Strasbourg, 5 December 2002
<cdl\doc\2002\cdl-ju\044-e>

Restricted
CDL-JU (2002) 44
English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

The Role of OSCE in the Potection of Human Rights"

Report by Mr F. Javier Leon-Diaz
(International Lawyer, Human Rights Chamber for Bosnia and Herzegovina)

Conference on "Human Rights Protection Systems"
(Bishkek, 21-22 November 2002)

Summary of Contents

I. INTRODUCTION

This paper intends to examine both the process and the content of the debate over Human Rights issues in one of Europe's significant international bodies, the Organization for Security and Cooperation in Europe (OSCE). Indeed, the OSCE has become a significant institutional participant in the area of international conflict resolution and the mechanisms whereby the OSCE deals with human rights questions therefore offers an important insight into the future of human rights developments at least in the European context.

In fact, since the adoption of the Helsinki Final Act in 1975, the countries of Europe, then divided between East and West, committed themselves to the development of a community of shared values in the interests of their shared security and placed the protection of human rights at the center of the CSCEs broad concept of security.

II. THE OSCE AS A HUMAN RIGHTS MECHANISM:

The OSCE, originally established in 1975 as a forum for diplomatic consultation, has metamorphosed into a regional collective security instrument that ties respect for human rights -referred to as the "human dimension"- closely to the maintenance of security. It encompasses 55 participating states, including all 15 Member States of the EU.

Although the OSCE was created as a “security organization” and is dedicated primarily with “security and co-operation” issues, the OSCE understands security in a broad sense. It defines security not only by the absence of armed conflict – negative peace – but as a situation, which ensures the protection of human rights. In order to promote its human Rights aspect, the OSCE has introduced “the human dimension” into its activities. Thus although the Organization’s focus is conflict prevention through international security and inner-state conflict resolution, it understands that this cannot be achieved without democracy building, maintaining the rule of law and protecting and promoting Human rights within all participating States. Its institutional approach is comprehensive and can be an interesting tool since most of the issues tackled are interdependent.

The Human Rights aspects of the organization (human dimension) were agreed upon during successive meetings. At the CSCE summit in Paris in 1990, the “Charter of Paris for a New Europe” was signed to mark the transition from the politics of the Cold War. The Charter codified the guiding principles governing the "human dimension." The principal lines of the charter are prevention, negotiation and monitoring of the implementation of undertakings subscribed to by its 55 members. The Helsinki Document of July 1992 strengthened the OSCE contribution to the protection of human rights. To fulfil this role the OSCE, in 1992 established a new Post of Secretary General, and in 1993, a strengthened Secretariat and Conflict Prevention Center in Vienna. At the Budapest summit in 1994, the CSCE took on a permanent structure with a small secretariat and formally became the Organization for Security and Cooperation in Europe. The concept was to make it a “light” organization without a strong central bureaucracy, but with a mechanism that could oversee an increasing level of activity. Like other CSCE documents, the Budapest declaration was adopted by consensus but did not take the form of a treaty requiring ratification by member states.

Today, the OSCE maintains a very small permanent bureaucracy, drawing most of its staff on an as needed basis from professionals and experts who are seconded by their governments on renewable six-month contracts. The OSCE is an agile organization that can adjust quickly to changing circumstances. However, the OSCE's operational strength depends mainly on political consensus by all participating States, this can sometimes affect its operational decision-making process.

In fact, the OSCE is predominantly a "Field oriented organization". During the years, the OSCE has developed into an active field organization, with currently over 25 field operations (permanent missions and other forms of field activities) and approximately 5,000 national and international staff members. This physical presence in the region allows the OSCE to have a direct, long-term involvement with the actors in the different areas of responsibility. Indeed, almost 85% of the OSCE budget is directed towards Field Missions - rather than its central institutions. These field operations are supplemented by the work of such OSCE institutions as the High Commissioner on National Minorities (HCNM), the Office for Democratic Institutions and Human Rights (in Warsaw), the OSCE Representative on Freedom of the Media, the OSCE Regional Strategy and the Stability Pact for South Eastern Europe.

A. OSCE Institutions:

As said above, in addition to the Secretariat and the Conflict Prevention Center in Vienna, the OSCE has several other instruments to promote and protect human rights at its disposal:

The High Commissioner on National Minorities:

With its office located in The Hague, it has been tasked since its creation in 1992 with responding to ethnic tensions that have the potential to escalate into conflict within the region. The High Commissioner's function is to identify - and seek early resolution of - ethnic tensions that might endanger peace, stability or friendly relations between the participating States of the OSCE. His mandate describes him as "an instrument of conflict prevention at the earliest possible stage". Thus although the office substantive mandate relates to minority rights, which as part of human rights in international law are accorded to individuals, its main concern lies on the conflict prevention impact of it. The High Commissioner is not properly a human rights mechanism as could be the special raporteurs of the UN Commission on Human Rights. It does not investigate individual human rights violations.

