rendered by a professional lawyer.

The desire of the state to somehow maintain the right to legal assistance in the situation of lack of professional lawyers is understandable, but it does not make much sense to resolve the matter by substituting qualified professional legal assistance with its surrogate. The issue of increasing the number of lawyers is one of the most acute ones in many countries of the world. The ways of addressing this issue might be different. In some former Soviet countries the attempts to soften the control over qualifications of bar members did not help to ensure low-income citizens with legal assistance since very few people expressed the desire to work for a symbolic fee. At the same time the conditions created were such that many people who, based on their professional and moral qualifications, should not have enjoyed the high status of a defense lawyer were given the opportunity to get it.

In this regard, the proposals often put forward to simplify the procedure of entering the bar by way of making control mechanisms less complicated might not so much attract more qualified lawyers into the professional bar associations but lead to transforming the bar into a refuge for people unable to fulfill themselves within the chosen career path or those who were rejected by the law-enforcement system, including on moral and ethical grounds. I hope that this important issue will be thoroughly discussed in other working sections of this conference.

The third issue is the limitation of the lawyer's rights in criminal procedure. One of the most important aspects of access to both qualified and effective professional legal assistance is the issue of adhering to the principle of adversarial procedure and the expansion of lawyer's powers under the criminal procedure law. Unfortunately, in many cases the lawyer is viewed as a pseudo-democratic supplement to the inquisitorial by its nature mechanism of criminal prosecution – some of the lawyer's professional rights may be utilized only with the approval of the investigation agency. The anecdotal story about trying to get access to the

client that I used in my presentation is by far not the only one. The lawyer may exercise his right to present evidence during the pre-trial stage of investigation only with the investigator's approval. In order to appeal illegal actions of the investigator to the court the lawyer has to address the prosecutor's office, which itself is an investigation agency and has close ties with the regular investigation. Because of that, it is a frequent case that appeals or motions by the lawyer are left unanswered.

In some CIS participating States the authorization of arrest and other activities limiting basic rights and freedoms of citizens fall within the jurisdiction of prosecutorial agencies and this, in turn, absolutely excludes the possibility of resolving such matters in adversarial environment in keeping with equality of parties to the case. Such state of things makes the lawyer's work unproductive, damages the citizens' belief in the possibility of effective resistance against abuse and lawlessness exercised by certain representatives of the state.

The situation is made worse since the lawyer, while protecting the rights and interests of citizens, is open to the same abuse/violence as his clients. For example, the content of the lawyer's belongings (briefcase, folders, etc.) has to go through a superficial but still a check. Consequently, the right to confidentiality of client-lawyer communication is not being observed. In addition to that, the lawyer while being on the premises of a detention center or other law-enforcement/investigation agencies, is not guaranteed his personal immunity and may fall victim to a provocation or some other illegal actions against him by his procedural opponents.

The current legislation of the Republic of Kazakhstan does not provide for any more or less effective mechanisms protecting the lawyer against accusations and prosecution for alleged violations of current legislation during execution of his professional duties. The lawyer may suffer for his own eloquence and become accused of slander, insult or contempt of the court. We consider it quite necessary to introduce a provision into the current legislation which will provide for a special procedure for a criminal, civil and administrative prosecution of lawyers and will ensure due protection of lawyers against persecution for actions conducted while fulfilling their professional duties, and possible provocations and other conflicts between them and their procedural opponents. It would be quite interesting to learn more about the situation with the above issues in other OSCE participating States and make an attempt to find possible solutions in this sphere for Kazakhstan.

In conclusion, allow me to express hope that in today's discussion not only the above mentioned issues but also other topical and important ones related to professional defense in criminal procedure would find their solution.

Session II: Admission to and Regulation of the Bar

Introducers: **Mr. Leonard Cyrson,** Lawyer (Poland)

Dr. Margarete von Galen, Lawyer, Chair of the Berlin Bar (Germany)

Introductory Speech of Mr. Leonard Cyrson

What is the Bar? It is a profession. It is the lawyers. It is the Bar Association. In this order and no other. The order, in fact, is of much significance. There is no doubt about the importance of the legal profession. For that reason, the kind of people who practice it and the way in which it is practiced are both highly critical issues. The role of the Bar Association is to keep the wrong people from enter the profession and ensuring their performance fits well with the mission of the legal profession. The Bar, therefore, is a system in which Lawyers serve the profession; the Bar Association serves both the Lawyers and the Profession. The Profession, its purpose and significance, remain the ultimate value.

The history of the Bar in Poland has been rather complex, as can be expected of a country that has gone through many difficult periods in the past. During successive periods, the principles upheld by the Polish Bar differed to a larger or smaller extent from those adopted in strongly democratic countries. The most substantial departures from democratic standards made by the Polish Bar took place under Communism. At that time, acting through the competent minister, the state and the central administration exercised close and continuous control over the organization and operation of the Bar, in line with the overall philosophy of the Communist regime. In contrast, today's Bar system in Poland is fully aligned with democratic principles. This, in fact, is the only statement describing the present condition of the Polish Bar that can be this categorical and unambiguous. As soon as the discussion becomes more detailed, questions and doubts arise. These are particularly pressing on the issue of admission to the Bar.

