



## **The Review**

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### **International Commission of Jurists**

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# Articles

## *Protection of Human Rights During Emergencies*

Fali S. Nariman\*

Theme - The best defence to a nation's liberties is prevention of their erosion through ignorance. Ignorance is always the first stage to the abuse of freedoms. Step by step, through subtle attempts, at which an Executive is so adept, liberty is compromised by first compromising on the principles upon which it rests. One must never let the people forget: this brief contribution is towards that end.

### I Introduction

There is an inevitable link between States of Emergency and grave violations of human rights.

The most serious infractions tend to occur in situations of tension when those in power are (or believe they are) threatened by forces which challenge their authority. Too often, they justify unbridled authority as being necessary for maintaining "the established order of society." There is also the more disturbing tendency of an "Emergency", outlasting the emergent situation which led to its imposition.

In 1982, the International Commission of Jurists (ICJ) undertook a study of fifteen selected countries which had experienced States of Emergency in the sixties and seventies - countries (literally from A to Z; Argentina to Zaire) that included India. In addition, detailed questionnaires, had been sent out to as many as 158 different governments in the world, to which a few governments had responded (with replies). In 1983, the study and an analysis of the data, were published by the ICJ in book-form under the title *States of Emergency; their Impact on Human Rights*. Appropriately, the cover of the publication was in black colour!

How effectively are human rights protected during Emergencies? That depends. How effectively can they be protected? Again, there is no standard answer - since there is no set pattern. The degree of protection varies from State to State, from constitution to constitution - and above all from people to people.

And universally, it is perhaps too early to tell. Even that standard basic

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human rights instrument, the International Covenant on Civil and Political Rights (ICCPR) 1966 (adopted and ratified by one hundred and thirty countries) has not proved to be adequate - except when coupled with adoption by Party States of the Optional Protocol (to the ICCPR). Whilst prescribing a protective legal framework, the Covenant has left a gaping, almost foolproof, 'escape clause'. Article 4 (of the ICCPR) recognises the rights of governments "in time of public emergency which threatens the life of the nation" to derogate, from its obligations under the Covenant "to the extent strictly required by the exigencies of the situation". When the derogation provision of the ICCPR was being drafted, France argued that the right to due process as a whole should be non-derogable. This view did not prevail and with the exception of the principle of non-retroactivity set out in a separate article, the entire complex of rights was made derogable leaving the door open to abuse. Although in theory the principle of strict necessity ("strictly required by the exigencies of the situation") should minimise the effect of emergency powers on rights of persons in detention or on trial, the weakness of the

only international review mechanism (that of reporting periodically to the Human Rights Committee) deprives this theoretical limitation of much of its force.

There is a provision similar to Article 4 (ICCPR) in the European Convention on Human Rights (Article 15) - but protection of human rights in this regional convention is made more effective by the supervision of a regional court of human rights - the European Court on Human Rights at Strasbourg.<sup>1</sup>

The difference between countries where public emergencies have been periodically proclaimed resulting in jeopardy to human rights and countries which have not resorted to declarations of public emergency, is comparable to the difference between "happy families" and unhappy families: so poignantly portrayed in the opening lines of Tolstoy's "Anna Karenina":

"All happy families resemble each other,  
But each unhappy family is  
unhappy in its own way."

1 The European Convention on Human Rights (ECHR) - Article 15 - leaves to national authorities a wide margin of appreciation; but State Parties to the ECHR do not enjoy unlimited power in this respect. The Commission is responsible for ensuring observance of the States' obligations and the European Court of Human Rights is empowered to rule on the question of whether States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by Court supervision. But there is no International Court to supervise the obligation of States under the ICCPR. The supervisory function under ICCPR is exercised only by the Human Rights Commission (which is a political body) and even this supervision is only effective where party States have ratified the Optional Protocol: - the latter confers right on individuals residing in Party States to directly petition the Human Rights Committee for violation of basic human rights by the concerned Party State.

It was only after the lifting of the Emergency of 1971 and 1975 - (in March, 1977) - that India ratified the ICCPR, in 1979. India has not ratified or acceded to the Optional Protocol: in fact the only Asian States which have (so far) are: the Philippines, and (very recently) Sri Lanka.

We in India have had our due share of unhappy times - in our "own way". It all started whilst the Constitution of India was being framed.

## II Constitution of India - Background and Emergency Provisions

The Constituent Assembly which first met on 9 December 1946, commenced its deliberations on a written Constitution for India amidst political upheaval of traumatic proportions. First, there was partition and the carnage and destruction of people and property; second, the persistence of some erstwhile rulers of Indian States to remain outside the Union and to fight for their "independence"; and then, above all this, came the assassination of U Aung San and most of his Cabinet colleagues in neighbouring Burma in July 1947. This hydraulic pressure of significant events had their effect, they greatly influenced the draftsmen of India's Constitution: to structuring the basic document so as to provide the strong Centre armed with special powers.

India's Constitution was brought into force on 26 January 1950. It included a separate Part (Part XVIII) headed "Emergency Provisions": Articles 352 to 360.<sup>2</sup> It also contained a permanent provision for Preventive Detention in the Fundamental Rights Chapter itself. (Part III). The Constituent Assembly (which became India's first Provisional Parliament) passed free India's first Preventive Detention Act, (1950), only a month after the Constitution was brought into force on 26 February 1950.<sup>3</sup> This was not a happy augury for human rights. Under provisions of this Act: (i) courts were expressly forbidden from questioning the necessity for any detention order passed by government; (ii) no evidence could be given in any court either by the detained or the authority of the grounds of detention nor could the court compel their disclosure; and (iii) courts could not enquire into the truth of the factors taken into consideration by the Executive as grounds for detaining the individual. We learnt to live with this drastic law for more than a decade. But worse was to follow.

- 2 Article 352 as drafted enabled the President (which meant the 'Central Government') to make a declaration of grave emergency when the security of India or any part thereof was threatened "by war or external aggression or internal disturbance." Such declaration of emergency brought in its wake an automatic suspension of Article 19 (right to freedoms - of speech and the press, of forming associations, of movement, of property, of trade, business and profession): Article 358. The President was also empowered after declaring an emergency to suspend the right to move Court for enforcement of any other Fundamental rights in the Fundamental Rights Chapter.
- 3 Preventive detention was introduced in India as a permanent measure way back in 1818, first in the Presidency of Bengal, extended later (in 1819) to Madras and in 1827 to Bombay Presidency. Preventive Detention laws were also authorised under the Defence of India Act 1939, during the Second World War. During the period 1947-1950 - there was a rush to Public Order and Public Safety Acts (authorising preventive detention throughout the country). The Constitution of India (Article 22) accepted preventive detention as part of the normal administration of law and order in the country and provided for minimal constitutional safeguards, even these could be suspended during the period of an emergency proclaimed under Article 352.

For almost two continuous periods of six years each - between October 1962 and March 1977 - the entire country had to live through and experience three separate and distinct Emergencies, two of them "External" the last (of June 1975) an Internal Emergency. We have much to learn from this experience: above all, of our own frailties and of the inadequacies of our constitutional functionaries. In the early sixties, armed conflict with neighbouring countries (first with China and then with Pakistan) gave impetus and legitimacy to the invocation of the Emergency Provisions of the Constitution and their continuance. It also highlighted some major defects in these provisions.