The Office for Democratic Institutions and Human Rights (ODIHR):

The ODIHR is based in Warsaw. It assists the participating States to implement their human dimension commitments. It manages and undertakes human rights and rule of law projects within the OSCE region. It has the important task of translating the grand principles set out in the OSCE documents into concrete realities and turning the universal standards into specific programs. It deals with a variety of issues that fall under the "human dimension" category. The Office provides human and documentary resources, analyses constitutions, assists in drafting laws and organizes training programs for jurists, the judiciary, lawyers, journalists and the public in emerging democratic states from Armenia to Kazakhstan, the Baltics to Transcaucasia. It also has the task of managing the Vienna and Moscow mechanisms and of organizing the Implementation Meetings and human dimension seminars

The OSCE Representative on Freedom of the Media:

Created in 1997 it is tasked with monitoring developments within the OSCE area in the field of media freedoms. This provides the OSCE with a valuable 'early warning' function, enabling it to alert the international community to potential violations of international commitments to free media and by extension freedom of expression. The Representative collects and receives information on the situation of the media from many different sources. Participating States and other interested parties (e.g. organizations or institutions, media and their representatives, relevant NGOs) may forward their requests, suggestions and comments related to strengthening and further developing compliance with OSCE principles and commitments, including alleged instances of intolerance by participating States (hate speech).

B. Field presence:

As pointed out above, the OSCE's particular strength lies in the preponderance of field operations among its activities. The field presence is about ten times more than the size of the central institutions, and 84% of the organization's budget goes to support field activities. The operational center of gravity of the OSCE and its unique assets are these field missions. The OSCE institutions are also field-oriented: the ODIHR for instance, often fields expert teams and smaller OSCE field missions often depend on the ODIHR for expert assistance and financial support in dealing with human dimension issues.

Having transformed itself following the breakup of Yugoslavia and the Soviet Union, the OSCE began to send "missions of long duration" to take up residence in member states. These long-term resident missions play a unique role because they deal with specific issues at the local level, building partnerships. Real progress on the local level more often results from interaction of local officials and internationals that work with them on concrete issues. Because OSCE "missions of long duration" typically remain in a host country for a number of years, they have the capability of managing programs that could not be handled by visiting experts. The mission members are able to develop personal relations with local officials and follow progress on a day-to-day basis.

Today it has some 5,000 people in field missions in 19 countries of the region. The establishment of permanent OSCE field missions has proved to be an effective instrument for the protection and promotion of human rights. As a consequence of the basic OSCE principle of consensus the missions are established with the consent of the host countries. This of course influences the mandate of the missions, but, on the other hand, the consensual approach does help to make host governments more willing to cooperate with the OSCE.

The human rights tasks of the missions vary from country to country but are generally connected with observing, investigating, documenting and/or reporting on Human Rights Violations. Monitoring includes investigating incidents or government policies through recovery of evidence or data and interviewing victims and witnesses and evaluating the evidence and drawing conclusions. It brings the actions of states under the watchful eye of the international community, which may serve to deter state governments from continuing human rights abuses.

Besides their reactive role in monitoring Human Rights Violations more proactive developmental and long-term approach strategies such as institution-building and

strengthening local capacity are employed. Capacity-building, through advisory services and technical assistance to national human rights institutions, government and local authorities, as well as support for local human rights NGOs and representatives of civil society, may be the greatest long-term contribution which an (inevitably) transitional human rights operation can make. The OSCE has been focusing on four areas – the judicial system, national human rights institutions and NGOs, and human rights education. These are aimed at preventing further abuses through and appear an important factor to peace building in all its aspects. Further, the monitoring human rights and the building of institutions to secure these rights are intimately connected.

1. Role of Large OSCE Field Missions: the example of the Mission to Bosnia and Herzegovina[1]

The OSCE Mission to Bosnia and Herzegovina is the longest lasting and the maturest of large OSCE field presence. The mandate for the OSCE Mission to Bosnia was outlined in the Budapest Ministerial Council Decision MC (5). Dec/1, either directly or through reference to the Peace Agreement (see para 9 of that Decision: establish a Mission to Bosnia and Herzegovina [...] to carry out its tasks as requested by the Parties to the Agreement), in the OSCE Lisbon Summit Declaration, the Conclusions of the Paris Ministerial Steering Board Meeting, the London, Bonn and Madrid Peace Implementation Conferences as well as in the PC Decision No. 145. According to this Decision, they consist of the following human rights connected elements: (…) to assist in democracy building and be active in human rights promotion and monitoring, in particular in support of the Ombudspersons throughout Bosnia and Herzegovina (…).

In accordance with its mandate under Article XIII of Annex 6 of the General Framework Agreement for Peace to monitor closely the human rights situation in Bosnia and Herzegovina, OSCE Human Rights works to ensure that a domestic framework exists to protect human rights based on appropriate legislative reforms, institutional capacity, and personal responsibility.