"A Revolution in the Legal Profession" was a title of a recent article ran in the Polish press concerning admission to the Bar. The title clearly reflects the kind of press that the latest amendments to Bar regulations have received. I am not quoting this title by accident. The title reflects the direction of a change process that was triggered by the amendments of June 30 of this year. It hints at some of the key issues that are essential for the future of the Bar. Are we witnessing a revolution? Why revolution? What kind of revolution?

The amended Bar Act has enacted a number of changes in the operation of the Bar. The most emotional ones are those concerning admission to the legal profession and advocate training. The common theme behind all of the changes is a substantial curtailing of the rights and powers of the Bar Association, including, in particular, its influence over the examination process, both in advocate training competition examinations as well as in attorney examinations. Under the new law, both of these examinations are conducted by advocate trainee examination committees that reports at the Ministry of Justice. The Committee is comprised of three representatives of the Minister of Justice, one scholar, one public prosecutor and two representatives of the Bar. In this composition, Attorneys ended up being in minority. The Minister of Justice stands as an authority superior to the Committee. Admission to both of the examinations takes place at a charge. The advocate training competition examination is a written test. The final attorney examination is made up of a written and an oral part. Under the new law, which is now in effect, the completion of advocate training is no longer prerequisite to being entered onto the list of attorneys at law. In the light of the amended act, performing work that involves the application or formulation of the law as well as the performance of services involving the application or formulation of law is

sufficient to qualify one for admission to the attorney examination. The minimum period of legal employment or of performing legal services is five years.

The changes enshrined in the new law are of great significance as they touch upon the most critical part of the Bar system – admission to the bar. The power to decide on such admission has now been removed from the Bar Association.

The changes in the Bar system are a response to long-expressed expectations of the general public as well as the legal community, particularly young law graduates embarking on a carrier in the legal profession. Their main mantra has been to open up the profession. The slogan expressed opposition to ambivalent admission criteria and cases of nepotism which the public associated with the Bar. As painful as it has been for the legal community, the perception was fairly substantiated, and proved especially true for smaller attorney board districts. Particularly discreditable was the fact that lawyers themselves dragged their feet on solving the bar admission problem and carrying out the necessary reforms. Expressions of support for change that for long years have been heard from lawyers were not followed up with concrete steps and initiative. In the early 2004, the Extraordinary National Assembly of the Bar posed the question of whether "we are absolutely certain that the existing bar is a perfect system". This has long remained a rhetorical question. The legal community's failure to institute reforms has come as quite a surprise. What makes it even more surprising is that a large proportion of certified lawyers have proved themselves capable of supporting society and joining ranks to fight for a worthy cause. This was demonstrated even back under communism as they fought fiercely for human rights and, in their role of the intellectual elite, played an important role of preventing the absurdities of Communism and averting its threats. Yet, the fact of the matter is that such consolidation has all but disappeared. The change came from the outside. It was launched by politicians and, as such, came with all the characteristics of a political reform.

One of the main arguments used in formulating the amended Bar Act, one quoted also at the time the Act was first enacted, was that better access to the profession is indispensable. There is no arguing that a close link exists between the number of lawyers relative to the population and access to legal council. Many recommendations can be found in the science of economics which consistently refers to the iron rule of supply and demand. Poland has one lawyer per every 5.5 thousand residents and one legal advisor for every 2 thousand population which is substantially below other member states of the European Union. There are countries in the EU with an attorney or legal advisor for every 500 inhabitants. To remedy this disproportion in Poland, the amendment was designed to increase the number of lawyers by reforming admission rules. However, by putting the arguments used in the Act of June 30 into the language of politics, an adverse effect was produced of clouding this complex issue. The legal services sector is unlike any other. The legislator has repeatedly used the argument that market mechanisms should apply directly to legal services. Such rules, however, must not be applied directly without accounting for the specific nature of the legal profession. Once the number of lawyers goes up, the availability of their services will certainly improve, but will the quality remain unaffected? Another question is whether the cause of improving access to legal council justifies measures in the new act that curtail independence? Could no other means have been used to achieve the goal?

