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Perspectives on Judicial Dialogue and Cooperation: Keynote Address¹

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Madam Chairperson,
Honorable Justice Sandra Day O'Connor
Honorable Justice Richard Goldstone,
Honorable Presiding officers and members of Supreme Courts, Constitutional
Courts and other Courts,

Distinguished members of the Judiciary and legal professionals from around the
world,

Distinguished authorities and representatives of the two convening entities, and
of all the organizations and associations here present,

Distinguished audience,
Ladies and Gentlemen,

I feel extremely honored to address this unique gathering in the very prestigious context of the world-renowned Harvard Law School, a leading center of thinking and research on crucial challenges facing our world. I salute the initiative of the two convening entities, the American Society for International Law and Harvard Law School. This gathering is extremely timely and relevant. And, indeed, it is a rare privilege to see such a number of highly experienced judicial actors and representatives of entities concerned with justice and its independence sitting together for a think-tank on such topical issues as those on our agenda. I thus look forward to very stimulating and fruitful discussions and to the emergence of fresh ideas and strategies.

I am talking today based on my daily experience as United Nations Special Rapporteur on the Independence of Judges and Lawyers. Yet, rather than reflecting

¹ This paper was prepared for a conference entitled "Transnational Judicial Dialogue: Strengthening Networks and Mechanisms for Judicial Consultation and Cooperation," held at Harvard Law School on December 1-2, 2006 and sponsored by the American Society of International Law and Harvard Law School.

on current world juridical and judicial developments, which are central to my mandate, I would like to focus on an emerging phenomenon that I consider extremely important, timely, and worth contemplating. I refer to the involvement of judges and lawyers in defending and consolidating the independence of the judiciary around the world. Through my work as U.N. Rapporteur, I can testify to various inspiring good practices in this respect, which go far beyond a narrow corporative approach of judicial institutions. Both individually and through their networks, judges and lawyers are, and should increasingly be seen as, key actors in international efforts aimed at securing independent judiciaries and, through them, the right to fair and efficient justice for all. This is why I am personally interested in stimulating and diversifying such involvement.

But allow me first to provide a brief overview of the nature and scope of my mandate as U.N. Special Rapporteur on the Independence of Judges and Lawyers and to present the tools available to me.

As you may know, when the former U.N. Commission on Human Rights established my mandate in 1994,² its main concern was to address the many examples of attacks on human rights to which judges, lawyers, and auxiliaries of justice were being exposed around the world. This was already rather audacious and ambitious. Yet, it soon emerged that one could hardly defend judicial actors without looking at structural factors permitting or even leading to their personal attacks. This is why, after nine years of excellent work by my Malaysian predecessor, Dr. Param Cumaraswamy, and almost four years of my work, the mandate has considerably evolved through successive decisions of the Commission³ and currently the Human Rights Council.⁴

Today, the mandate encompasses all aspects related to the structure and functioning of the judicial system and their impact on the enjoyment of human rights. This covers a very wide range of issues, such as corruption, equal access to fair proceedings, the level of financial allocation and independence of the judiciary, and ways in which judges are being appointed and removed, just to name a few. It covers the administration of justice in both ordinary and exceptional situations, military and civilian justice, and developments taking place at the level of the International Criminal Court and other international tribunals. Last but not least, it covers best practices in what is usually referred to as transitional justice in post-conflict states. This includes a variety of subjects such as vetting processes, the building or rebuilding of the judiciary, the right to truth, and the fight against impunity.

I will not reveal any secret if I say that such dramatic evolution is the product both of a rapidly evolving international agenda and of the acknowledgment that the

² See Comm. on Human Rights Res. 1994/41, U.N. Doc. E/CN.4/RES/1994/41 (Mar. 4, 1994).

³ See, e.g. Comm. on Human Rights Res. 2002/43, U.N. Doc. E/CN.4/RES/2003/43 (Apr. 23, 2003); Comm. on Human Rights Res. 2002/43, U.N. Doc. E/CN.4/RES/2002/43 (Apr. 23, 2002).

⁴ See e.g. Human Rights Council Dec. 2/110, U.N. Doc. A/HRC/DEC/2/110 (Nov.27, 2006).

rule of law lies at the heart of the democratic system. From this podium, such a statement is merely obvious. We all know that wherever basic legal principles are being thwarted for political reasons, the rule of law is in danger. Wherever the judiciary lacks independence, human rights are seriously at risk. Wherever judges and lawyers are exposed to abuse and persecution on account of their defense of fundamental legal principles and norms, justice itself is at risk. In fact, an independent and effective judiciary is in a privileged position to avert the erosion of the rule of law and uphold those essential values upon which our societies are being built.

