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PRESIDENT

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Address of Judge Patrick Robinson, ICTY President

OSCE 2009 Human Dimension Seminar: Strengthening the Rule of Law in the OSCE Area, with a Special Focus on the Effective Administration of Justice

Your Excellencies,

Ladies and Gentlemen,

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

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

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

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

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

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

> "The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without restrictions, improper

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influences, inducements, pressures, threats or interferences—direct or indirect—from any quarter or for any reason."[1]

Judicial independence is a means by which courts are made fair and impartial.[2] What judicial independence does not mean is that judges are free to decide cases according to their own whims or prejudices. Judges are constrained by the law and have a responsibility to apply the law to the facts that have been established before them.

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

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

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

Although there are overlaps in the functions of the three branches of government, the inviolability of the independent decision-making powers of the judicial branch must always be preserved. The way the courts decide a case before them can never be dictated by the legislature or the executive. The doctrine of the separation of powers does not exist in a pure form, and one often finds overlaps in the functions of the legislative and executive branches. But the judiciary can never be subjected to direction by the executive or the legislature.[3]

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

Judges must be permitted to work without being subject to political pressure. This does not mean that judges live in a hermetically sealed bubble or never read the newspaper. It means, rather, that judges must be free to make decisions without fear of political reprisal or without the hope that they will benefit from political favour through their decisions. The need for judicial independence is most evident when the

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

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

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

majority is bearing down upon the minority, or even an individual. Judges can be a powerful counter-majoritarian force in a society, making unpopular decisions at sensitive moments in history in order to protect the rights not only of individuals in the present, but the rights of future generations as well.

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

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

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

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

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

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

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

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

The Statute of the Tribunal provides that the judges are elected by the Member States of the United Nations in the General Assembly. Those nominated and elected must be persons of high moral character, impartiality, and integrity. And they must possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the judges of the Tribunal, due account must be taken of the experience of the judges in criminal law and international law, including human rights law and humanitarian law.[4]

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

In respect of judicial tenure, promotion, and remuneration, the permanent judges of the Tribunal serve for fixed terms, and this enables them to exercise their impartial judgement in the cases before them without concern that their decisions will impact upon their holding of the judicial office. Moreover, the non-permanent ad litem judges, who serve only for the duration of the specific case to which they are assigned, are secure in the fact that, once they have begun a trial, they will be

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

permitted to finish it. The judges therefore exercise their duties in an atmosphere where their judicial tenure is never in any way dependent upon the approval of political forces.

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

The question of the independence of the judges of the Tribunal was raised in a case in which I was involved in 2005. In 2003, the Security Council adopted a Completion Strategy for the Tribunal, requiring all investigations to be completed by the end of 2004, all trials to be completed by the end of 2008, and all work by 2010.[5] An application was made for the joinder of seven accused's cases into one of our multi-accused trials. One of the accused, in opposing the joinder of his case with the other six accused, argued that the Completion Strategy of ICTY should not influence the Trial Chamber in its determination of the joinder motion or be allowed to influence his right to a speedy trial.

The Trial Chamber granted the motion to join the cases together into a single trial, but I considered it necessary to draft a separate opinion making it clear that the Completion Strategy in no way affected the decision I made and that I would have decided the motion in the same way, had it come before me before the Completion Strategy had been adopted by the Security Council and the Tribunal.[6] I think that this is an example of how political and administrative forces can co-exist alongside judicial decision making, without the former having any influence upon the latter.

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

The Rules of Procedure and Evidence of the Tribunal provide that one of the functions of the President is to co-ordinate the work of the Chambers and supervise the work of the Registry.[7] This is a relatively straightforward task, but requires a great deal of organisation within the Office of the President. When a chamber of judges must be assigned, routine checks are conducted in order to ensure that no judges have conflicts in the case.

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

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

However, I would support, in principle, an international model code of judicial conduct, which all international tribunals could adapt to their specific needs. There

[5] Resolution 1503.
[6] *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Motion for Joinder, 21 September 2005, Separate Opinion of Judge Patrick Robinson.
[7] Rule 19(A).

may always be cases where things go wrong, and in those cases, it is prudent to have in place objective and established standards that can be applied, when necessary.

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

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

On the issue of self-governance, pursuant to the Rules of Procedure and Evidence of the Tribunal, a judge may not sit in a trial or appeal in any case in which he or she has a personal interest or concerning which the judge has, or has had, any association that might affect his or her impartiality. In such circumstances, the judge is required to recuse him- or herself, and the President must assign a new judge to the case.[8] Moreover, this rule extends not only to cases where an actual conflict exists, but also where the mere appearance of partiality could exist in relation to an objective and informed observer of the proceedings.

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

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

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

However, due to their involvement in the investigative stage of the contempt proceedings, the specially appointed chamber was of the view that there was an appearance of bias and thus disqualified the two judges and asked me to appoint others to take their place. I have now done so, and the case is moving forward once again with a new bench. I think this is a splendid example of the tribunal's healthy and robust self-governance.

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

[8] Rule 15.

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

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

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

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

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

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

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

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

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

An essential element of the Completion Strategy is the referral of cases from the Tribunal's docket back to the states of the former Yugoslavia. For the Tribunal is

not able – and was never intended – to address all serious violations of international humanitarian law committed during the wars in the former Yugoslavia in the 1990s, and the Tribunal is merely one of a variety of tools to address the post-conflict challenges in the area of international criminal justice. It is for all of these reasons that the Security Council used its foresight in 2003 and 2004 to enlarge the mission of the ICTY. It called upon the donor community to support the development of the War Crimes Chamber of the Court of Bosnia and Herzegovina. And it did so based upon the stated proposition that the strengthening of competent national judicial systems was crucially important to the rule of law, in general, and to the implementation of the ICTY Completion Strategy, in particular.[9]

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

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

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

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

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

    b. Another project, carried out in partnership with UNICRI and the OSCE's Office for Democratic Institutions and Human Rights[10] – one of the sponsors of this conference – involves an assessment of the capacity of the judiciaries of the former Yugoslavia to conduct war crimes cases and identifies ways in which the needs of those judicial institutions can be met.

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

[9] Resolutions 1503 and 1534.
[10] ODIHR.

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

The United Nations General Assembly has adopted "Basic Principles on the Independence of the Judiciary".[11] There are seven of these principles. I will not discuss all seven of them here today, but I would like to focus on two of them, which provide the following:

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

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

It is essential in a free society for these principles to be put into practice – by the executive, legislative, and judicial branches – as well as by an informed citizenry. The courts and judges cannot, all by themselves, ensure that the rights of citizens are protected. This is the job of all three branches working both together and, sometimes, in opposition to each other.

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

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

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

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

4. Reduction in the funding for courts.

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

> "what ultimately protects the independence of the judiciary is a community consensus that that independence is a quality worth protecting".[12]

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

It is therefore the responsibility not only of judges, but of all of us here in this room today, to adhere to the principles of judicial independence, which I have outlined in my remarks, and to support at all times the independence of the judiciary. And this

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

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

means even when we do not necessarily agree with the outcome of those men and women entrusted with this most sacred duty.

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

To quote Justice Kennedy of the United States Supreme Court:

> "The law makes a promise – neutrality. If the promise gets broken, the law as we know it ceases to exist. All that's left is the dictate of a tyrant, or perhaps a mob."[13]

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

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

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