By admitting to the Bar persons who have not gone through the trainee period and who only formulate and apply the law and perform services that involve the formulation and application of the law, the quality of legal services becomes potentially compromised. The advocate training is not just any regular training. It is a test of trainee fitness for the legal profession. The profession requires not only legal knowledge but also a strong morality and integrity. A candidate for the profession should demonstrate his or her suitability to the Bar Association. The advocate training is the only effective test instrument that can be used for the purpose. There is another critical risk in waiving the training requirement, which is that the Bar Association will lose all say in deciding who will become its member. The system runs contrary to the rules of democracy and undermines the significance of the Bar Association as a guarantor of the independence of the Bar. Similar effects can be expected to come from stripping the Bar Association of its power to decide who is to undergo training as the authority to do so has been passed over to the state with a supervisory function vested in the Ministry of Justice. The model has put off many lawyers who associate it with the past political system, and, more importantly, raised concerns as to the consequences of the new solutions. A lawyer who is independent of the Bar Association and who has incidentally become its member will not be inclined to be loyal to the Association. This, infact, as non-political as it may sound, may prove to be quite dangerous. The concern is not as much about professional loyalty but rather about holding up the principles that safeguarded by the Bar Association. The most important of them is the principle of independence and honesty. What has upset the legal community even more regarding the amendment is that it came up with a number of existing or planned legal changes concerning the legal profession. The key change that has come into effect in a new regulation is to allow for legal representation in civil cases to be provided by persons who are neither attorneys not legal advisors. The most essential novelty is the thorough reorganization of the disciplinary system by transferring some of the related powers outside of the Bar Association. The trend undermines one of the most important historic the accomplishment of the Bar which is to achieve independence. The Bar's independence rests on the independence of the Bar Association and individual lawyers. Independence in practicing the profession is a major guarantee of ethical standards. Such independence is not mainly about the independence of disciplinary courts and control over Bar Association members regardless of political and other pressures. Once allowed to affect the Bar system, as in the case of passing the authority over examinations to the Ministry of Justice, political influence will undermine both the independence of the Bar Association and that of lawyers themselves.

To return to the title cited earlier, there seems to be little question about the fact that lawyers in Poland are witness to a revolution in the profession. Not only do they stand witness. There is a need for more involvement on their part in a way that is constructive, proactive and positive. Otherwise the Bar Association will become a union of lawyers who join it without any control on its part and who perform their duties fully detached from the Association and without any accountability thereto. Whereas from the standpoint of a regular client, the traditions and values cultivated and upheld by the Bar Association are of little consequence, its faithfulness to such principles as independence, honesty and professionalism are of utmost importance.

In summary, it should be noted that as well-intentioned as they were, the Polish reforms are being carried out using imperfect means. In my personal view, the depriving of the Bar Association of authority over admission to the Bar has failed to ensure transparency of the procedure of entry into the legal profession. No such guarantees are inherent in the system of centrally setting the composition of examination committees, subordinating them to the Minister or abandoning the oral part of the competition examination. A change of the evaluating party alone will not ensure a fair assessment of candidates. The transparency of admission to the bar has been additionally undermined by allowing candidates to avoid advocate training – this, in my opinion, stands in sharp contrast with the original argument for reform. The only evaluation criterion embedded in the system is the technical knowledge of the candidates. One must not allow, however, for verification of lawyer integrity and morality to take place only after they have already been placed in their positions of employment

.

The amendment of the Polish Bar Act is by no means an all-cure for the ailments of the Polish Bar system. As the important controls of the system are handed over to the state, new risks arise. All of this should make us search for alternative solutions. We should pursue the same end using alternative means. Note also that one cannot overestimate the importance of the legal community getting involved in solving this issue. The active mobilization of their knowledge and experience is critical for conducting a proper and thorough reform of the Bar that will adequately account for all of the intricacies of its system.

Introductory Speech of Dr. Margarete von Galen

It is a great honour for me to speak before this conference which deals with the role of the defence Lawyers. I am delighted that I have the opportunity to present the situation as it is in Germany. Even if some aspects of the German system can be seen with a critical eye, we are still very much aware that we do enjoy a very high standard concerning the rule of law.

To start with, I shall give you a short overview of the terms and conditions how to become a defence lawyer in Germany. Then I shall touch on the role of the Bar Association as a regulatory body. Finally I shall come to speak of the matters which defence counsels were confronted during the 1970s at the time of the terrorism trials connected with the Red Army Faction. I will close with a short summary concerning the situation of today.

There are 28 regional bar associations in Germany dealing with regional concerns and issues affecting the legal profession, and one Federal Bar Association which deals with concerns and issues affecting the Bar associations as a whole. Every lawyer must be accredited by the Bar association responsible for the area in which his law firm is domiciled. Membership of the Bar is mandatory. There are no lawyers who are not members of the Bar.

Legal training in Germany is divided into two separate phases. Each phase ends with a state examination: first a university course, and second a two-year period of practical training accompanied by the teaching of theory, funded by the state. This training period ends with the second state examination. Everybody who has successfully passed the second state examination is eligible for admittance to the Bar. The admittance is conducted by the Bar association itself and gives a lawyer,

an entitlement to act before all courts in Germany. (There are some exceptions concerning civil law, but they don´t matter in this context.)

Thus in criminal cases from the first day of his admittance to the Bar a lawyer is empowered to appear before all courts in the land, including the Federal Supreme Court of Justice.

Each lawyer pays a fee covering the administrative charges of admission. In addition, he is also obliged to pay an annual fee to the Bar. Such fees vary from region to region, but they all come within the compass of the charges that I can cite for Berlin where the administrative fee for admittance to the Bar is EUR 250,- and the annual fee is EUR 306,-.