Now, let me mention very briefly the tools available to me so that I may later elaborate on ways in which to strengthen cooperation between my mandate and judges' and lawyers' networks and associations, which is my main concern here today.

My main tool is the **annual general report**, which I present to the Human Rights Council and which, in the last two years, I have also been able to present before the U.N. General Assembly. It is aimed at addressing key substantive issues such as upkeeping principles for fair trial in the context of the fight against terrorism, transitional justice, the right to truth, the fight against impunity, military justice, and the role of international tribunals. In the same vein, I can also present **special reports** such as the one on the situation of prisoners in Guantánamo Bay that was prepared jointly with three other Special Rapporteurs and the Chairman-Rapporteur of the Working Group on Arbitrary Detention,⁵ and which I recently presented to the General Assembly. Also, at the invitation of governments, I can perform **on-site visits to countries** that enable me to review the actors involved in all aspects of the structure and functioning of the judiciary in a given country. This is probably my most efficient tool as it enables me to put forward detailed and well-informed recommendations for reform and improvement. The follow-up process to such visits often paves the way to fruitful and interactive international cooperation. Finally, I have two other tools, generally known as communications, enabling me to act swiftly in response to specific complaints. I can send out **urgent appeals** to consult governments about allegations on situations involving a possible violation of the human rights of a judge or a lawyer, a possible violation of international norms for a fair trial, or a threat to the independence of the judiciary or the rule of law. Where the complaint involves very complex issues of a less urgent nature, I can address **letters of allegation** to governments requesting detailed explanations. In both cases, such actions may work as a warning and have a level of preventive or dissuasive effect. And obviously, I can also issue **press releases** whenever I am satisfied that a major violation has taken place or is about to take place. For example, you may recall my interventions in 2004,⁶ when the Italian Parliament approved a reform of the judiciary

⁵ See U.N. Economic and Social Council [ECOSOC], Comm. on Human Rights, *Situation of Detainees at Guantánamo Bay*, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006).

⁶ See ECOSOC, Comm. on Human Rights, *Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice, Impunity*, ¶ 68-71, U.N. Doc. E/CN.4/2005/60/Add.1 (Mar. 18, 2005) (*submitted by* Leandro Despouy). See also Press Release, UN Expert Welcomes Italian President's Decision to Send Judicial Reforms Back to Parliament (Dec. 17, 2004).

that represented a major threat for its independence, and the head of state accepted my urgent recommendation not to ratify the law.

Such interventions would be impossible and would lack substance were it not for the daily contacts I maintain with those in the field who report on situations affecting the judiciary and its independence. **NGOs and human rights activists**, many of them members of the legal profession, are often in direct contact with the victims and are well aware of all domestic intricacies.

There also exist other networks that are key partners in my mandate. I refer to **networks and associations of judges and lawyers**, such as the International Bar Association, which analyze legal and other developments affecting judiciaries and explore ways to consolidate their structures and functioning. To that end, these networks sometimes offer expertise and assistance. I regret that time constraints do not permit me to elaborate on these entities and their important work, internationally, regionally, and nationally. It is thanks to such networks that many decisive international norms are elaborated. One example is the Bangalore Principles,⁷ a welcome initiative of my predecessor and an instrument that the United Nations and I, as Special Rapporteur, are proud to promote. Allow me also to take this opportunity to welcome and salute the fact that some of these networks - many of which are represented in this room - have recently made a breakthrough in their long-established practice of restricting themselves to studying judicial issues and have undertaken to intervene directly in defense of the judicial institution or its actors against abuses. And who better than judicial actors themselves and members of the legal profession to do so?

While I hope that the discussion will provide an opportunity to elaborate on these initiatives, I would like to offer a few ideas and suggestions for our debate.

First of all, this meeting demonstrates that judges and lawyers around the world fully understand that if the independence of the judiciary is to be upheld, networking and exchanging experiences are essential not just among judiciaries, but also among experts, scholars, and human rights activists. Judges should not remain confined to themselves. We need to create stronger bridges between different actors who are concerned with the judiciary.

Defending its independence is not a matter of corporatism. We are not merely defending an institution, the specific privileges of a given category of professionals, or even the prevalence of a specific judicial culture over others. I repeat and insist: What is at stake is a fair and efficient administration of justice for all.