Because the administration of elections, the protection of human rights, and the process of return were so demanding, the OSCE decided at the outset to establish offices throughout the country and opened 29 OSCE offices located in virtually every major town in the two entities – the Federation of Bosnia and Herzegovina and the Republika Srpska. Many of the successes of the mission were obtained through constant pressure at the grass roots level, for example, by insisting on the implementation of property laws and respect for the rights of returning refugees.

The mission from 1998 to 2002 consisted of about 200 internationals and 700 citizens of Bosnia and Herzegovina. Initially, nationals did exclusively support-work as interpreters, drivers, security guards and secretaries. Beginning in 1998, they were integrated into professional positions as lawyers, administrative supervisors, democratization officers, human rights monitors, etc. By 2000, some 30% of international professional staff positions were taken over by Bosnian citizens, which resulted in greater productivity and built capacity for the future.

[1] The author worked for the Mission from June 2000 to June 2002 but would like to underline that this section represents his own assessment and is in no way the OSCE Mission's one.

The Bosnia Mission interpreted its mandate to include a variety of human rights programs, ranging from support for domestic human rights institutions to efforts at judicial and legal reform. But the central focus of the human rights officers in the field has been the implementation of property laws, which would restore private and socially owned houses and apartments to their original owners and will help the return of refugees and internally displaced persons – the undoing of the efforts at ethnic cleansing during and after the war.

a) Property Law Implementation:

Mission officers conducted public educational campaigns to inform people of their rights under the property laws, conducted workshops to explain how to file claims, monitored the claims process and intervened personally with local authorities to ensure compliance. Where a pattern of non-compliance was found, the mission and the Office of the High Representative acted to remove obstructionist officials, up to and including entity ministers. Thanks to a consistent effort over a number of years, return has gradually accelerated. By 2002, nearly half of refugee claims for return of property have been approved. This would not have happened without the unyielding pressure that only a resident mission could provide. Even when the property has been returned, the work of the human rights officers is not over. They must ensure that minority returnees are provided with security, that their water, electricity and phones are reconnected, and that they are not discriminated against by the local power structure; this is what has been called: "sustainable return".

b) <u>Sustainable return:</u>

This program is very much entrenched into Economic and social rights, focusing mainly on employment discrimination, education, access to pensions, utilities, documents, ID cards and military service/conscientious objection issues. Thus, human rights officers are involved in monitoring non-discriminatory access to employment, utilities and education.

c) Rule of Law:

The main focus has been on Judicial and legal reform, trial monitoring and criminal justice. As such, the Mission is actively participating in initiatives to reform the legal and judicial system under the lead of the International Judicial Commission. It is supporting the process for a comprehensive review of judges and prosecutors by submitting substantiated complaints about alleged judicial misconduct received from its field offices to the competent review bodies. Human rights officers interact regularly with the judiciary and prosecutors in property matters and cases involving return-related violence and discrimination in access to employment and utilities that impact on the sustainability of return. Human rights officers also monitor trials related to corruption and war crimes.

d) Human Rights Institutions:

The Mission work actively in co-operating with and supporting all the domestic human rights institutions in Bosnia and Herzegovina, it focused on the Entity Ombudsmen, the Human Rights Ombudsman for BiH, the Human Rights Chamber, the Annex 7 Commission for Real Property Claims (CPRC) and the Ministry for Human Rights and Refugees.

The Mission's support for the entity ombudsmen has concentrated on operational support (funding), support for the development of substantive capacity and preparations for the

transition and transfer of fully functional and sustainable institutions to domestic responsibility. The ongoing transfer of responsibility from the OSCE to domestic responsibility is being facilitated through negotiations over memoranda of understanding with each entity government designed to transfer full budgetary responsibility for facilities and staff, with OSCE agreement to help secure voluntary contributions, where required, from OSCE participating States. The Mission in co-operation with the Venice Commission of the Council of Europe and the Office of the High Representative for Bosnia and Herzegovina, also intensively negotiated with the entity governments on the enactment of adequate legal provisions for the institutions.

e) Minorities and Roma issues:

The Mission has been active in implementing and developing projects as part of the Roma under the Stability Pact Program. In doing so, the Mission is continuing to co-operate closely with Romani NGOs in Bosnia and Herzegovina and with the office of the ODIHR Contact Point for Roma and Sinti Issues, as well as the Council of Europe.

As to the protection of Minorities, the Mission in close co-operation with the Venice Commission of the Council of Europe and the OSCE High Commissioner on National Minorities, acting as focal point in the country, helped in producing a draft Law on National Minorities.

f) Freedom of expression and the Media:

In this area, the mission played a key role. They opened a "Media" department separated from the "Human Rights Department" to tackle the issue. From establishing and enforcing rules for media conduct during elections to the protection of journalists from persecution. Over time, the combined efforts of the international community have produced a public broadcasting system, a licensing regime that denies licenses to those who indulge in hate speech, a Freedom of Information Law that requires transparency, defamation laws and laws protecting journalists from politicians' efforts to silence them. All in all, this is a substantial result.

The models developed in Bosnia spread to other OSCE field missions. As the large field mission that had been in operation the longest, the Bosnia mission became the training ground for others.