### III The First Emergency and its Continuance

On 26 October 1962, an Emergency was declared under Article 352 (better known as the First External Emergency) in view of the sudden conflict with China in the Himalayan border regions. A few days later, by Presidential Order, the enforcement in any Court of fundamental rights guaranteed by the Constitution under Articles 14, 19, 21 and 22 was also suspended.<sup>4</sup> Though hostilities with China came to an end with the cease-fire declared on 21 November 1962, the Proclamation of Emergency (of 26 October 1962) continued - fundamental

rights under Article 19, remained suspended (Article 358) and the right to enforce, in any Court, the fundamental rights guaranteed by Articles 14, 19, 21 and 22 also remained suspended (Article 359).

There were widespread allegations of abuse of Executive Power after 1963 - especially in the States, by frequent misuse of the harsh provisions of the Defence of India Act and Rules 1962 (which was enacted after suspension of fundamental rights) and conferred arbitrary and sweeping powers on a vast array of officials (both Central and State) to transgress the personal liberties of citizens and non-citizens alike, without recourse to legal redress.

The Supreme Court of India, itself said there could be no right to legal redress in April 1963 (in *Mohan Chowdhury vs. Chief Commissioner of Tripura*) and again in September 1963 (in *Makhan Singh vs. State of Punjab*) - this time by a majority of 6:1. Of course, if in challenging the validity of the detention order, the detained was pleading any right outside the right specified in the Presidential Order his right to move any Court in that behalf was not suspended - e.g. if his contention was that his detention was illegal because it violated the mandatory provisions of the Act. But a challenge to the Constitutional validity of the Defence of India Act was held impermissible in view of the suspension of the

4 Article 14 (Right to Equality); Article 19 (Right to Freedoms) - of speech and press, of association and assembly, of free movement, of property, and of business trade and profession; Articles 21 and 22 (Protection of life and Personal Liberty and constitutional protection and Personal Liberty and constitutional protection and procedural safeguards against arrest and preventive detention).

right to move any Court for enforcing Articles 14, 19 and 21; the detained had no *locus standi* to move the Court for a writ of *habeas corpus* on that ground.

The next best thing then was extra-constitutional pressure of public opinion.

But before the pressure of public opinion could be felt in places that mattered, there was partition and an armed conflict with Pakistan in September 1965, which gave a new lease of life to the External Emergency (of October 1962). But though a declaration was signed a few months later in January 1966 by the representatives of the two countries in Tashkent laying-down procedures for normalisation of relations, the Emergency still lingered on for two years more.

In February 1966, thirty-four jurists and prominent citizens belonging to no particular political creed or party urged the President and the Prime Minister to revoke the (External) Emergency. One of its authors was Motilal Setalvad who had been India's first Attorney-General. The appeal emphasised that the issue was not one of policy nor one for political debate:

"The issue relates to the basic foundations of a democratic government. A democratic Constitution necessarily has to contain provisions to enable the nation to tide over emergencies. But the use of these emergency powers when the emergency has long receded is to turn a democratic government into what has

been called a constitutional dictatorship."

At about the same time (February 1966) a Constitution Bench of the Supreme Court presided over by Chief Justice Gajendragadkar, handed down its decision in the case of *G.Sadanand*. He was preventively detained by the State of Kerala (in October 1965), under Rule 30 of the Defence of India Rules 1962, pending the trial of a Criminal case against him. He was detained the day after he had already been released on bail by the District Magistrate trying the criminal case! The petition on his behalf in the Supreme Court succeeded. Sadanand was ordered on 11 February 1966, to be released forthwith on the ground that the wide statutory powers conferred on the appropriate authorities had been abused and the order was vitiated by *mala fides*. The concluding portion of the Court's judgment expressed concern and anguish at the continuance of the Emergency proclaimed way back in 1962:

"We feel rudely disturbed by the thought that continuous exercise of the very wide powers conferred by the (Defence of India) Rules on the several authorities, is likely to make the conscience of the said authorities insensitive if not blunt, to the paramount requirement of the Constitution that even during Emergency, the freedom of Indian citizens cannot be taken away without the existence of justifying "necessity specified by the

Rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which may conceivably result from the continuous use of such unfettered powers, may ultimately pose a serious threat to the basic values on which the democratic way of life in this country is founded. It is true that cases of this kind are rare, but even the presence of such rare cases constitutes a warning to which we think it is our duty to invite the attention of the appropriate authorities.

The "warning" by the highest Court was listened to - but not heeded. Even in normal times power is delightful, but during an Emergency, absolute executive power is absolutely delightful!

#### IV Factors Influencing the Revocation of the First Emergency

Then, fortunately for Indian democracy, an event of considerable significance occurred. On the retirement of the incumbent Chief Justice of India (CJI), Mr. Justice Subba Rao (then seniormost Judge of the Supreme Court of India), was appointed CJI with effect from 28 June 1966. He remained Chief Justice for less than a year. But in that short period he made it his mission to take up pending human rights cases in which he persuaded his colleagues to expand the frontiers of judicial power. He showed what a Judge can do during an emergency, which has long outlasted its original

purpose. In fact even before he became Chief Justice he had decided, when a senior judge presiding over a Constitution Bench, that the mere passing of a detention order, did not justify the detainee being deprived of his other "freedoms" - for instance of the freedom of a detainee to write and publish a book was not been taken away by the Defence of India Rules, 1962 (*Prabhakar's Case*). The Conditions of Detention Order (framed under the Defence of India Rules) had prescribed conditions regulating the activities of a detainee; writing and publishing an article or a book was not one of such activities. Therefore (the State argued) this activity was impermissible. The Court rejected the argument as absurd. Subba Rao J. said:

"If the argument (for the State) were to be accepted this would mean that the detainee could be starved to death, if there was no condition requiring the State to provide him with food!"

The Court held (in *Prabhakar's Case*) that the refusal of the authority to send the manuscript of the book out of jail to the publishers for publication was contrary to law.

Later in December 1966, presiding over another Constitution Bench of five Justices, Chief Justice Subba Rao commented upon the possibility of judicial review of conditions alleged to justify the continuance of an Emergency, even where lawfully imposed - in *Ghulam Sarwar's case*. Whilst not expressing any opinion on this question in the case at hand for lack of material,

brought on record, the Court effectively answered the question, as to how human rights could be best protected during an emergency, speaking for the Court the Chief Justice said:

"Part XVIII (Emergency Provision) appears to bring down the grand edifice of our Constitution at one stroke, but a little reflection discloses that the temporary suspension of the scheme of the constitution is really intended to preserve its substance. This extra-ordinary power is unique to our Constitution. It reflects the apprehensions of the makers of the Constitution and their implicit confidence in the parties that may come into power from time to time. Two expressions indicate the extra-ordinary situation whereunder this Part was intended to come into force. The expression 'grave emergency' in Article 352(1) and the expression 'imminent danger' in Article 352(3) show that the existence of grave emergency or imminent danger is a pre-condition for the declaration of emergency. Doubtless, the question whether there is grave emergency or whether there is imminent danger as mentioned in the Article is left to the satisfaction of Executive, for it is obviously in the best position to judge the situation. *But there is the correlative danger of the abuse of such extra-ordinary power leading to totalitarianism.*

*Indeed, the perversions of the ideal democratic Constitution, the Weimar Constitution of Germany, brought about the autocratic rule of Hitler and the consequent disastrous World War. What is the safeguard against such an abuse? The obvious safeguard is the good sense of the Executive, but the more effective one is public opinion."*

Armed with the observations made by Supreme Court in this judgment, public opinion was once again bestirred. Responsible sections of the public again agitated for revoking the External Emergency of October 1962. And the ICJ lent its weight to these overtures.

