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"Elections, Democratization and Human Rights in Azerbaijan"

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My name is Catherine A. Fitzpatrick and I am executive director of the International League for Human Rights, a non-governmental organization based in New York with representatives in Geneva and a network of affiliates and partners around the world. The League, now in its 59th year, has special consultative status with the UN's ECOSOC and its mission is to protect human rights defenders worldwide and to help strengthen the capacity of international institutions to respond to human rights violations. The League has long been concerned about the development of democracy and human rights in Azerbaijan, and we have maintained a special focus on this strategically-located, oil-rich former Soviet republic, which we would like to see avoid many of the tragedies Nigeria witnessed in recent years. We see the establishment and protection of a vibrant civil society in Azerbaijan, with significant U.S. government and private support, as an important factor in resolving persistent regional problems such as the Nagorno-Karabakh conflict, and in creating stability in the Caucasus, especially at time when the whole region has been affected by Russia's prosecution of the war in Chechnya.

The League has two partner organizations in Azerbaijan, the Association of Lawyers of Azerbaijan and the Azerbaijani Advocates Association, as well as other colleagues such as the Baku Center for Human Rights. Our president, board members, and staff travel to Azerbaijan frequently to maintain contact with our partners there and provide our support.

In anticipation of the November parliamentary elections, the OSCE, CSCE and other international organizations are once again focusing on conditions for what might best be termed a balloting exercise. That is, as with the presidential elections in 1998, under pressure from Western institutions, some changes in the law or the electoral commissions or the access to state media may be made, but they won't add up to genuinely free and fair elections that will consolidate an authentic democratic government with a thriving civil society. Even democratic elections cannot bring about democracy, unless due diligence is exercised now about the civil and political rights which make up the nuts and bolts not only of electoral machinery but the ultimate checks and balances of power -- freedom of speech, association, and assembly, and an independent bar that can vigorously protect these basic rights. The League has maintained, in examining a number of flawed election settings around the OSCE, that unless basic goals of registration of parties, NGOs, and trade unions as well as legalization and the independent media and peaceful assembly are tolerated, full-fledged observation teams should not be sent, thereby further legitimizing the absence of basic human rights required for democracy to take hold.

Therefore while there are many glaring human rights issues in Azerbaijan which must urgently be tackled -- torture in detention, failure to protect refugees, political prisoners, and so on, we have focused on the importance of the

bar and human rights NGOs, without which it is possible to even have a human rights movement to resolve the harder issues.

INDEPENDENCE OF THE BAR

An independent, fee-paid, private bar, free of interference by the Ministry of Justice and other government agencies, allowed to practice freely and safely, should be the centerpiece of any democratic reform program. International human rights treaties specify the right to choose one's counsel or certain protections for lawyers, but the institution of a private, non-state, fee-paid bar, a goal related to market reforms and principles of free enterprise not necessarily protected in international law, has received less attention although it is a cornerstone of our own U.S. democracy. We have stressed the importance of support of the independent bar as a priority over other legal reform projects like reform of the criminal justice system, judge, and police training because without independent trial attorneys, there is no one to employ the law and the courts to instill the rule of law. Just as, in the words of A.J. Liebling, "freedom of the press belongs to him who owns one," only a private bar can ensure the rule of law. Our own history illustrates the importance of public interest litigation in developing and implementing human rights and government accountability. Lawyers have a vested interest in legal reform, and attention to their concerns should be the priority in any U.S. sponsored rule of law program.

In Azerbaijan, lawyers have had an uphill struggle breaking away from the state-sponsored Collegium of Advocates, the Soviet-era body which regulates the bar. In the last three years through a series of presidential, ministerial, and judicial decrees or instructions, a private bar with licensed attorneys practicing independently of the state first came into existence and flourished, and then was repelled, punished and put out of business when the state bar became jealous and the Justice Ministry saw that a force had appeared to seriously press for protection of civil society through the courts.

In Azerbaijan, three types of legal professionals: jurists, who have legal education and provide legal services and can defend a client in a civil proceeding; advocates, who have further credentials and training and can defend a client in criminal court, and notaries, who perform legal transactions such as real estate deeds.