Whoever wants to stand out from the crowd of some 135,000 lawyers currently hosted by Germany can go for the laurels of the title "Specialist Lawyer in Criminal Law". The award is granted by the regional Bar association itself. But even those without this specific title can take over the role of defence counsel in criminal proceedings at any time. The Bar associations have no regulation in this matter.

I shall now touch on the regulatory and supervisory functions of the Bar associations:

The regional Bar associations are autonomous corporations under public law. Self-administration among lawyers has a long tradition in Germany. The Bar associations were first established 126 years ago, and since then their structures have remained largely unchanged – only the Nazi era imposed limitations on the powers of lawyers to regulate themselves. The Bar associations are subject to a supervision by the Regional Ministry of Justice. But this supervisory body has little practical effect. The Ministry rarely interferes in the affairs of the bars.

First and foremost, the bar assumes the role of the supervisory authority for all accredited lawyers. Moreover, the bar is the key body representing lawyers' interests at large. For instance, in this capacity it delivers statements of position on legislative procedures and represents lawyers' interests when it comes to the settlement of conflicts between the legal profession and the judiciary.

The Bar associations monitor lawyers' compliance with their professional obligations. If a lawyer infringes on them, the Bar association may issue a reprimand or pass the matter on to the Prosecutor General for further investigation. The Prosecution has a special department dedicated to the violation of laws on the profession.

If the lawyer should appeal against the reprimand by the Bar, or should the prosecution bring an action against him, proceedings are brought before a special tribunal established by the Bar for handling complaints against lawyers. This tribunal is a special branch of the judiciary that deals exclusively with violations of the laws governing the lawyers' profession, the accreditation or revocation of accreditation, and disputes over the awarding of specific lawyers' titles. There are three instances. The first two instances are staffed by a majority of lawyers who in these cases act as judges. Only the third instance is majored by regular judges. We

cannot say that nowadays a defence counsel would run any particular danger of being accused before a Bar tribunal.

But there were times when numerous defence counsels had to justify their conduct in a court of law in proceedings before the bar tribunals. Those were the times of the terrorism trials for the crimes of the "Red Army Faction" in the 1970s. Representing the interests of their clients in a trial and using every op-portunity offered by procedural law to do so, led to conflicts with the courts and the prosecution.

This was accompanied with bitter hostility on the part of the government. The then federal minister of justice said at that time "both the accused and the defence counsel make an exceptionally intensive use of all opportunities offered by legal procedure .... We are dealing with people who are ruthless in exploiting each and every possibility offered by the rule of law." A government statement declared, "The rule of law would be damaged if extremist forces succeed in turning the Courts into their stamping ground thereby mounting a challenge to the enforcement of the state's entitlement to instigate criminal proceedings in a trial governed by the rule of law."

In a case brought before the tribunal of the Berlin Bar association the prosecution applied to have the lawyer Hans-Christian Ströbele – today a well known member of the German parliament and member of the Green Party - banned from practising his profession. In spite of the political pressure, the bar tribunal ruled against this apply.

So today it is practically unknown for the conduct of the defence counsel – as long as it does not infringe general statutes of criminal law – to become the object of a case on the violation of laws on the profession.

Defence counsels may undertake all manner of things which are useful to their clients provided they are legally non–objectionable. The defence counsel may put forward claims about whose accuracy he himself has doubts. As long as he does not consider such claims to be completely devoid of foundation, he is in fact obliged, in the best interests of his client, to bring them before the court; even if he considers that there is the possibility the claims might be incorrect. Not allowed are deliberate lies on the part of the defence counsel. He must keep well away from wilful obscuring and distorting.

Ladies and Gentlemen, I hope that I have succeeded in showing how a free, self-governing and self-regulating legal profession can ensure that the defence lawyer plays his or her adequate role in a fair trial according to the rule of law.

Session III: Equality of Parties in Criminal Proceedings

Introducers: **Ms. Louise Christian,** Lawyer, United Kingdom

Mr. Yuri Schmidt, Lawyer, Russian Federation

Summary of the Introductory Speech of Ms. Louise Christian

Concerns were expressed about the right of the client to choose their lawyer. In the UK this is an enshrined right. The term 'Equality of Arms' does not appear in international conventions; UN Basic Principles and the European Convention on Human Rights (ECHR) do not mention it, but rather regulate different rights that define the principles that make up the ingredients of the concept.

Equality of arms is always an aspiration but not something that can be completely achieved. People are often prejudged as being guilty well before the end of their trials. This is especially true in terrorist cases where the state is under pressure to convict. When there are concerns about the independence of the court, it is difficult to speak about equality of arms, but lawyers can make a difference. The current case of the prisoners in Guantanamo Bay, some of whom Ms.Christian represented, is a case in point. Despite the fact that there is no access to prisoners in Guantanamo or to trials by military commissions, the appointed military lawyers were as concerned about the conditions in Guantanamo as civil lawyers. In such cases defence lawyers can be compared with David in the biblical story of David and Goliath. All the physical strength lies with the state, and one cannot win by virtue of sheer strength but by virtue of intelligence and perseverance.