C. Regional Approach:

The relative advantage of any OSCE regional approach over other organizations is its very good knowledge of the Eastern European world in all its respects, as a result of its previous involvement in the area. Thus, the OSCE has further developed the regional dimension of its work and activities related to human rights. For instance, in South Eastern Europe the OSCE' strategy lies on the idea that the region as a whole faces a number of common problems and that many of these can only be overcome through a comprehensive and coherent approach to the entire region. The organization is working in specific regional initiatives with an important human dimension component. Cross-border issues and common problems that are not cross-border in nature related to human rights have been identified, and regional initiatives have been formulated to deal with it. This said, again these initiatives are primarily

the product of the OSCE missions and field operations in the region and these are the main actors in its further development and implementation.

However, there is a need to make a more creative use of existing channels of co-operation and communication between the field missions themselves. Further, usually field missions shy away from regional efforts and prioritize their programs in their different areas of responsibility. The increasing of co-ordination and co-operation between OSCE Missions in their regional approach and the sharing of ideas and best practices on how to deal with common issues regarding their human rights mandates is still a gap to be bridged. This would compliment efforts by the Stability Pact.

The starting point for the discussions should be the need to identify the added value of a regional approach to some of the common features and problems identified through the OSCE field missions. Such an approach should be based on practical, experience-based contacts, linkages and exchanges between OSCE focal points in the region, in a mutually supportive perspective, drawing lessons from what has, or has not, worked and why. ODIHR should have a stronger role as a central body where all the information gathered could be forwarded.

The OSCE added value to the International Community general effort (the United Nations, the Council of Europe, other regional bodies and bilateral donor nations) lies on the special expertise of OSCE with regard to the common problems of the different institutions based on its presence with a combined field presence in different countries. For instance, as far as human rights institutions are involved, the OSCE has gained considerable experience regarding the particular situation of Ombudsman Institutions in transitional societies. One of the main characteristics of the OSCE is its continued field presence which enables the organization to work with the institutions on a day to day basis, allowing a constant dialogue with the institutions which enables a close assessment of their concerns and needs. The OSCE field operations are assuring a vast and unique presence and daily action on human rights institutions and are able to share with the latter the vast experiences the OSCE has accumulated both by and in its institutions - in particular the ODIHR, the Office of the HCNM and the office of the OSCE Representative on Freedom of the Media.

As such, the OSCE role is of utmost importance and complementary to other organizations efforts and its internal initiatives should be shared with other actors in order to work closely, in particular, with the Council of Europe to achieve the objectives set out in the Stability Pact.

Some examples of OSCE missions involvement in specific regional initiatives with an important human dimension component include "cross-border return" (in the former Yugoslavia area). There are significant obstacles to regional return that have resulted in human rights violations in Bosnia and Herzegovina (BiH), the Federal Republic of Yugoslavia (FRY), and Croatia. An estimated 701,000 persons are still displaced among, BiH, FRY, and Croatia. Many of those persons are living as temporary occupants in property belonging to persons who also fled the war. Another issue where the OSCE Missions have been involved is the problem of trafficked persons. Since the fall of the iron curtain and the economic decline in many former communist countries thousands of women were trafficked from the former Soviet Union and from other Central and Eastern European countries to Western Europe. National authorities often have the perception that, because many trafficked persons are illegal migrants, trafficking has to be dealt with like smuggling. This leads to the deportation of trafficked persons by the authorities without taking into consideration violation

of human rights and the future fate of the deported in their country of origin, where their vulnerability towards trafficking networks remains.

III. THE OSCE'S APPROACH TO HUMAN RIGHTS:

As pointed out above, although the OSCE's focus is conflict prevention through international security and inner-state conflict resolution, it understands that this cannot be achieved without democracy building, maintaining the rule of law and protecting and promoting Human rights within all participating States. Human rights, and the human dimension as a whole, are seen as constituting an essential component of security and stability. The OSCE three facets of security - the politico-military, the economic and environmental and the human dimensions - are interlinked, and indeed, the OSCE comprehensive concept of security which integrates human rights protection into the very center of its work can be an interesting tool since most of the facets are not only inter-linked but to a certain extent, interdependent. Thus for instance, the matter of regional or national security cannot be separated from an active commitment to protect the human rights of the individual citizen, particularly as a means for preventing conflicts where large-scale patterns of human rights violations are likely to occur. It is in this area that the OSCE human dimension pursuit of early warning and preventive diplomacy adds value.

At the European regional level, in parallel with the important work on human rights in the Council of Europe, the OSCE has developed as an essential forum for the promotion of human rights.

OSCE human rights standards:

To a certain extent, the human rights component of the organization is based on the 1975 Helsinki Final Act. On 1 August 1975 in Helsinki, the Heads of State or Government of the 35 participating States signed the Helsinki Final Act of the Conference on Security and Cooperation in Europe. The Act, which was originally aimed at bringing together the western and eastern world, developed into a declaration on human rights as well.