Formally, the Collegium is independent from the Ministry of Justice and any other state control. In reality, it, like most semi-public institutions in Azerbaijan, is governed by the state's political influence. Although the Ministry of Justice does not micromanage the day-to-day operations, the Collegium leadership knows what is politically acceptable to the Presidential Administration and the Ministry of Justice. The leadership toes the line and ensures that the lawyers it controls stay in line as well. When it does not, a phone call from above can quickly energize the Collegium leadership into action.

In addition to the pervasive fear in Azerbaijani society of causing dangerous political offense, advocates working within the Collegium are influenced by the organization's direct control over their work and pay. The Collegium controls the flow of case work from the criminal justice system and requires lawyers to turn their fees over to the Collegium's accounting offices. This is among the features of a Soviet-style Collegium that make it different than a Western-style professional society; it functions as a kind of law firm itself. An advocate's clients and salary are supplied by the Collegium, which in turn takes between 15% and 25% of the advocate's salary. Local lawyers have stated that they turn over as much as 58 percent of their fees to the Collegium: about 38 percent goes to taxes, and 20 percent for the Collegium's "upkeep."

Lawyers in Azerbaijan report that the Collegium presidium rarely interferes directly in an individual advocate's work, but that typically a lawyer's Collegium supervisor monitors the lawyers under him or her and exerts pressure through slightly more subtle means such as suddenly not finding cases to assign a lawyer who shows too much independence. Since an advocate's work is officially channeled through the Collegium (even if clients approach a specific advocate, as they often do), an advocate can be precluded from earning a living inside the Collegium and thus forced to seek one outside. Under recent regulations, advocates may sign a contract with a private client to handle civil cases, but the Collegium becomes suspicious if an attorney is not available for its case assignments, some of which are pro bono for indigent clients. Thus, the best, most independent attorneys are forced to juggle an unwieldy load of cases they have taken to keep the Collegium off their backs; pro bono or low-paid cases of

political activists in trouble with whom they sympathize; and other paying clients with civil or criminal cases who may wind up getting them in trouble with the law through their fees.

Advocates have very little power, either in the broad political scheme or within the justice system itself, and they are vulnerable to the influence of the prosecutor's office and the police in addition to the higher political authorities. Faced with the enormous power of the state's prosecution machinery and pervasive judicial corruption, often the best a lawyer can do is to resort to technicalities or health grounds to seek a sentence reduction or a client's release. For this reason, the general public frequently describes advocates as "musicians at a funeral" you need them for the ceremony, but they can no longer really do anything for you once you are arrested.

Currently, the Collegium of Azerbaijan has approximately 500 members, of which an estimated 20 are believed to be attorneys independent enough to choose to defend politically-sensitive clients. Given the country's eight million person population and the hundreds of citizens that have been caught in the net of state repression (journalists, human rights activists, political party leaders, rebellious policemen), there is a severe shortage of attorneys who can provide victims of human rights abuse, let alone the population at large, a serious legal defense.

In addition, the Collegium's monopoly on defending criminal cases deprives defendants of the opportunity to file suits or defend themselves independently, in clear violation of basic human rights and international standards for the legal profession, such as the UN Basic Principles for the Role of Lawyers. Moreover, attempts to practice as a non-member have been all but unthinkable: Article 158 of the Criminal Code of Azerbaijan punishes performing services without a license by up to five years of imprisonment. It is not known if this article has ever been invoked, but lawyers are intimidated by believing it could apply to them.

Until recently some confusion has reigned as Azerbaijan has moved to market practices regarding the rights and limitations of a licensed lawyer. Some felt that the 1997 presidential decree and the 1998 Council of Ministers' resolution gave licensed lawyers the right to engage in some of the same activities as their advocate counterparts, including taking on criminal cases, and to open up private firms. A December 1998 letter from the Minister of Justice sought to clarify this point of confusion by stating that only members of the Collegium had the right to take on criminal cases as defense lawyers. In many cases, it was up to individual judges to determine which lawyers would be allowed into the courtroom. While some judges did in fact allow the licensed lawyers into the courtroom for criminal cases, there was always the factor of uncertainty, which made lawyers dependent on the arbitrary interpretations of the judges.

The new Law On Advocates and Advocate Activity, which entered into force on January 27, 2000, constitutes a significant step backwards because it fails to provide adequate means to license private practitioners of law free of state interference. Rather, the new formulation of the law reiterates the Justice Minister's distinction between jurists and advocates (even when jurists have the specified credentials) and worse, continues to designate the Collegium of Advocates as the main regulatory body of the legal profession, noting in Article 9 that "individuals who are not members of the Collegium of Advocates cannot engage in advocates' activities."