In its Bulletin of March 1967 the ICJ drew attention to the effects of prolonged suspension of fundamental rights:

"The International Commission of Jurists does not seek to arrogate the right of the government to decide whether circumstances yet exist which would justify the continued suspension of fundamental rights. But such prolonged suspension of those rights, which are the very essence of a democratic form of Government, when the features of a grave emergency do not appear to exist any longer; has given rise to increasing concern in all parts of the free world where India has been looked upon as the bas-

tion of fundamental rights and the Rule of Law in Asia."

This time responsible public opinion (at home and abroad) was listened to and heeded.

A few months later, the Home Minister announced that the Government of India had decided to revoke the State of Emergency, and on 10 January 1968, the Proclamation of Emergency of 26 October 1962, was revoked and with it the suspension of fundamental rights (Article 14, 19, 21 and 22) came to an end.

## V The Second Emergency (3 December 1971) and its Prolongation

Nearly four years later, on 3 December 1971, following the outbreak of hostilities between India and Pakistan, an External Emergency under Article 352 was declared, for the second time. Following this second Proclamation of Emergency, all the Rights to Freedoms guaranteed by Article 19, stood automatically suspended (Article 359). Parliament then passed in quick succession the Maintenance of Internal Security Act 26 of 1971 (MISA) and the Defence of India Act 42 of 1971, and the Central Government promulgated the Defence of India Rules, 1971.

Hostilities between India and Pakistan ceased by the end of December 1971. But the Emergency continued. It was even reinforced by a further Proclamation issued by the President in November 1974, suspen-

ding the right to seek the assistance of any court for enforcement of fundamental rights under Article 14, 21 and 22. Emboldened by the observations in *Ghulam Sarwar* (December 1966) that questioning the prolonged continuance of a State of Emergency may be justiciable if sufficient material was brought on the record of the case, a *habeas corpus* petition was filed in January 1975, in the Supreme Court of India. The continuance of the Proclamation of Emergency issued on 3 December, 1971 was directly challenged. The contention was that there was no longer any threat of "external aggression" justifying its continuance. The arguments in the Writ Petition filed under Article 32 of the Constitution were heard by a Constitution Bench presided over by the Chief Justice A. N. Ray - the arguments dragged on from March 1975 upto the beginning of May 1975, when the Supreme Court closed for the summer vacation. Before judgment could be delivered on the re-opening of the Supreme Court in July 1975, new political events supervened prompting a fresh Proclamation of Emergency 26 June 1975, (this time an "Internal Emergency"). Earlier in the month of June, the High Court of Allahabad had allowed an Election Petition filed against Mrs. Indira Gandhi, and held her to be guilty of "corrupt practices" (proscribed by the Representation of Peoples Act, 1951). The High Court held she was consequentially disqualified from holding any public office for six years. Mrs. Gandhi was the Prime Minister. She appealed from this verdict to the Supreme Court of India. The Supreme Court was in summer vacation and the Vacation Judge (Justice Krishna Iyer) refused to grant her an absolute stay of the High Court

judgment - only a conditional stay was granted. There were calls for her resignation as Prime Minister, followed by widespread agitation throughout the country. Mrs. Gandhi's response was the 'One Night Swoop' of 25 June. The arrest of all the leaders and members of opposition parties and those who agitated for her resignation, and complete censorship of the press and media. The President had been prevailed upon to sign a Proclamation of Emergency under Article 352 (Internal Emergency) on the night of 25 June 1975, without even a prior meeting of the Council of Ministers. The Cabinet met only the next morning endorsing what was done the night before. Under the Constitution of India the President can only act on the aid and advice of his Council of Ministers (with the Prime Minister at its head) and not on the advice of the Prime Minister alone, nor of anyone else. On 27 June 1975, the President signed another Presidential Order suspending Articles 14, 21 and 22, both for purposes of the External Emergency of 1971 (which had been continuing) and the new Internal Emergency proclaimed on 25 June 1975.

This 'Internal Emergency' of 25 June 1975, was the most repressive of all our States of Emergency.

- All political opponents were taken into custody and held without trial. Twenty seven Organizations (political and social) were banned and their office bearers were arrested and detained.
- A rigid and unprecedented press censorship was imposed - there was a

complete ban on reports of speeches in Parliament (other than Government Statements) and of reports of all cases in Courts other than the names of Counsel and Judge and the operative part of the decision; names of detainees, places of detention and all references to agitation was proscribed.

- The President's satisfaction about the need to declare an Emergency (External or Internal) was declared by Constitutional Amendment (38th Constitution Amendment Act of 1 August 1975) to be not only final and conclusive, but also non-justiciable.
- By a Presidential Ordinance amending MISA, the statutory requirement of the detainee's right to be informed of the grounds of arrest was deleted. It was sufficient for the authorities to declare that the arrest was made to "safeguard the security of India".
- Furthermore, drastic amendments were made to MISA:
  - the right of appeal to the government in case of an illegal detention was abolished;
  - the constitutional safeguard of a scrutiny of every detention order by an Advisory Board was rendered useless, since (with the suspension of Articles 21 and 22) provision was expressly made by ordinary law that the Advisory Board would have no right to reverse the detention order (for any reason) for one year;

- grounds of arrest were forbidden to be disclosed even to the Courts, and by enacting a statutory fiction - it was to be deemed that it was against public interest in all cases to disclose the grounds of arrest;
- provision was made that the expiry of a detention order was not a bar to the making of further detention order against the same person.

Widest powers of detention were thus vested, in the Central Government and the State Government - which meant any person authorised to act for the Central Government or the State Government; theoretically, even a desk clerk! And the power to detain was not confined only to those in the secretariats in Delhi or the State capitals. It could also be exercised by every District Magistrate and every Commissioner of Police in every town and village in every State. This was the most significant contributing factor to the abuse of Emergency Powers.

I was witness to an incident which typified the "climate of the times"; how, in Lord Acton's hackneyed phrase: "Power tends to corrupt and absolute power corrupts absolutely". Before the Internal Emergency of 25 June 1975, I had been invited to preside at a Conference of Andhra State Lawyers to be held at Rajamahendravaram in August 1975. Justice Krishna Iyer was to inaugurate the Conference. It was expected that two thousand lawyers would attend. Despite the Proclamation of Emergency, they did. When we arrived, the Organizer (a Senior lawyer of the

District) informed us with anguish that his son, a law student at Vishakhapatnam, who was to assist him in the arrangements had been arrested under MISA the day before our arrival. He was a conscientious student - almost obtusely so. When his lecturer had announced in class (at Vishakhapatnam) in July 1975 that they would all march in procession on a particular week-day in support of Mrs Gandhi's 20-Point Programme, he suggested that time was better spent studying in college and that the procession should be postponed to a Saturday! The rest of the students shouted him down. They thought that marching in a procession would be far more fun than attending classes! The boy insisted and there was some argument. And there, apparently, the matter rested. But then a District Magistrate, in whom wide powers of detention were conferred, exercised them when he heard of this "misdemeanour". He promptly issued an order of detention on the ground that the boy was a "danger to the security of the State." The order of detention was served at Rajamahendravaram at the same time as he was whisked off in the night. Fortunately, the then law minister of Andhra Pradesh was one of the principal guests at the Conference, and some of us requested him to personally look into the matter, which he graciously did. The order of detention was revoked a few days later. But then, the boy could not be located! No one knew where he was put away; he was ultimately found after three weeks in a jail in a remote part of the State, and finally (after many anxious moments) returned to his parents. No one in Delhi instructed the District Magistrate to act as he did - in fact South Block would have been aghast at such irresponsibility.

But once laws are passed which enable officials to act irresponsibly, then in this country (and possibly in any other country) they *will* - with hobnailed boots!