This document contains four chapters called "Baskets". Each Basket contains a number of Principles. The principal human rights provisions of the Final Act are found primarily in the Guiding Principles contained in Baskets I and III. Principles VII and VIII refer to the member states' obligation to fulfill their obligations to respect human rights under existing international law. Principle VII confirmed "the right of the individual to know and act upon his rights and duties" and further promises conformity with the Charter of the United Nations and the Universal Declaration of Human Rights. It established basic principles for behavior among the participating States and of governments toward their citizens.

This said, the Final Act is not a treaty, it is not a legally binding document. However, the Act does manifest legal implications and effects, for as an internationally agreed upon program it has a specific legal nature. With time and continued acceptance, the Final Act may come to be regarded as customary international law, in much the same manner as the Universal Declaration of Human Rights has come to be accepted as international custom.

Since then there have been numerous follow-up meetings that gave rise to what is called the Helsinki Process. These meetings concerned compliance of members with their human rights obligations, and the expansion for the catalogue of human rights and many documents concerning human rights issued from them.

The 1989 third Follow up Meeting in Vienna led to significant advances in international human rights, as the detailed provisions and declarations regarding human rights in the *Vienna Concluding Document* replaced the earlier trend of broad formulations in CSCE documents. These meeting allowed an open recognition of the international responsibility for the protection of human rights. The free exercise of national minority rights was further enhanced, as "the ethnic, cultural, linguistic, and religious identity of national minorities on their territory" was collectively protected and promoted. A separate section entitled "Human Dimension of the CSCE" established firm measures to exchange and respond to requests for information, created diplomatic channels for bringing situations under the human dimension to the attention of participating States, and provided for bilateral meetings to examine questions among participating States on the human dimension of the CSCE (see below).

In Vienna, the States also decided to convene a Conference of the Human Dimension in order to review developments in the human dimension, evaluate the functioning of its provisions, and consider practical proposals for new measures to improve and enhance its effectiveness. The *Copenhagen Document* is the result of one of these conferences, it explicitly expands the human rights commitments of its Member States and is an important document since it may help provide a framework for developing legally binding implementation of the human dimension of the OSCE. However, like the Helsinki Final Act, the Copenhagen Document is not a treaty and has no binding legal effects, it is probable that it will continue to develop as a political process rather than evolve into a legal process, although it may with time come to firmly embrace established legal instruments for the protection and promotion of human rights in Europe.

The Charter of Paris for a new Europe, the 1992 Helsinki Follow-up Meeting, the Concluding Document of the 1994 Budapest Review Conference are important texts which have established mechanisms to monitoring the compliance of the States with their human rights commitments.

Thus, although many important documents have been agreed upon by the participating states, the OSCE standard setting process is essentially political and does not create legally binding norms and principles. This is an important distinction since it limits the legal enforceability of OSCE standards.

OSCE Implementation mechanisms:

Most international human rights instruments have a state reporting mechanism or a right of individual petition, sometimes both, to monitor and ensure the process of implementation. The OSCE has neither. Within the OSCE there is no supervising body to examine state reports or individual complaints. Unlike other organizations, there are no specific organs for enforcement or adjudication within the OSCE framework. The Accords seem to create obligations which OSCE Member States must reach on their own and the "mobilization of shame" through the use of international publicity seemed to be the only sanction against

failure to comply with agreed upon provisions. However, the OSCE has at its disposal different ways of implementing human dimension commitments.

Obviously, a primary role lies on field missions. As a matter of fact, the missions of long duration are increasingly being asked to monitor the implementation of human dimension commitments. Fact-finding missions, like the ones, which were carried out in Chechnya, are another way for the OSCE to obtain on the spot information and also to monitor how human rights are being implemented. By reporting back to the Permanent Council incidents of disregard for the human dimension can be discussed.

In addition to the field, Follow up Meetings, Conferences and the so called "Implementation Meetings" (which are organized biannually by the ODIHR) are good platforms where participating states have been able to bring up human dimension issues. This process allows for public awareness and discussion since apart from representatives of participating states, non-governmental organizations are authorized to be present and speak at all sessions of the working bodies as well as at the plenaries.

Further, the OSCE has also created a so-called human dimension mechanism, the Vienna mechanism and the Moscow mechanism, the latter partly constituting a further elaboration of the Vienna mechanism.

At the 1989 third Follow up Meeting in Vienna the "Human Dimension of the OSCE" became official. It was introduced by the western delegations in their proposal for a mechanism to monitor compliance with CSCE commitments on human rights. The 1989 Vienna follow-up document gave rise to the "Human Dimension Mechanism" of the C.S.C.E. The separation of the "human dimension" into an instrument distinct from the military aspects of the Accords served to enhance the importance placed on human rights by CSCE Member States. This mechanism consists of a multi stage negotiation, fact finding, and mediation process between states, as well as bilateral and multi-lateral negotiations, and the use of missions of experts and rapporteurs to deal with specific issues and crises. This mechanism is another method for supervising the implementation of commitments since it enables participating states to bring up cases of human rights violations through diplomatic channels at any moment. The Vienna Mechanism has been applied over 100 times.