The fact that six of the nine members of the Qualification Commission, which selects Collegium members, are chosen by the executive branch and by the judicial branch, which, by many estimates, is heavily influenced by the executive authorities, serves to further undermine the independence of the Collegium. Perhaps it is no accident that the chair of the Collegium is on the Central Electoral Commission, and a supporter of Aliev.

Adding to the monopolistic status of the Collegium is the fact that the Law makes no mention of the permissibility of alternate bar associations. The fact that they are not banned outright might be seen as encouraging, although their absence from the law, in a civil law setting, signals that they may not gain legitimacy. Article 58 of Azerbaijan's Constitution, which guarantees freedom of association as well as Article 6 of the Law On Public Associations do not specifically prohibit lawyers from creating associations.

The law does make mention of legal entities through which advocates can carry out their activities. Article 5 specifies that "the conduct of advocate activities shall begin after the state registration of the organization chosen for the activity on the basis of an organizational legal form. The founders of such an organization can only be advocates (i.e. Collegium members, emphasis added).

In general, this section of the law seeks to add to the monopoly of the Collegium, whose influence now will penetrate in each and every law firm employing advocates. Lawyers report that the damaging final clause was apparently not included in the draft version of the law, but was instead added at the last minute.

Many of these weaknesses in the Law could have been avoided had the government of Azerbaijan made the discussion of the draft law public, and provided ample time for revision. As it was, independent lawyers and other international experts were not allowed to participate in the process of drafting this highly important law. The government of Azerbaijan claims to have obtained approval from the Council of Europe (which keeps its recommendations secret), although it now appears that the text of the draft law which the Council of Europe was given for review was not the same one presented to and passed by the parliament later. In general, the government of Azerbaijan seems to have made little if no effort to incorporate suggestions from local and international observers to avoid a law which contradicts Azerbaijan's own legislation as well as international norms, and which places serious restrictions on the legal profession.

Any democratic society must create a system for credentialing lawyers; this is not at issue. But such a credentialing body must be legitimized through participation by respected jurists, and if housed in the state itself, it must have the respect and cooperation of the genuinely independent bar, with the primary focus being professional self-regulation. This has not been the case in Azerbaijan.

The Collegium, with the apparent collusion of the Ministry of Justice, has conducted targeted harassment of one particular lawyer in apparent retaliation for his criticism of the Collegium and the Ministry of Justice and for his advocacy of a strong independent defense bar. Aslan Ismailov, formerly a judge in the Stavropol Territory during the Soviet era, and a prominent attorney and legal advisor to past governments, was a member of the Collegium until his dismissal in 1999. He received a license to provide paid legal services on June 12, 1998. He has served repeatedly, pro bono or for a nominal fee, as legal counsel in human rights cases that have met with government resistance, particularly cases involving freedom of the media.

The case of Aslan Ismailov provides an important window into the system of Collegium control and coercion over attorneys.

From February 21 to March 5, 1999, Aslan Ismailov and two other Azerbaijani lawyers - one a member of the Collegium, the other a licensed jurist attorney - traveled to the United States on a training and advocacy trip sponsored by the International League for Human Rights. During their stay, they met with judges, lawyers, journalists, scholars, congressional staffers, and government officials. Their trip coincidentally overlapped with a working visit by the Minister of Justice and the president's legal advisor, who were meeting with many of the same policy-makers as the lawyers. Their simultaneous presentation of information that directly contradicted what the Minister was saying was undoubtedly a cause of irritation to the Minister. Within days of his return, on March 18, Mr. Ismailov was informed that he had been expelled from the Collegium.

In a separate report to CSCE, the League has provided exhaustive detail on all the twists and turns in Mr. Ismailov's case. We've faced a continual war of facts with the Collegium of Advocates, the Azerbaijan government, and others, and we have been forced to present the copious detail to make the following points: 1) arbitrary licensing procedures led to the situation where the Collegium, on a whim after becoming annoyed at Ismailov's outspoken positions in the U.S. and at home, expelled him from the Collegium. 2) Through the intervention of the U.S. ambassador and others, he was allowed to continue to practice as a jurist, which of course deprives him of access to pre-trial detention and criminal court. Repeated interventions were not sufficient to reinstate him to the bar as a criminal trial attorney, and we urge the new ambassador and members of congress to raise his case anew and to remain persistent; 3) Ismailov attempted to protest the Collegium's actions in court, in trial observed by League representative, and the charges that private legal work somehow violated laws on commercial activity were clearly untenable, yet the court did not restore his membership; 4) the new law on the bar gives every indication of having been designed to keep independently-minded practitioners out of business.