With such repressive laws, so oppressively implemented, the people looked upto the Courts. But as it ultimately turned out, they looked in vain.

During the Emergency of June 1975, (now acknowledged by all but the most obtuse to be a 'phoney' one), the Supreme Court of India handed down a decision in April 1976 which said that during the period of an Emergency, which enabled Article 21 to be suspended, the basic right to life and liberty itself was in suspense. During the hearing of that case, the then Attorney-General of India was asked if there would be any remedy if a police officer because of personal enmity and for reasons which had nothing to do with the State, took into detention a law-abiding citizen and even put an end to his life. The answer of the Attorney-General was unequivocal: "Consistently with my argument" he said "there will be no judicial remedy in such cases as long as the Emergency lasts". The Attorney-General then told the judges "It may shock your conscience, it shocks mine, but consistently with my submissions no proceedings can be taken in a Court of Law on that score during the

Emergency". That was the consequence of the suspension of the Fundamental Rights under Art. 21 according to government.<sup>5</sup> Courts were powerless (he said) to prevent any possibility of abuse, they could not grant redress. This extreme contention (contrary to the dicta even of the majority of 6 judges in a Bench of Seven Justices in *Makhan Singh's case* (1964) referred to above) found favour with four out of the five senior-most judges of the Supreme Court who sat to decide *ADM Jabalpur vs. S.Shukla* (euphemistically called 'the *Habeas Corpus Case*'). Judgments of ten of the High Courts in the country which took the contrary, more liberal view (inspired by *Makhan Singh*), were declared erroneous, and set aside by the highest Court; the Supreme Court set back the clock of liberty proclaiming its helplessness against arbitrary arrests and *mala fide* detentions. In his majority judgment in the case the Chief Justice (Ray CJ), in a classic judicial *faux pas*, said: "Liberty is itself the gift of the law and may therefore by the law be forfeited or abridged". The lone dissent was that of the senior-most Judge in the Supreme Court (next only to CJ Ray) Justice H. R. Khanna. Khanna refused to rationalise tyranny. He would not bow down to insolent might.<sup>6</sup> Life and Liberty are not conferred by any Constitution he said - they inhere in men and women as human beings. But Khanna was in a minority - a minority of one. Historians

5 Mr. Justice H.R. Khanna in an address at Calcutta (14 May 1988) to a Convention of West Bengal Lawyers specifically mentioned this exchange between the Bench and Bar during the hearing of *ADM Jabalpur*: his was the sole dissenting judgment in that infamous case.

6 It was directly as a result of the dissent in this case that Justice Khanna was superseded. Contrary to long standing practice he was not appointed CJI though he was the seniormost judge after the retirement on 28 January, 1977 of CJ Ray. Khanna then promptly resigned.

of the Supreme Court will doubtless record that it was only in the post-Emergency period, (not during the phoney Emergency of June 1975-March 1977), that the highest Court gave vent to expressions of grave concern, about violations of human rights! A sobering thought.

## VI The Silver Lining to the Phoney Emergency of June 1975

With the judgment in *ADM Jabalpur*, the warning of Justice Felix Frankfurter came to mind: "don't rely on Judges and Courts to save your freedoms". (he had said) Rely instead on yourself, on stimulating public opinion. Another lesson of the Internal Emergency (of June 1975) was: "don't rely on constitutional functionaries either". These functionaries failed us: Ministers of Government, Members of Parliament, even the President of India. It was because President Fakhruddin Ali Ahmed so readily agreed to sign the Proclamation of Emergency on the night of 25 June 1975, even before the Cabinet (Council of Ministers) knew anything about it, that three years later (after the revocation of the December 1971 and June 1975 Emergency in March 1977) a constitutional amendment was deliberately enacted (44th Amendment). Article 352(3) now declared that a President could not sign a Proclamation of Emergency unless the decision of the Council of Ministers was communicated to him in writing! (Article 353(3) as amended in June 1979 was an avowed expression of Parliamentary distrust in India's highest constitutional functionary: the President.

But I believe that the (Internal) Emergency of 25 June 1975, and even the unfortunate majority decision in *ADM Jabalpur* in April 1976, were (in the long run and in retrospect) not a bad thing. They stimulated in right-thinking people the realisation that you could not save freedoms by merely relying on the Constitution, and expecting constitutional functionaries to perform their allotted tasks; there had to be a public feeling, an upsurge, about cherished rights, not merely because they were enshrined in the Fundamental Rights Chapter of the Constitution, but because they were believed by right-thinking people to be basic to civilized existence. I believe that the June 1975 emergency was an inoculation against future impositions; it helped instil in people, responsible people like elected representatives in Parliament, greater respect for the Rule of Law. By a Constitutional Amendment enacted with effect from June 1979 (44th Constitution Amendment 1978), Parliament (in its constituent capacity) declared that Article 20 (Double Jeopardy) and Article 21 (Right to Life and Liberty) could never be suspended even during times of war, nor during a period of an Emergency (External or Internal) declared under Article 352. Then again for the inadequate existing constitutional provisions relating to revocation of an Emergency (it could only be revoked by the President, i.e. the Central Government) there was added an important additional safeguard. By the same constitutional amendment (44th Amendment): (i) Parliament was endowed with overriding power to revoke an Emergency declared by the Executive under Article 352 whenever according to a majority of members of

Parliament conditions for its invocation no longer existed; (ii) an Emergency declared under Article 352 had to be approved within a stated time by a two-thirds majority in Parliament and if Parliament was not in session it had to be summoned and assembled for this specific purpose; and; (iii) the finality and non-justiciability clause in Article 352(5) inserted by the 38th Constitution Amendment 1975 (w.e.f. 1.8.1975) was expressly deleted.

The most fitting comment on the events of 26 June 1975 was to be found in the Bombay issue of the *Times of India* of 27 June 1975; it was not in the editorial columns, it was not in the news columns, it was found (of all places) in the Obituary Columns. Under *Deaths* - there was the following item:

"Mr.D'Ocracy D.E.M. son of L.I. Bertie and T. Ruth, brother of Faith, Hope and Justice expired on 26th June, 1975."

That was all. But the message got across!

The censors were aghast. They never thought of censoring the Death Columns; the contributor was never tracked down although the management of the Times did start an investigation into this lapse. It became the talk of the town. I believe it was the still small voice of the people that had spoken so defiantly, before being finally silenced. With a few exceptions that voice was not heard till March 1977. Not heard in many of the great institutions of our democracy. The lurking fear in the mind of all citizens - great

and small - of being locked up and put away debilitated and weakened a free people. Fear was infectious, but fortunately, fearlessness, (though amongst the very few) also had its silent circle of admirers. It was only in the third week of March 1977, that "Mr.D'Ocracy" was resurrected from the dead, doctored back to life by the members of disparate political parties, most of whose leaders had only just been released from jail. It was because of them - and because (above all) of the electorate who voted them into power that human rights in India survived, and has since then derived its source of strength.

## VII Conclusion

When the Constituent Assembly first met to discuss India's draft Constitution, its seniormost Member Mr. Sachidanand Sinha, was unanimously elected to preside over its inaugural session. He told the members that whatever Constitution they ultimately adopt it could only be preserved by the public spirit and vigilance of the citizens. Human rights are protected no differently than the Constitution in which they are enshrined, viz. by those in position of power and authority; by legislators, by judges by administrators. In other words by the people would have to protect it and make it work.