The Copenhagen Document resulted from one of these Conferences of the Human Dimension as provided for in Vienna. It expands the specific provisions of various types or subsets of human rights (such as national minority rights) and enumerates some of the available remedies for alleged violations (such as the right to refer human rights abuses to competent international bodies or the establishment for a time frame for written responses to requests for information as to human rights violations and for requested bilateral meetings). The specific measures and controls on the review process created by the Copenhagen Document provide more of a legal framework upon which the pursuit of the OSCE human rights objectives may be enforced.

The 1992 Moscow Mechanism (established at the last meeting of the Conference on the Human Dimension of the CSCE in Moscow (1991)) or "emergency mechanism for the human dimension" goes one step further by establishing a system of missions of independent experts or rapporteurs with fact-finding, advisory or even mediation powers to facilitate the resolution of a particular problem relating to the human dimension of the OSCE. It allows for a participating State to invite a rapporteur mission of up to three experts to contribute to the

resolution of human dimension questions in its territory. In addition, it allows for one or more participating States to inquire whether another State would agree to invite experts to address a particular, clearly defined question. In case this recommendation is not accepted, a participating State can, with the support of nine other States, establish the rapporteur mission on an emergency basis. The rapporteurs will determine the facts of a situation, report on them, and may give advice on possible solutions.

However, the human dimension mechanism has practically fallen into abeyance, partly due to the development of the OSCE into a permanently functioning organization and partly due to the political considerations involved in invoking such ad hoc mechanisms. The Moscow Mechanism for instance has been activated a few times.

The Concluding Document of the 1994 Budapest Review Conference gave the Chairman in Office responsibility for raising human rights issues in the Permanent Council on the basis of information from the ODIHR or from the High Commissioner on National Minorities.

Finally, in some of the meetings and conferences, participating states have made strong statement committing themselves both at implementing OSCE human dimension commitments and general human rights standards.

In the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 29 June 1990 (Preamble, par. 11) it is stated that: “The participating States (...) reaffirm their commitment to implement fully all provisions of the Final Act and of the other CSCE documents relating to the human dimension and undertake to build on the progress they have made.

In the Charter of Paris for a New Europe/Supplementary Document to give effect to certain provisions contained in the Charter of Paris for a New Europe of 21 November 1990 (“Human Dimension”, par. 1) they stated: “We declare our respect for human rights and fundamental freedoms to be irrevocable. We will fully implement and build upon the provisions relating to the human dimension of the CSCE”.

In the Istanbul Document of 19 November 1999 or Charter for European Security (par. 7) they reaffirmed their: “full adherence to the Charter of the United Nations, and to the Helsinki Final Act, the Charter of Paris and all other OSCE documents to which we have agreed. These documents represent our common commitments and are the foundation for our work. They have helped us to bring about an end to the old confrontation in Europe and to foster a new era of democracy, peace and solidarity throughout the OSCE area. They established clear standards for participating States’ treatment of each other and of all individuals within their territories. All OSCE commitments, without exception, apply equally to each participating State. Their implementation in good faith is essential for relations between States, between governments and their peoples, as well as between the organizations of which they are members. Participating States are accountable to their citizens and responsible to each other for their implementation of their OSCE commitments.

In Helsinki Final Act of 1975 (Declaration on Principles Guiding Relations between Participating States, principle VII, par 8 and principle X, par. 3) they stated that: “In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the

international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound. (...) The participating States confirm that in the event of a conflict between the obligations of the members of the United Nations under the Charter of the United Nations and their obligations under any treaty or other international agreement, their obligations under the Charter will prevail, in accordance with Article 103 of the Charter of the United Nations.

Nowadays, it is already possible to state that almost in all countries of new democracy there took place the radical changes and particularly in arrangement of State power on the basis of principle of the separation of powers. Almost each constitution of those countries proclaimed the construction of state governed by law as its objective where the independent judiciary would hold its special place like in other European countries. The basic objective of judicial reforms in those consisted in turning of a court into independent referee in interrelationships between individual and State, resolution of disputes on the basis of law only and implementation of protection of human rights and freedoms. At the same time despite the incontestable successes there are still the problems, which have an effect on authority of justice. Among them I would like to note the pendency of a number of legal and procedural issues, which are mostly connected with correct definition of functions of prosecution and defense, role of the Ministry of Justice and the weakness of judiciary itself. It is also important that on the one hand the political and economic reforms held in those countries are possible owing to stability preserved and on the other hand not everyone is realizing that the true stability is based on the functioning of democratic institutions, protection of human rights and freedoms that all actions of authorities, who are thinking of preservation of stability by means of penetration of the “governed democracy”, as it was designated by some analysts, will bring to reinforcement and predominance of authoritarian tendencies probably first of all through weakening of judiciary. It was correctly noted that a court is “the last boundary” of democracy. I am not in a position to dwell now on all the complex of unresolved problems but to analyze in the framework of this presentation the general tendencies and some issues of protection of human rights by courts.