The international human rights community has three interests at stake in this particular case. First, Ismailov is

presenting the legal case for an independent bar, which must be a central element in legal reform for any country. Second, he is one of the most high-profile defenders raising important issues like corruption, media censorship, and other human rights violations, and not only in public, but in the courts. If he is silenced, it will send a strong signal to others who might be discouraged from raising legal challenges to human rights abuses and injustice in the courts. Third, he has challenged the unreformed Soviet-era Collegium of Advocates, similar to the Collegia in most other post-Soviet states, and his case is a litmus test for the degree to which the rule of law, defended vigorously by lawyers, will be tolerated by other post-Soviet governments with the same circumstances.

Under the Law On Advocates and Advocate Activity, Ismailov can now be persecuted on a new level as well. He is the sole founder of the law firm called VIZA, which has until recently engaged in advocate activity. In theory, now that he has been expelled by the Collegium, VIZA could thus potentially be closed by the authorities. This could also be the case for nearly a dozen other law firms which were founded by licensed lawyers (not Collegium members) who had practiced advocate activity on the basis of a license originally honored by the Justice Ministry. It seems unlikely that the authorities would likely take such a drastic step, although the fact that the current legislation puts these law firms at potential risk should be of great concern to foreign law firms, businesses, governments, IOs, and NGOs with a presence in Baku.

RIGHT OF ASSOCIATION

The League has campaigned for the last 3 years to register NGOs, first and foremost for the legal NGOs, which themselves provide pro-bono assistance to third-sector groups who would like to obtain legal status. The Association of Lawyers of Azerbaijan (ALA) did finally obtain official registration on February 15, 2000, nearly three years after it first applied. The reason for this was likely twofold: the Council of Europe had been putting pressure on the government of Azerbaijan to register a series of organizations, including the ALA, which it had been refusing to legalize for years. The other reason is that just days before the ALA obtained registration, Aslan Ismailov, one of the founders of the organizations since the very beginning, was told by an official from the Ministry of Justice that the ALA would continue to have difficulty as long as he remained one of the founders. He thus withdrew his name from among the list of founders, and the organization was registered shortly thereafter, thus constituting only a partial victory for the Council of Europe and others who have raised the case.

Another group with which Ismailov was involved, the Azerbaijani Advocates Association or AAA, composed of 14 founders, initially submitted its registration documents to the Ministry of Justice on June 18, 1999. Only several months later (in violation of the law, which says that a response shall be given within ten days) on August 4, 1999, the AAA received a letter from Fazil Mamedov, the head of the Ministry of Justice's Board for the State Registration of Legal Entities, notifying them that registration of the organization could not be considered until the draft law on the legal profession had been passed.

On the grounds that the decision of the Ministry of Justice was unlawful, the AAA resubmitted registration documents several weeks later. On November 19, 1999, the AAA received a second letter signed by Fazil Mamedov denying the organization registration on the grounds that the organization's documents violate the Law on Public Associations (although no specific reasons were provided) and that, once again, registration of the organization could not be considered until the draft advocates' law was passed.

After the law went into force on January 27, 2000, the AAA submitted its registration documents for the third time, although they have yet to receive a response.

When international human rights groups and governments intervened, most notably the Council of Europe as part of the legal harmonization exercise, after the ALA, the Democratic Party, the Center for Human Rights, the Trade Union of Journalists, and others whom had long been denied were finally legalized this year. This is indeed a welcome development, but a troublesome one -- what can be given by discretion, only under pressure from the Council of Europe, could just as easily be taken away after the coveted Council membership is achieved. Meanwhile, the discriminatory and still cumbersome NGO law, and the absence of adequate tax protection continue to hobble the NGO sector, since without a tax-exempt, charitable system to attract cash and in-kind donations, both foreign and domestic aid winds up in the state tax coffers. This must be of paramount concern to

the U.S. government and private donors in Azerbaijan, who must cooperate to negotiate with authorities across-the-board legal registration and charitable status for NGOs, as distinct from discretionary registration and confiscatory tax policies.