In concluding, Mr. Sinha commended to his listeners the eloquent words of Joseph Storey about the Constitution of the United States:

"The structure has been erected by architects of consummate skill and

fidelity; its foundations are solid; its compartments are beautiful as well as useful; its arrangements are full of wisdom and order; and its defences are impregnable from without. It has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by folly, or corruption or negligence of its only keepers. THE PEOPLE, Republics are created - by virtue, public spirit, and intelligence of the

citizens. They fall, when the wise are banished from public councils, because they dare to be honest, and the profligate are rewarded, because they flatter the people, in order to betray them".

We must all harken to Story's ringing words. They are as relevant today in India as they were more than a century ago in the USA. In fact they apply to all nation States, in good times and in bad times, in periods of normalcy as well as periods of emergency.

# *Lawyers and Peace Negotiations*

*Bertrand G. Ramcharan\**

## Introduction

Conflicts, internal and international, abound in our times. The Rule of Law, respect for human rights, and life chances, all fall victims in their wake. Genocide and ethnic cleansing enfeeble the efforts of half a century to let a universal culture of human rights take root and blossom. At a time when long-fought-for new institutions like the High Commissioner for Human Rights should be addressing the human rights challenges of peacetime, we see most of their efforts taken up in chasing after the graveyards of conflict. The prevention and resolution of conflicts must therefore be high on the agenda of those committed to the international Rule of Law on the basis of the international bill of human rights.

Lawyers have been integrally involved in efforts, over the last five years, first to prevent, and then to stop, conflicts in the former Yugoslavia, probably the most dangerous trouble-spot in the world since the Cuban missile crisis of 1962. For the past four years the author of this essay has been part of the international negotiating team engaged in trying to bring the conflict to an end.

An earlier essay published in this review [ICJ Review No. 50 1993] shared insights on how a preventive deployment of United Nations peacekeeping forces came to pass as part of a strategy of conflict containment and limitation. This essay will seek to share insights on the role of lawyers in conflict-prevention and in peace negotiations. It is offered in the belief that organizations such as the International Commission of Jurists need to examine the role of lawyers in such situations and to help develop better understanding of the part lawyers can play in the prevention and resolution of conflicts.

## I Conflict Prevention

From a lawyer's perspective the first thing to note about efforts to prevent conflict in the former Yugoslavia is that the then European Community, in 1991, claimed primacy of efforts to deal with this situation and its claim was acceded to by the United States of America and the United Nations. This was followed by the arrival, in 1992, of a Secretary-General of the United Nations advocating a greater role for regional organizations in the prevention

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and settlement of conflicts. It would be seen in the end, however, that both the United Nations and the United States had to become deeply involved before the conflict could be stemmed, some five years later. That is a subject for another time.

The European Community, in 1990, adopted a three-pronged strategy for dealing with the deteriorating situation in the former Yugoslavia, two of which built integrally on legal core elements and the third of which, though politically promulgated, built quintessentially on legal foundations. Taking the third element first, it will be recalled that in a series of policy statements the European Community called for negotiated solutions, within a framework of democracy and respect for international human rights, and with no forcible changes of borders. These policies were largely codified in the Principles adopted by the International Conference on the Former Yugoslavia, sponsored by European Union and the United Nations and held in London in August 1992.

Consistent with its advocacy of negotiated solutions, the European Community established the Carrington conference, which brought the constituent republics of the former Socialist Federal Republic of Yugoslavia into negotiations on a draft convention that envisaged a loose Yugoslav confederation, arrangements for cooperation in the political, economic and legal spheres, and with detailed provisions for respecting human rights and the rights of ethnic communities, nationalities and minorities. The late Henry Darwin, a former legal adviser in the British

Foreign Office, was one of the architects of the draft convention and it was an inventive and admirable piece of legal work. Legal methodology was at the core of the document, which was accepted by all but one of the constituent republics and even the hold-out republic accepted all if its provisions except for the part on autonomy.

The European Community/ Union decision to recognise Slovenia, Croatia and the other constituent republics brought efforts on the Carrington draft convention to an end. But in the recognition process the European Union, through the Badinter Commission, brought the law into the heart of the process again. The Badinter Commission was set up to advise on the eligibility of the successor republics for recognition. It established a set of criteria against which it judged each of the republics. Its criteria were fairly stringent and it placed great emphasis on commitment to internationally recognised norms of human rights. The Badinter Commission would go on to become the arbitral body of the International Conference on the Former Yugoslavia and, altogether, it would hand down fifteen arbitral opinions, some of which would be strenuously contested. We are concerned here, however, with process rather than with substance, and the Badinter Commission, now headed by Roland Dumas, ranks as an important innovation in the use of legal techniques in the processes of prevention and peacemaking.

If, so far, considerations having to do with the law, have been offered in a positive light, there is an unfortunate

downside. The German and European Union decisions to recognise successor republics have been severely criticised for having ruined the Carrington process and for having led to the dissolution of Yugoslavia. The then German Foreign Minister, Hans Dietrich Genscher, who pushed for recognition, is known to have acted in part out of consideration having to do with the law: wishing to prevent the Yugoslav National Army from becoming more militarily involved in conflict in Croatia and elsewhere, Genscher reasoned that if the constituent republics were recognised the conflict would no longer be internal but international and it would then be illegal for the Yugoslav National Army to be involved outside Serbia and Montenegro. Legal considerations therefore, in part, led him in the direction of recognition. This is an aspect of the evolution of the crisis that awaits exploration.

Lord Carrington is convinced that had recognition not taken place, his draft convention would have worked and that the situation could have been contained. From this perspective, therefore, the Carrington draft convention must go down as a notable experiment in the use of legal methodology for conflict prevention that almost worked. Political calculations, inspired in part by legal considerations, ruined the preventive efforts represented by the Carrington draft convention. Even with a score of one to one, however, it cannot be said that the law comes out with a draw; the results of failure to prevent the conflict were too devastating. It may be offered in mitigation, though, that the establishment of the Commission of Experts to inquire into allegations of war crimes and crimes

against humanity and, subsequently, the establishment of the International Tribunal on the Former Yugoslavia were designed, by identifying and punishing the perpetrators of crimes, to deter their commission in the former Yugoslavia and elsewhere in the future.

## II The Design of Blueprints for Peace.

From 1991 to 1995 there were six blueprints for peace in Bosnia and Herzegovina, four blueprints for peace in Croatia, a blueprint for resolving the dispute between Greece and Macedonia and different blueprints for dealing with the problems of ethnic and national communities and minorities. Legal draughtsmanship played a role in all of them and, to that extent, lawyers were central throughout.

To what, extent, though, did legal advisers participate in creating or shaping the blueprints? In the first instance, we need to begin with the lawyers of the parties. Throughout its existence, the former Yugoslavia had the problem of balancing the relations among its constituent states, peoples, national and ethnic minorities. There are those who argue that the root of the problems of the former Yugoslavia lay in the 1974 constitution and the formulas it provided for dealing with these relationships. The withdrawal of the autonomous status of Kosovo within the Serb Republic, as the 1980s ended, is considered to have begun the slide towards the destruction of the former Yugoslavia. One of the reasons for the war between Croats and Serbs in Croatia had to do with the fact that whereas, previously, Serbs had the

status of a constituent people within the Socialist Republic of Croatia, the Croatian independence constitution of 1991 treated them as mere minorities. The quest for recognition as constituent peoples has moved both the Croats and the Serbs in Bosnia and Herzegovina, as well as Serbs and Albanians in Macedonia. From the outset, therefore, the search for solutions revolved around claims to be recognised as constituent peoples, claims for self-determination and claims for autonomy. One will therefore find in the Carrington-Cutiliero Statement of Principles for Bosnia and Herzegovina, agreed among the three Bosnian sides in February-March 1992, provisions to the effect that Bosnia and Herzegovina should be organized around recognition of three constituent peoples, each with their own republic, and with each republic having its assigned territory. It is with stuff like this that the negotiators and their lawyers had to grapple from the beginning.