Ms.Christian has been practicing law in the United Kingdom for twenty-six years and has seen great improvements. Twenty-six years ago, in one of her first cases, a person was charged with murder. She was not allowed to speak to him in private or see him for a week. Nowadays this is unthinkable. The relevant legislation was amended and these conditions were changed. In those days it was considered irregular to refer to the ECHR, and indeed in one case Ms.Christian was censured for mentioning it. Now one could be censured for not doing so since the ECHR has been incorporated into the legal system of the United Kingdom. Indeed one of the most powerful weapons in a defence lawyer's armory is the international conventions enshrining the rights of presumption of innocence. It is up to the prosecution to prove guilt.

The Prosecutor is obliged to fully disclose all the materials, information and evidence they have gathered. Ms. Christian defended a woman whose husband went to Israel to become a suicide bomber. She was accused of having known what he had been planning and then failing to inform the authorities. During the search of her house all her papers were taken by the police. However, evidence within those papers that proved her innocence was ignored by the police. That evidence was brought into court and she was acquitted. Defence lawyers must always demand to see all the evidence gathered by investigators, even that which the prosecution is not using or does not plan to use.

In the United Kingdom there is what has been called public interest immunity. According to this rule some evidence cannot be presented on the basis that it might prejudice an individual's security in the case of informers, or state security.

In some cases expertise is required to deal with technical issues. One example of this involves a terrorist trial where surveillance of defendants revealed several persons speaking at once. Experts were needed to make sure that the evidence was not tampered with. In such cases the defence needs experts of the same calibre as those presented by the prosecution.

Subjective prejudicial coverage in the media must be challenged by defence lawyers. In one of Ms. Christian's cases, that of the woman whose husband became a suicide bomber, the media referred to her client as the "woman of terror" before her trial. In cases like this it is the responsibility of the attorney general, who is a member of the Government, to stop this kind of highly prejudicial coverage.

The final message is this: everywhere lawyers have to struggle for equality of arms and it is our obligation to carry out that struggle as good lawyers will never stop trying to achieve it.

Introductory Speech of Mr. Yuri Schmidt

In 1991 the Supreme Council of the Russian Soviet Federal Socialistic Republic adopted a Concept Paper on judicial reform in Russian Federation. It was a document respectable in every sense. Along with democratic principles of adjudication, the Concept Paper set forth a specific plan for gradual reform of the judiciary. Today it is difficult to say, how the reform would be implemented if it was not for difficult political and economic situation in Russia during the first years after the collapse of the Soviet Union and extreme events of autumn 1993.

At the same time, quite possibly it was the shooting and dismissal of the Supreme Council that stimulated the prompt adoption of the new Constitution. Overall, the new Constitution was democratic, as it included some of the most important human rights principles and guarantees envisioned by the Concept Paper, i.e. adversarial process and equality of arms, jury trial and possibility of pretrial detention only on the basis of court order. It should be noted however, that implementation of the latter two principles was conditioned on the adoption of new laws and thus significantly delayed.

Starting from mid-1990s, the reform went very slowly. The government neither impeded the process, nor did it have sufficient political will to advance it. It was probably Russia's desire to join the Council of Europe that prompted the adjustment of the Criminal Code in compliance with the European Convention of Human Rights and Fundamental Freedoms. The key role in reforming the Criminal Code at that time belonged to the Constitutional Court of Russian Federation, especially during the presidency of Justice M. Tumanov and tenure of Justice T. Morshchakova and the late Justice E. Ametistov. The reform, however, practically stopped after Russia was accepted to the Council of Europe in 1998.

The reform received new impetus during the first two years of Putin's presidency due to titanic efforts of Mr. Dmitry Kozak, chief of Presidential Administration at the time. However, Mr. Kozak's efforts were soon held back, and later he was relocated to the Southern Region (Chechnya, Dagestan and the rest of the Caucasus) to serve as plenipotentiary representative of the President.

In 2003 the judicial reform was stopped, and a retreating process, which continues today, began. The "counter-reform" primarily aims at limiting equality of arms and adversarial nature of the process by diminishing the rights of attorneys and of the accused.

It should be noted that the Ministry of Internal Affairs and the Federal Security Service opposed the judicial reform at all times. The same is true for the Prosecutor's office and courts of all levels. Ironically, the more rights the accused received - the more violations of those rights occurred. Thus, the system of justice administration was trying to preserve itself unchanged. Nevertheless, at some point there appeared to be first signs of an independent judiciary. Courts issued sensational acquittals in several high-profile cases, including the case of environmentalist A. Nikitin, charged with treason. Nothing like that ever happened in the USSR or even in post-communist Russia. At the time of those decisions the Federal Security Service attempted to pressure the courts, but Eltsin administration stayed neutral. Later, the government suppressed these signs of judicial independence, and learned how to manipulate trials - even those heard by jury.