First of all I would like to draw your attention on one important context. Almost all European countries are the member-States of Council of Europe and have ratified the European Convention of Human Rights. Most of countries incorporated the provisions of Convention into domestic legislation. But in countries, which have not done this, the courts should interpret the domestic law in conformity with Convention. The legal standards set up by European Court influence on domestic law in different fields: should it be the substantive or procedural law. European Court has been always recognizing the subsidiary nature of Convention considering that the values enshrined therein should be first of all ensured by domestic courts. Thus, the protection of rights and freedoms envisaged in European Convention is the mission of courts irrespective of the model of constitutional justice.

In most of European countries the created model of constitutional review is the result of theoretical researches by H. Kelsen who was seeking to substantiate the legal guarantees of Constitution in accordance with the idea of hierarchy of legal norms. He proposed the concept of integral legal order the whole hierarchy of the norms of which one and their juridical value is consequently derived from the single source constituting the top of pyramid that is the Constitution. The value of all this system and the mechanism of its functioning is conditioned by setting up of the only instance of constitutional review of normative acts - that is the Constitutional Court.

For many reasons the concept of protection of Constitution by Constitutional Court that was established for this purpose did not firstly settle down. There prevailed the decisions neglecting the mechanism of such protection and among its supporters there was spread the persuasion that the control for constitutionality should be built on American model. And in the beginning exactly such resolution of a problem was advocated in jurisprudence of Scandinavian countries, Germany, Portugal Greece and with some peculiarities in Switzerland.

However, the progressing development of authoritarian systems excluded the possibility of creation of remedial mechanisms protecting the Constitution and fundamental human rights. Starting from 1945 there has been appearing the tendency towards enlargement of constitutional review - not by means of enlargement of competencies of ordinary courts but through setting up of special judicial bodies. Thus, in most of European countries there appeared the body of special jurisdiction that is organizationally marked out from judiciary. In this definitely concentrated system of protection of Constitution the ordinary courts were deprived of the right to resolve the constitutional problems on their own. Undoubtedly, the protection of constitutional rights and freedoms is the objective of all courts: but the competence of Constitutional Court has got its peculiarities. The legal nature of constitutional review bodies can be characterized as political and legal one what is connected with the fact that the task of this body is the protection of Constitution that is not only juridical but also the political and legal document with the procedure of formation of these bodies.

One of the important means for protection of human rights is the individual complaint owing to which one the Constitutional Court gets the opportunity to penetrate into the spectrum of problems of implementation of these rights. This is absolutely new institution for Constitutional Court of Azerbaijan Republic after modifying Article 130 as a result of nation-wide voting held on 24 August 2002. Meanwhile, in most of countries this institution has become an effective remedy for restoration of violated rights. Since the Constitution is the basic law of a State it should be respected by all courts. Constitutional Court serves as the last instance for prevention of violation of rights. Taking this into account the legislation of a number of courtiers e.g. Germany, Latvia etc provides for the requirement of exhaustion of all judicial remedies as the most important one. On one hand this reduces the influx of complaints and on the other hand it ensures the checking of the questions of fact and that the applied law would be subject to consideration by ordinary courts. The individual tries to attract the attention of courts on violation of his/her rights and claims for their restoration because his/her interests have been directly affected by the challenged act. On another hand our Constitution is of self-executing nature and any court can refuse to apply the unconstitutional acts and apply in a certain case the Constitution and even the normative act of higher legal force. However, ordinary court cannot abolish this unconstitutional provision. From this point of view the possibility to refer directly to Constitution and to apply its provisions admits the courts to implement completely their direct social function that is to protect the human rights and freedoms from any arbitrariness. At the same time, the model of centralized review of the legal provisions under which one the ordinary courts address in this case to Constitutional Court as to verification of the applied or to-be-applied provision ensures the uniformity of practice of application of law and contributes to implementation of the principle of legal distinctness.

When examining the issue of individual complaint to Constitutional Court the problem of correlation between constitutional and common rights draws an attention. It is obvious that Constitutional Court is neither appeal nor cassation instance. But it is also

obvious that the court decision that is based on arbitrariness also violates the Constitution. Besides, according to the new text of Article 130 of the Constitution of Azerbaijan Republic the individuals were granted the right to challenge the court acts. What is to be done if an individual challenges the provisions of procedural legislation that is not respected or is interpreted wrongly by courts? One can suppose that in this case the formula elaborated by Federal Constitutional Court of Germany can serve as a guideline. According to this formula the decisions on the procedure, ascertainment of facts and application of provisions of "simple law" are entrusted to ordinary courts and not subject to constitutional control. Constitutional Court can intervene only where the decision adopted by a court is directly related to the effect of the fundamental right.