The Vance-Owen plan for Bosnia and Herzegovina envisaged the country being organized as a loose federation of ten provinces with recognition of four constituent peoples. The Stoltenberg-Owen and the European Union Action plan envisaged the country being organized as a Union of three republics, with recognition of four constituent peoples. The Contact Group plan never got to the stage where it offered a constitutional blueprint to the parties. The subsequent Dayton blueprint saw the country organized into a Union of two entities, the Bosnian-Croat Federation and the Republika Srpska. The Lawyers of Vance-Owen and Stoltenberg-Owen

basically crafted the concepts following discussions with their principals. The lawyers of the US State Department had a major input into the drafting of the US-sponsored Bosnian-Croat Federation and the Constitutional agreement for Bosnia and Herzegovina adopted at Dayton in November, 1995. It would be fair to say that the blueprint adopted at Dayton was an outgrowth of work begun under Vance-Owen/Stoltenberg-Owen and that the lawyers involved were as instrumental in shaping blueprint as anyone else. Paul Szasz, formerly of the Office of the United Nations Legal Counsel, deserves pride of place for his role. The blueprints offered for long-range solutions in Croatia, Macedonia, and for dealing with situations involving ethnic and national communities and minorities also owe a great deal to the lawyers. It should be said, however, that on the ground the practical problem-solving involving situations of ethnic and national communities and minorities was non-dogmatic and taken on a case by case basis.

### III Problem-Solving During the Negotiating Process

One discovered, during the peace-making process, that even as one was negotiating, one had to deal with issues of interpretation of texts in *statu nascendi*. Two main approaches were followed in dealing with such problems. The first was the provision of authoritative legal interpretations by the negotiators themselves. Two examples of this will illustrate the process.

### *(a) Interpretative Declarations*

At the start of the Vance-Owen negotiating process an issue arose concerning the capacity of provinces within the proposed federation of Bosnia and Herzegovina to conduct international relations. Martti Ahtisaari, now the President of Finland, who was then Chairman of the ICFY Working Group on Bosnia and Herzegovina read into the records of the negotiations an interpretative declaration to the effect that while some international transactions were allowed, the provinces would not have international legal personality. The text was as follows :

"Only Bosnia and Herzegovina is to have international legal personality. Provinces cannot conclude formal international treaties. They would, however, be allowed to enter into administrative arrangements, with each other or with foreign States, as long as the subject of the agreement was one within the exclusive competence of the province concerned and did not infringe on the rights of any other province or of the central government. Thus, agreements could be concluded in relation to education, cultural institutions and programmes, radio and television, licensing of professions and trades, natural resources use, health care, provincial communications, and energy production, etc. Should any question arise between one

or more of the provinces wishing to conclude arrangements with each other or with a foreign entity, and the central government or certain other provinces, as to the legality of such an arrangement, the question could be decided by the Constitutional Court at the request of any of the provinces or of the central government."

Again, during the Stoltenberg-Owen negotiations on Bosnia and Herzegovina, President Alija Izetbegovic wrote to the co-chairmen for clarification regarding the continuing international legal personality of Bosnia and Herzegovina. The co-chairmen, Thorvald Stoltenberg and Lord Owen replied as follows:

"(a) Bosnia and Herzegovina is already a recognised member State of the United Nations.

"(b) The principles adopted at the London Conference, as well as the principles laid down by the Security Council, guarantee the sovereignty, independence and territorial integrity of Bosnia and Herzegovina as a member State of the United Nations.

"(c) Article 1 of the Constitutional Agreement, which all three parties have agreed to, states that 'the Union of Republics of Bosnia

and Herzegovina will be a member State of the United Nations'. We interpret this article in the spirit of the Charter of the United Nations, the Principles of the London Conference and the principles laid down by the Security Council and therefore confirm to you our understanding that the meaning of Article 1 is that the Union of Republics of Bosnia and Herzegovina will continue as a member State of the United Nations."

During the negotiation of a groundbreaking Economic Agreement between the Croatian government and the Croatian Serbs, an issue also arose on which the co-chairmen had to make an interpretative declaration in order to allow the negotiating process to go forward.

### *(b) Arbitral Opinions*

Reference has been made earlier to the role of the Badinter Commission in advising whether the successor republics in the former Yugoslavia qualified for recognition. The Badinter Commission would also be used to clarify points arising during the negotiating process. Thus, during discussions on issues of succession, when the parties were locked in controversy over the formulae to be used in a draft treaty on distribution of assets and liabilities, the Chairman of the Working Group on Succession Issues functioning within the International Conference on the Former Yugoslavia referred several

issues to the Badinter Commission which provided legal opinions on them. It is worth mentioning, however, that the Federal Republic of Yugoslavia (Serbia and Montenegro), which has been harshly critical of the Badinter Commission for the opinion which it gave on whether Yugoslavia had broken up or not, has not accepted the opinions of the Badinter Commission on these points.

The device of arbitration in the interpretation has also been used in connection with the Agreement establishing the Bosnian-Croat Federation. When difficulties of interpretation and application of the agreement arose, the parties agreed to the appointment of former US State Department legal adviser, Roberts Owen as arbitrator and he has given opinions on issues submitted to him. The peace agreement worked out at Dayton, Ohio, also provides for the establishment of an Arbitral Tribunal.

The Dayton talks had almost foundered on the disposition of the Brcko area in Northern Bosnia. That there was an agreement at all is attributable to the fact that the lawyers came up with an article providing for arbitration. The parties agreed to binding arbitration of the disputed portion of the boundary line in this area by a three-member panel of arbitrators, one each appointed by the parties and the third by the President of the International Court of Justice. The proceedings of the arbitral tribunal are to be conducted in accordance with UNCITRAL rules.

#### **IV Workable Solutions Versus Legal Purity**

Two things emerged clearly during the negotiations :

Lawyers should give their opinions but should not dominate the negotiating process. The purpose of peace negotiations is to achieve peace. Lawyers are there to assist in that objective, not to make it more difficult. Legal perfectionism can lead to disaster in negotiations.

Another important lesson learnt during the negotiations is that a short text that the parties can agree on and that can be fleshed out later might make agreement possible, whereas a detailed blueprint can make agreement impossible. This is another instance where legal perfectionism can mean the death of negotiations.

#### **V Pitfalls**

An unpleasant incident during the negotiations stemming from the conduct of a foreign lawyer hired for one of the parties served as caution to all those involved to beware of unsuspected pitfalls. During the Stoltenberg-Owen negotiations on Bosnia and Herzegovina an American lawyer for the Government of Bosnia and Herzegovina asked for a meeting with a lawyer working for the ICFY to discuss the interpretation of one of the draft documents under discussion. The ICFY lawyer knew the government lawyer and, being of the same nationality, they proceeded to have an open exchange of views. It was with horror

that the ICFY lawyer discovered the following day that his compatriot, who had a witness with him, had done a selective account of the conversation, certified it, and then distributed it widely. The ICFY lawyer had been alone, and was practically defenceless, except for the fact that his professionalism and integrity were well-known to his colleagues on the ICFY who immediately rallied to shield him off from harm. Fortunately the incident faded and left no imprint. We mention it here as a note of a caution about the kind of infamy that can suddenly befall one if one loses one's guard.