It is well known that in USSR there was an official policy of the party in the field of justice. Courts regularly received guidelines and orders, and engaged in numerous campaigns targeting particular criminal activity. In fact, there was an unofficial prohibition of acquittals.

In order to analyze judicial practice in criminal cases during Putin's presidency, I would like to categorize all trials depending on their political significance and government's interest in their outcomes. Thus, in politically motivated cases (the number of which is rapidly increasing) independence of the judiciary, adversarial trial and equality of arms do not exist. These cases are not governed by law. In some cases, however, the government is interested in acquitting defendants. It happens when the government is forced to prosecute, for example, for murder of civilians in Chechnya. But "staged" trials like that should not be taken into account altogether.

The bulk of cases, where political motivation is absent, are from time to time tried in a manner more or less compatible with democratic standards of adjudication. Unless, of course, these standards are replaced with corruption…

Having limited time for my speech, I won't be able to analyze the entire legal framework in detail. Therefore, I will emphasize only certain aspects thereof and illustrate some of them with examples.

It is absolutely impossible to speak of any degree of equality of arms at a the pretrial stage. During a pretrial investigation, which sometimes lasts for years, investigators and prosecutors are not obliged to inform the accused or her counsel about evidence they have collected. Only a small number of procedural documents are made available for the defense. Obviously, this hurts innocent defendants the most – at times, they have no idea what is going on and what exactly, apart from their involvement in crime, they have to dispute.

The accused are entitled to file petitions. Under Article 159 of the Criminal Procedure Code, investigators and prosecutors "may not deny petitions, filed by the accused for questioning of witnesses, appointment of expert examination or conduct of other procedural actions, under condition, that circumstances to be established by such procedural actions, bear significance to the case". But who, apart from prosecutors and investigators, determines which circumstances "bear significance for the case"? Therefore, denial of petitions filed by defendants is a

normal practice during pretrial investigation. Moreover, any piece of paper found and attached to the case file by an investigator, is considered evidence by default. In order to find it inadmissible, defense has to be very active and apply significant efforts.

The law provides for a possibility to appeal "unlawful actions and decisions" of investigators and prosecutors to court. Unfortunately, judicial supervision over conduct of investigators and prosecutors boils down to a mere formality. Firstly, judges consider such complaints additional burden on top of their main duties and don't like to scrutinize them. Secondly, judges bear no responsibility for the outcomes of reviewing such complaints. Regardless of the outcome, judges have nothing to do with it. Finally, judicial supervision over conduct of investigators and prosecutors could be improved by having a single judge assigned to review defendants' complaints. In reality, complaints regarding the same case are often reviewed by different judges. For example, in a case against Yuriy Samodurov, Director of Sakharov Museum, the defense simultaneously filed three complaints alleging unlawful conduct of an investigator. It would only make sense that the complaints were reviewed by a single judge, but despite attorney's efforts the complaints were examined by three different judges.

Article 53 of the Russian Criminal Procedure Code (hereafter "CPC") provides for the right of defense attorney to "collect and submit evidence, necessary for rendering legal assistance in the case". However, this rule is only a declaration. In reality, an attorney can only petition her *procedural opponent* to attach evidence to the case file, and the latter decides whether she needs additional headache. Should the petition to attach evidence be denied, scenario described in the paragraph above will take place.

There is no guarantee that the materials you submit will be attached to the case file. Let me give my younger colleagues a piece of advice based on 45 years of my experience as a defense attorney. Make sure that you file all petitions to attach evidence to a case file in writing. Moreover, include the evidence itself as an *attachment* to the petition. This does not guarantee that the investigator will accept, for example, expert findings. Therefore, you should reproduce those findings in the petition. Even if a procedural action for which you petition is not granted, there is no way for the investigator not to accept the petition itself.

It is possible to resubmit all petitions, rejected during pretrial investigation, at the hearing on the merits. However, timing can be vital. Besides, if your petition was previously denied, you will probably face the same resistance from your opponent in court. In this regard, I would like to tell you how Meshchansky district court of Moscow city treated petitions, filed by defense in the case of M. Hodorkovsky and P. Lebedev.

First of all, at the time of filing the petition the court neither allowed the defense to voice the importance of documents which were sought to be attached to the case file, nor did it allow talking about their substance. The court justified its conduct under Article 286 of CPC, according to which documents submitted for the hearing on the merits "may by decision of the court be examined and attached to the criminal case file". The second source of law, referred to by the court, was Article 285 of CPC under which documents attached to the case file may be fully

or partially announced at the hearing if "they state or certify the circumstances, which bear significance for the criminal case".