Defending the independence of the judiciary involves both study and action: study of substantive legal issues and developments and direct interventions wherever we see a need for it, be it because the rule of law is at risk or because judicial actors are being exposed to threats to their independence or integrity.

⁷ See ECOSOC, Comm. on Human Rights, *Civil and Political Rights, Including the Questions of: Independence of the Judiciary, Administration of Justice, Impunity (Annex: The Bangalore Principles of Judicial Conduct)* 18-29, U.N. Doc. E/CN.4/2003/65 (Nov. 25-26, 2002) (submitted by Dato' Param Cumaraswamy).

For many judges and lawyers, peers from other countries are more reliable and better suited to provide advice than scholars and experts. This is why, in my reports and in situations where I am called upon to help resolve a given conflict affecting the judiciary, I insist that the United Nations seek the contributions of seasoned judges from other countries. One key example is the crisis affecting the Ecuadorian Judiciary in 2004/2005, which was resolved satisfactorily thanks, *inter alia*, to the involvement of presidents of various Latin American Supreme Courts as “watchdogs”.⁸

With this in mind, I personally launch an appeal here to those of you who feel that you can form part of a roster of potential resource persons for the United Nations in its efforts to uphold the independence of the judiciary and the rule of law around the world. I recall that reference has been made to an “invisible college of judges”.

It is not for me to say whether the need exists to generate a new entity. It may in fact be pragmatic and effective to federate efforts of existing networks through regular conferences such as this one. I only wish to suggest that one mission for such a “college” could be to offer assistance and expertise to this Special Rapporteur and to the United Nations in general in their efforts to strengthen the rule of law and independent, fair, and efficient justice. It could also form a high-level think tank to further the development and promotion of international norms on crucial topics such as protection of the rule of law during a state of exception or other exceptional circumstances, the fight against terrorism and transnational crime, or other hot topics referred to in our program. As you are well aware, I am especially concerned with the spreading all over the world, like powder, of legislation that breaches many basic international human rights norms and represents a real threat to the rule of law. Involving seasoned representatives of different legal systems and cultures, including religious and traditional law, from all parts of the world could help bridge dramatic gaps and further dialogue and understanding. It could also help to uphold legal conquests that cost the international community decades of effort.

Similarly, I call upon this prestigious Harvard Law School and the American Society of International Law to pursue the excellent initiative of this conference by undertaking to develop a manual of best international practices on the issue of the independence of judges and lawyers, especially those developed through this Special Rapporteurship. I just referred to the case of Ecuador, but in some fifteen years of work, many other inspiring cases are worth compiling. Allow me, for example, to express my gratitude to the American Bar Association’s Central European and Eurasian Law Institute for its decisive support in the context of my missions to various countries in Central Asia. It has been inspiring and has helped me consolidate a number of good practices.

With regard to international tribunals, I also trust that we need to promote exchange of information and experience. Very little has been done so far to take stock of and compare their procedures and achievements, yet there exists a wealth of

⁸ See Angela Kane, *Judicial Independence as Conflict Prevention and Resolution: The Recent Case of Ecuador’s High Court*, U.N. CHRONICLE ONLINE EDITION, 2006, <http://www.un.org/Pubs/chronicle/2006/issue1/0106p21.htm>.

experience that could prove decisive in difficult situations, such as Iraq's effort to judge its former dictator. As Special Rapporteur, I certainly call on members of those tribunals to participate in think tanks and networking. I also welcome a continuous dialogue with them.

With regard to transitional justice, United Nations efforts to identify and compile best practices have already borne some fruit. Still, such work needs to be deepened and continued. I am convinced that this is key if the United Nations is to provide the kind and level of assistance needed by dozens of countries in transition, which are faced with very different needs and challenges. I urge you to help in this process and to offer your insights and experience.

Countless countries lack proper judicial education, training, and expertise. Surely, there exists no magic and unique recipe. While we are familiar with the characteristics of various existing legal and judicial cultures, we must also acknowledge the reluctance that some emerging countries may feel toward being "colonized" through the importation of legal and judicial norms and practices foreign to their own. At the same time, it is worth emphasizing that values informing the rule of law are universal in nature. Their application is perfectly consistent with all moral or religious beliefs based on human dignity.

We also know that many countries are faced with the challenge of the coexistence of modern law, religious law, and tribal or traditional law. In all of these issues, dialogue with respect may be the answer. I am convinced that such dialogue, with all its limits and difficulties, should be prompted and developed. Indeed, I welcome a specific discussion group on the subject.

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