#### **VI International Tribunals and the Negotiating Process**

The impact of international tribunals on the negotiating process is one that will need more attention than we can give it here. Two issues have arisen in practice. First, there has been a situation where the International Criminal Tribunal for the Former Yugoslavia handed down an indictment for international crimes against a negotiator for one of the parties. The question then arose whether countries such as Switzerland, where peace negotiations were usually held, could allow the person in question to enter Switzerland for negotiations or whether Switzerland would be obliged to arrest the person upon arrival. The position taken by the Swiss government was that it would act upon an arrest warrant issued by the Tribunal. Without an arrest warrant, if the person were simply indicted by the Tribunal, Switzerland would not effect an arrest.

The second issue that arose during the Dayton peace talks was the handing down of indictments by the Tribunal against key leaders of the parties in conflict even as efforts were being made to stop the conflict. This issue, which has become rather controversial, will require further reflection on the part of lawyers as well as peace-negotiators.

## Observations

This essay has been offered with the aim of inviting reflection within associations of lawyers such as the International Commission of Jurists on the role that they should be playing in preparing and supporting lawyers during peace negotiations. It may be opportune, and timely, for the International Commission of Jurists, for example, to solicit and publish a collection of essays on the experience of lawyers in other peace negotiations so as to enable comparisons and the distillation of patterns and recommendations.

# *The Independence of International Tribunals*

*Dinah Shelton\**

*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*

Article 10, Universal Declaration of Human Rights

The human right expressed in Article 10 of the Universal Declaration of Human Rights reflects a basic principle of the Rule of Law, derived in part from the maxim *nemo iudex in sua causa*. The guarantee of a fair hearing reflects human rights concepts of equality and justice. It also furthers the interest of society in seeing disputes settled by peaceful means; parties are more likely to submit their differences to judicial resolution if they expect and are afforded procedural fairness and a judgment based on the facts presented and the

applicable law. On the other hand, sometimes powerful litigants may be tempted to induce or pressure the forum to reach a result favorable to them.<sup>1</sup> Independence of the judiciary entails freedom from such harassment or from any political pressure in the exercise of judicial functions. It is essential to a fair hearing.<sup>2</sup>

Independent and impartial tribunals are as important to international dispute resolution as they are to national legal systems. Without the governmental

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- 1 Judges and lawyers world-wide are subject to various forms of pressure and intimidation. Between 1 January-31 December 1995, the Centre for the Independence of Judges and Lawyers (CIJL) listed the cases of 337 jurists in 52 countries who were harassed due to their professional activities. Twenty-three of them were killed, 142 detained, 4 disappeared, 30 were physically attacked, 58 were threatened with physical violence and 44 were professionally sanctioned or obstructed. CIJL, Attacks on Justice - the Harassment and Persecution of Judges and Lawyers, January-December 1995, 9.
- 2 The concept of an independent judiciary as a foundation of human rights protection is well expressed in Article XXIX of the Massachusetts Bill of Rights of 1780: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws".

infrastructure that supports national judicial systems, international courts must depend to a large extent on their prestige and credibility to induce submission of disputes and compliance with decisions. The appearance of bias or lack of independence can severely undermine the effectiveness of any international tribunal or hamper the resolution of a particular case.

The need for independent tribunals and procedures that afford a fair hearing are perhaps most important where there is an extreme imbalance of power between litigants. Such disparity is usually found in international human rights proceedings, when an individual seeks redress for human rights violations committed by a State.<sup>3</sup> Generally, most evidence of violations is in the hands of the government and within the territory of the State concerned. The individual may be in exile and indigent or fear reprisals. In such circumstances, the international tribunal must maintain its independence and impartiality to devise procedures that ensure due process.

At first glance, ensuring an independent international tribunal may seem more difficult than guaranteeing an

independent national judiciary. International courts are created by States and are limited to the competence given them by treaty and other relevant texts. They are dependent on States for their budgets, their administrative support, and the enforcement of their judgments. Yet, international scrutiny and the multinational character of international courts, as well as the somewhat limited role courts play in many international disputes, may contribute to the guarantees afforded by their statutes to make them at least, if not more, independent than the judiciaries of many countries.

The elements of an independent and impartial judiciary have been identified in several international texts. The United Nations General Assembly endorsed twenty Basic Principles on the Independence of the Judiciary, adopted by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.<sup>4</sup> The Inter-American Human Rights Commission has studied the issue,<sup>5</sup> as have such non-governmental bodies as the International Commission of Jurists.<sup>6</sup> The following review tests the independence of international tribunals using the UN Principles, recognizing

3 Although inter-State complaints can be heard in both the Inter-American and European Court, they are extremely rare.

4 Milan (1985), GA Res. 40/32 of 29 November 1985 and 40/146 of 13 December 1985. See also *Draft Declaration on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*, Report by L.M. Singhvi, E/CN.4/Sub.2/ 1988/20/Add.1, 20 July 1988.

5 See IACHR, "Measures necessary to enhance the autonomy, independence and integrity of members of the judicial branch," in *Annual Report of the Inter-Am.Comm.Hum.Rts*, 1992-1993, OEA/Ser.L/V/11.83, Doc. 14, corr.1, March 12, 1993, 207-215.

6 See the reports of the Centre for the Independence of Judges and Lawyers, *supra* note 1.

that the Principles were drafted for national courts and are not applicable in every respect to international tribunals. The tribunals considered are the International Court of Justice,<sup>7</sup> the European Court of Human Rights,<sup>8</sup> and the Inter-American Court of Human Rights.<sup>9</sup> In addition, the European Court of Justice,<sup>10</sup> the Iran Claims Tribunal<sup>11</sup> and the United

- 7 The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. The Court is also open to States that are not members of the United Nations. The role of the ICJ is to decide disputes submitted to it in accordance with international law. Its jurisdiction is optional and comprises cases submitted by special agreement, those arising under treaties in force between the relevant States, and those matters taken to the Court by parties that have accepted the Court's compulsory jurisdiction. Only States may be parties in cases before the Court.
- 8 The European Court of Human Rights (ECHR) was created in 1959 to ensure the observance of the European Convention on Human Rights. The Court's jurisdiction extends "to all cases concerning the interpretation and application of the Convention to which the High Contracting Parties or the Commission shall refer to it." After proceedings are concluded before the European Commission of Human Rights, cases may be filed by the European Commission and/or by any Contracting State concerned within three months. At the Commission, applications may be lodged by a State or by a victim individual or group of individuals.
- 9 The Inter-American Court of Human Rights (IACtHR) was established in 1979 pursuant to the entry into force of the American Convention on Human Rights. The Court has competence with respect to all matters relating to the interpretation or application of the Convention. Acceptance of the Court's jurisdiction is optional for States parties to the Convention. Only States parties and the Commission have the right to submit a case to the Court, but the advisory jurisdiction of the Court is open to all Member States of the Organization of American States.
- 10 The Court of Justice of the European Union functions to "ensure that in the interpretation and application of th[e European Union] Treaty the law is observed." Article 164, Treaty Establishing the European Economic Community. The Court began in 1952 as the Court of the European Coal and Steel Community. In 1958, it became the common judicial organ for the three European Communities and remains the court of the European Union. A Court of First Instance has limited jurisdiction, subject to a right of appeal on points of law to the ECJ. The latter is competent to hear cases alleging the failure of Member States to fulfil treaty obligations as well as the legality of acts and omissions by the institutions of the Union. Cases may be brought by natural and legal persons as well as by the institutions and by Member States. National courts may, and in some circumstances must, request a preliminary ruling from the Court on questions of European law.
- 11 The Iran-United States Claims Tribunal was established pursuant to agreement between the two countries announced by the Government of Algeria. According to the Claims Settlement Declaration, the purpose of the Tribunal is to decide outstanding claims of nationals of the United States against Iran and those of nationals of Iran against the United States, and any counterclaim arising out of the same contract, transaction or occurrence. In addition, the Tribunal has jurisdiction over "official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services" as well as over disputes concerning interpretation of the Algiers Accords. See Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, 1 Iran-US C.T.R. 9 (1983). For a history of the Tribunal, see Wayne Mapp, *The Iran-United States Claims Tribunal: The First Ten Years* (1994); Jahmatullah Khan, *The Iran-United States Claims Tribunal: Controversies, Cases and Contribution* (1990).