Therefore, our attempts to *justify* the petition for attaching the documents to the case file were defeated by the judge's argument that the documents may only be examined on the basis of a court decision. But in order for the court to make such decision, it must be attested that the documents sought to be attached *state or certify the circumstances, which bear significance for the criminal case.* How can this be attested without scrutinizing the substance of the documents? As a result, in most instances the judge would simply ask us to hand the documents over to the prosecutor for determination of significance. The prosecutor (who, regardless of the volume, always needed less than 15 minutes for examination of the documents) objected our petition every time. The grounds for objection were always far-fetched and sometimes even comic. For instance, if we were attaching a duly certified copy of a court decision from a different case, the prosecutor would claim inadmissibility on the grounds that the court's letterhead has an "incorrect" coat of arms – there is no heraldic shield behind the two-headed eagle.

Another document, which we sought to attach in that case, was dismissed by the prosecutor and later by the court based on Article 53, paragraph 1 section 2 of CPC. We were told, that according to Article 53, it was the *attorney* who had the right to collect and submit evidence, but in our case the document we sought to attach was collected by our *law firm*, which is not an attorney! Do I need to comment this?

In other instances, expert findings were denied on the ground that the person employed by the defense in the capacity of expert was not deemed an expert prior to making of the findings. Accordingly, the prosecutor claimed violation of the procedure set forth in Articles 58 and 168 of CPC. It turns out that the attorney is deprived of the right to use experts. In practice, the attorney must first file a relevant petition with the investigator or court, and only in case of an affirmative answer, she may contact an expert. This situation is contrary to the letter and the spirit of the law.

Russian courts still give the same weight to witness testimonies received during pretrial investigation, and those received at the hearing on the merits. I would even say that the preference is given to the former, despite the fact that at the pretrial stage witnesses testify one-on-one with an investigator. Such testimonies are often given in the absence of the witness' attorney, and always in the absence of the defendant's attorney. However, striving to implement the principles of oral nature of court proceedings and direct examination of evidence by the court, the new CPC of the Russian Federation limited the ability to disclose the substance of testimonies given during pretrial investigation. Nevertheless, Article 281 of CPC was amended in 2003 to allow the disclosure of pretrial testimonies in cases of their "significant inconsistency" with testimonies given during the trial. It is clear, that in the majority of cases this Article is used to further the interests of the prosecution. Clearly, it is impossible to prove any kind of inconsistency without disclosing the content of the pretrial testimony. In the Hodorkovsky case, the court never refused the prosecutor to use pretrial witness testimonies. Yet, not once had the court inquired what the claimed inconsistency was.

At all stages of a trial the accused and her attorney may be limited in time to prepare for the case and to familiarize themselves with the trial record. In politically motivated cases, including the case of M. Hodorkovsky, such limitations are set with exceptional arbitrariness. I would not want to repeat the story of review of that case in the cassation court – most of those present here are well familiar with it. In order to prevent registration of M. Hodorkovsky as a candidate for elections to the State Duma, the court of cassation (following the government's orders) called a hearing with violations of all legal and ethical rules. I know from the media, that Saddam Hussein's attorneys requested three additional months to prepare for the case. The court shortened this term, but still gave them one-and-a-half months. On September 22, 2005, Mr. Hodorkovsky asked the Moscow city court for 8 weeks to familiarize himself with the charges (700 pages), the trial record (6500 pages), and with the appellate briefs (roughly 1000 pages) and to prepare his defense. The court gave him neither 8 weeks for preparation, nor even 1 day to see a lawyer.

The situation described above is primarily caused by ambiguity of the relevant legal provisions. However, it does not so much characterize the legal framework as inadequate, but rather illustrates the facts of outrageous violations of rights of the accused in politically motivated cases. Another legislative shortcoming in regulating the procedure in cassation courts is that the defense is deprived of the right to a closing argument. It means that before the court leaves for deliberation, the last word belongs to the prosecutor.

As I stated previously, in Russia we are not hoping for the continuation or advancing of the judicial reform. It would be great if we could preserve what we have. But we know of several retreating legislative initiatives, and there is little that can stop them from becoming laws in the nearest future. Russian government feels too confident. In the past, Western countries had such mechanisms of influence as selling wheat and giving loans to Russia. Today, however, oil prices relieve Russia of the necessity to entertain opinions of foreign governments or even the opinion of its own public.

ANNEX VIII: CLOSING REMARKS AMBASSADOR CHRISTIAN STROHAL

Closing Remarks

by Ambassador Christian Strohal

OSCE Supplementary Human Dimension Meeting
»Role of Defence Lawyers in Guaranteeing a Fair Trial«

3-4 November 2005
Tbilisi, Georgia

The vibrant discussions of these two days have clearly shown that the topic of this Supplementary Human Dimension Meeting is indeed important and timely. It was particularly rewarding to have here so many practitioners and leaders of the legal community.

The Meeting demonstrated how complex and closely intertwined are the issues we discussed: the right to a fair trial requires access to professional and competent legal counsel; admission to the bar and the bar regulation are linked with the availability of lawyers and their professional and ethics standards; the role that defence lawyers are allowed to play in criminal proceedings is crucial to ensuring the fairness of criminal trials and protection of human rights.

We heard from the participating States which are in the process of reform of the defence bar and from some who intend to undertake reform in the future.