In Germany, Italy, Spain, the right to address to Constitutional Court has been given to each judge, in other countries (e.g. Austria) this right is enjoyed by Supreme Courts and courts of second instance only. The Constitution of Azerbaijan Republic invested the Supreme Court along with other institutions with the power to address to the Constitutional Court for verification of constitutionality of normative acts. It can ask for determination of constitutionality of normative acts enumerated in Article 130 of Constitution and request to give interpretation of laws and Constitution. In its Article 4 the Law "On Constitutional Court" provided for extremely complicated procedure where the citizens can address to Constitutional Court via ordinary courts and the Supreme Court. However, despite the tenacious efforts of Constitutional Court this provision has been applied in practice exclusively rarely. Based on the new edition of Article 130 of Constitution the ordinary courts have been enabled to address to the Constitutional Court as to interpretation of laws and Constitution.

The practice of Constitutional Court displayed that the basic entity that is enabled to address to the Constitutional Court is the Supreme Court of Republic. I think that this is natural because it is exactly the Supreme Court as the highest judicial body that occupies the special place in the judicial system and by virtue of competencies invested to it appears as the bearer of functions on putting into good order the judicial practice and formation within it the characteristics of predictability and uniformity. It is supposed that interaction between Constitutional Court and ordinary courts especially the Supreme Court is very important from the point of view of respect to fundamental rights and freedoms. Before establishment of constitutional justice in our country the ordinary courts when applying the norms of law clarified its sense, objective and the will of legislator. All this contributed to the objective of ensuring the implementation of the legal norm that is not possible without activity connected with application of law. The latter is the forced mode of elimination of defects of the norms applied that is proceeding from constitutional principle of self-dependence of judiciary. Judge always makes a choice between the norms of law and takes the special position with respect to contradicting norms. He/she draws the conclusion from constitutional norms and principles, from basic principles of the State governed by the law. However, when there is no the case-law that is based on the respect to individual decision of one of higher courts and recognition of *ratio decidenti* that is to be followed by inferior courts, the decision delivered by court is binding only with respect to a concrete case. The Constitutional Court implements the constitutional interpretation of a norm that is subject to verification as to its conformity with Constitution. However, this should be differed from the special competence of a number of constitutional courts on interpretation of Constitution. The Constitutional Court of Azerbaijan Republic has been invested with the competence to give interpretation of laws and Constitution and in such cases its decisions become the sources of law. We consider this competence as a law creative one because there are formed the new decisions of normative

character, which by their force are equal to interpreted norm of Constitution and law respectively. One can assert that in the described situation the Constitutional Court takes the role of positive legislator. Without changing the Constitution or law the Constitutional Court enlarges its content. The application of a norm that was interpreted by Constitutional Court is impossible in isolation from interpretation given by it. Practice of Constitutional Court took the way of enlargement of its own competencies what causes an ambiguous reaction of some jurists. For instance, when examining the case concerning the constitutionality of normative acts the Constitutional Court did not confine itself to its interpretation only, having kept the norm as non-contradicting to Constitution but to be applied in future bearing in mind the interpretations given Constitutional Court. In other cases examining the request for interpretation of a norm the Constitutional Court came to conclusion that it was unconstitutional. For instance, examining the petition of the Supreme Court as to interpretation of Article 132 of the Labor Code providing that the term of serving the sentence by the persons condemned to correctional works shall not be included into seniority that enables to get the leave, the Constitutional Court recognized it as null and void because of its non-conformity to Article 37 of Constitution providing for the right to rest. In another case the Constitutional Court determining the constitutionality of Articles 67 and 423 of the Civil Procedure Code according to which ones the complaint can be lodged by a person who takes part in proceedings with advocate has recognized the given norms as corresponding to the Constitution of Azerbaijan Republic. However, the Constitutional Court clarified that when applying the mentioned norms there should be ensured the right to equality and the right to enjoy the legal aid. The essence of Constitutional Court's legal position on this case was that when respecting the requirements of the interests of justice the right to get free-of-charge legal aid by the people possessing the moderate means to protect their interests is the right that cannot be altered. When resolving the concrete case and where there emerge the legal problems requiring certain professional skills the State should not only ensure the constitutional right to enjoy the effective legal aid by the families of moderate means but also must also ensure their possibility to implement this right.

I would like also to note that the constitutional justice in the European countries have a lot of institutional differences and different jurisdictions. However, despite this all of them serve for protection of fundamental freedoms. The activity of Constitutional Council of France that is implementing the preventive control is estimated this way. It *prima facie* does not take part in protection of fundamental rights violated by Executive: this is the competence of State Council and ordinary courts under the control of Court of Cassation. However, as the French constitutionalists note the control of laws a priori corresponds to constitutional tradition of France. Among advantages of such control they mark out two aspects: first of all it is the clarity, because the discussion of the issue of conformity of law to Constitution is held before the law enters into force; and what is more important is that by their opinion there is achieved the legal security because the promulgated law cannot be prejudiced.

In conclusion I would like to express the confidence that the role of constitutional courts in protection of human rights and freedoms will steadily increase. But this function of Constitutional Court has the subsidiary character and this in its turn requires that ordinary courts and in particular the Supreme Court would definitely ensure the human rights.