We also heard numerous reports from individual lawyers on the situation for the defence bar, and on their abilities to do their jobs in their countries. Unfortunately, many of these reports have only served to highlight the fact that many participating States in the OSCE region still have a long way to go to ensure that defence lawyers enjoy the full protection of the law in defending their clients. These sometimes disturbing reports help to answer one of the questions posed by our Keynote Speaker, Sir Sydney Kentridge, when he asked: “why in 2005 do we need a meeting devoted to this topic?” The discussions during the last two days showed that there is still much work to be done before this topic is passé.

This only underscores the need for exchange of experience and best practices among the participating States in carrying out reform.

At the same time, it also highlights the need for similar exchange, dialogue and co-operation *within* participating States, among the different groups and stakeholders in the criminal justice system.

At first glance it may have seemed that some questions raised and debated during this Meeting were rather dry and technical. But as we all know, the devil is in the detail, and we should not forget that these technicalities determine the availability of effective legal assistance to the people – in criminal but also in civil cases, enabling them to exercise and enjoy their rights, and creating a favourable climate for economic development.

I am grateful to the many speakers who pointed out the need to balance, on one hand, the public interest to have access to professional but also affordable legal services, and, on the other hand, the legal profession's interest in independence, self-governance, and upholding high professional standards for its members. In finding this balance, the States should also be mindful of their obligation, often enshrined in national constitutions, to ensure competent legal assistance for their poorest citizens. Too many citizens in the OSCE participating States go on trial without the benefit of professional counsel.

Over the last years, the ODIHR has provided assistance in reform of the legal profession including strengthening the role of defence lawyers. Yesterday and today I heard calls for more ODIHR involvement in these issues. Of course my Office will continue to lend expertise and render whatever assistance is practical. You are encouraged to make full use of the experience and expertise available in the ODIHR.

So how can we take this meeting, and the numerous suggestions and recommendations made, forward together?

I would encourage the participating States to keep this issue high on the political agenda. Clearly one SHDM cannot solve these problems. There is a need for continuing, long-term and consistent involvement, including legislative and administrative measures.

Serious attention should be paid to ensuring full implementation of the existing laws in practice so they are not simply empty words on a page. In addition to on-going work at the domestic level, this topic should continue to be addressed on the OSCE agenda.

This meeting has also shown that the OSCE commitments in the field of legal assistance and legal profession undertaken by the participating States in Copenhagen in 1990 and in Moscow in 1991 continue to be of great importance and relevance. There also appears to be room for expanding the commitments on these issues to make them more comprehensive and giving greater guidance to the participating States in guaranteeing the right to legal counsel, better bar regulation, and equality of parties in criminal proceedings.

Beyond, we will have to ensure that a comprehensive approach is taken on the criminal justice system as a whole. Ms Christian suggested that equality of arms might not be fully attainable, but that defence lawyers will continue to fight for it. I would add the following: the State has to fight for it as well.

And Sir Sidney pointed out that it is not only the great cases that demonstrate our commitment to the rule of law – indeed, it is the everyday cases, the anonymous ones, as it were, which serve as a reality check, and as a litmus test.

In conclusion, allow me a few words of thanks. We are grateful for the insight of the OSCE Chairmanship in recognizing the importance of this topic. I want to thank again our generous hosts, the Government of Georgia, for their hard work towards the success of this meeting; a special word of thanks goes to Ambassador Dolidze.

This meeting was defined by the remarkably high quality of the participants' input. I am grateful to all of you for making the journey and for your active participation and your excellent recommendations. I also want to thank again our Keynote Speaker, and our introducers.

My special thanks go also to the OSCE conference services and the ODIHR staff who started the preparations of this Meeting many months ago and worked for long hours here in Tbilisi. The rapporteurs, note-takers, and our moderator also deserve a special mention and thanks for their hard work. Finally, thanks to our interpreters without whom we would not have been able to have this meeting.

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Keynote Speaker, Introducers, Moderator and Rapporteurs

Amb. Christian	STROHAL	Remarks at the Opening Plenary Session
Amb. Gela	BAZHUASHVILI	Remarks at the Opening Plenary Session
Amb. Jozica	PUHAR	Remarks at the Opening Plenary Session
Mr. Konstantine	KEMULARIA	Remarks at the Opening Plenary Session
Mr. Sydney	KENTRIDGE QC	Keynote Speaker of the Opening Session
Mr. Michael P.	JUDGE	Introducer at the Session I
Dr. Daniyar	KANAFIN	Introducer at the Session I
Ms. Cynthia	ALKON	Moderator of the Session I, II and III
Mr. Goetz	BRINKMANN	Rapporteur of the Session I
Dr. Margarete	VON GALEN	Introducer at the Session II
Mr. Leonard	CYRSON	Introducer at the Session II
Mr. Vasily	VASHCHANKA	Rapporteur of the Session II
Ms. Louise	CHRISTIAN	Introducer at the Session III
Mr. Yury M.	SCHMIDT	Introducer at the Session III
Mr. Frank	LEDWIDGE	Rapporteur of the Session III