Nations Administrative Tribunal<sup>12</sup> are referred to for comparison. The study concludes that for the most part, the international judiciary is free from overt pressures, but is not and cannot be fully insulated from international political organs and institutions.

### Basic Principles on the Independence of the Judiciary

*1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*

Most of the texts creating international tribunals refer to judicial independence. Article 2 of the Statute of the ICJ provides that "The Court shall be composed of a body of independent judges...". The American Convention on Human Rights contains two specific references to the independence of the Inter-American Court. First, Article 59 provides that the secretariat of the Court functions under the administrative standards of the Organization "in all matters not incompatible with the independence of the Court." Second, Article 71 prohibits judges from enga-

ging in any activity that might affect the judge's independence or impartiality. In addition, Article 52 provides that the judges are elected in an individual capacity.

The European Convention on Human Rights originally contained no reference to the judges' independence. However, Protocol 8 added Article 40(7) which requires judges to sit "in their individual capacity," adding that "during their term of office they shall not hold any position which is incompatible with their independence and impartiality as members of the Court or the demands of this office."

In the European Court of Justice, both the Judges and the Advocates-General are to be chosen from persons "whose independence is beyond doubt" (Art. 167). The same language applies to the judges of the Court of First Instance (Art. 168a). The Advocates-General referred to, "acting with complete impartiality and independence," are to assist the Court (Art. 166).

In addition to the explicit statements on independence, courts may be somewhat protected from direct pressure by their locations. Only the European Court of Human Rights is

<sup>12</sup> Several international organizations have created such tribunals, including the UN, the ILO, the World Bank, and the Organization of American States. The Statute of the UN Administrative Tribunal provides that it is competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat or of the terms of appointment of such staff members (Statute, Art. 2(1)). The Applicant must first submit the dispute to an appeals body established by the staff regulations, unless the Applicant and the Secretary-General agree to submit the application directly to the Administrative Tribunal (Statute, Art. 7(1)). Concerning other tribunals, see C.F. Amerasinghe, "The World Bank Administrative Tribunal," 31 *Int'l & Comp. L.Q.* 748 (1982); David Padilla, "Administrative Tribunal of the Organization of American States," 14 *Law. Am.* 249 (1982).

headquartered in the same city as the political bodies of its organization, in this instance the Council of Europe. The International Court of Justice and the Iran-United States Claims Tribunal are located in The Hague. The Inter-American Court is in San José, Costa Rica, while most other institutions of the Organization of American States are based in Washington DC.<sup>13</sup> The European Court of Justice in Luxembourg is similarly separated from the political and administrative centres of Brussels and Strasbourg. The relative isolation of the tribunals may assist in insulating the judges from political pressures, but could run the risk of marginalizing the courts within the respective organizations.

2. *The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*

In general, there is little evidence of pressure being directly placed on

judges of international tribunals. The one exception seems to be the Iran-United States Claims Tribunal where, for the most part, the US government and claimant community has viewed the Iranian arbitrators as lacking independence.<sup>14</sup> However, the United States challenged Iranian arbitrators only once, in part due to the belief that a replacement would be no more independent. "Over time, less and less was expected of the Iranian arbitrators as to impartiality and independence."<sup>15</sup> One US agent claimed "from the Iranian point of view, the Iranian arbitrators, the Iranian parties, and the Iranian Agent are all one large family. The Iranian arbitrators do not provide the kind of neutral, impartial service that one gets from the European arbitrator, or, in my considered judgement, from the American arbitrators."<sup>16</sup> The agent added that he was shocked at how Iranian arbitrators sought and received instructions from their government even during deliberations and how the Iranian agent had boasted of the power of the government to withdraw arbitrators and registry officials.<sup>17</sup>

The US did seek to disqualify two Iranian arbitrators who assaulted a

13 Notably, the IACtHR is "an autonomous judicial institution" not part of the OAS. The seat of the Court was chosen by the General Assembly in Resolution 372(XIII-O/78) OEA/Ser.P, AC/Doc.1020/78, Rev.2, at 97 (1978). The seat may be changed only if two thirds of the States parties to the Convention voting in the General Assembly agree to such a change (Article 3(3) of the Statute). The Court itself may decide to meet in the territory of any member State of the OAS with the consent of that State.

14 See Matti Pellonpää and David Caron, *The UNCITRAL Arbitration Rules as Interpreted and Applied: Selected Problems in Light of the Iran-United States Claims Tribunal* (1994) 138-219 at 161.

15 *Id.*

16 *Asil Proceedings* 1983, p. 24.

17 *Id.* p. 27.

third member of the tribunal.<sup>18</sup> The US argued that the assault "shows that Mr. Kashani and Mr. Shafeiei identify themselves so completely with what they consider to be the interests of the Islamic Republic of Iran that they will resort to unprecedented physical violence to protect those interests."<sup>19</sup> Iran withdrew the two judges before a decision on the challenge.

The differences between international arbitration and a permanent court may contribute to the less independent nature of some of the arbitrators on the Iran-United States Tribunal. Although the arbitrators are supposed to judge impartially according to the facts and law in the case, two-thirds are appointed directly by the parties and are of the nationality of the appointing power.<sup>20</sup> The Tribunal itself is *ad hoc* and of limited duration. The parties equally share the expenses of the Tribunal, including payment of the arbitrators salaries and expenses. Although there are guarantees against improper removal of arbitrators, these were ignored in some cases by Iran, which sought to remove arbitrators at will, at least in the beginning of the Tribunal's operation.

On permanent courts, the system of *ad hoc* judges is perhaps closest to that

found in the arbitral tribunals. The role of a judge *ad hoc* can be difficult from the perspective of independence, especially when the judge is of the nationality of the appointing State. In some instances it appears from the operation of the tribunal that the *ad hoc* judge exists not to be independent, but to represent the views of the appointing government to the Court as a whole. In several cases *ad hoc* judges can be seen to make considerable efforts to fulfil the expectations of the government.<sup>21</sup> However, it seems it was the fear of States that permanent judges would not be impartial that led to insistence on the right to propose an *ad hoc* judge. In most cases, there should be no problem, because the qualifications and requirements of the *ad hoc* judge are identical to that of the permanent judge on the tribunal.<sup>22</sup>

Individuals in all institutions are sensitive to criticism. In the case of judicial bodies, the level of criticism sometimes rises to the point where judges feel under pressure regarding their decisions. In the *Barcelona Traction Case*, Judge Fitzmaurice referred to certain criticisms as misrepresenting the Court "in a manner detrimental to the dignity and good order of its functioning as an independent judicial institution."<sup>23</sup> Judge Koretsky also commented on the breadth of criticism

18 Pellonpaa & Caron, *supra* 14 at 141.

19 *Id.* at 169.

20 According to the agreement between Iran and the United States, the remaining third of the Tribunal is selected by the members appointed by the two governments.

21 For examples and further discussion, see Lyndell V. Prott, *The Latent Power of Culture and the International Judge* (1979)13-14.

22 See, e.g. Statute of the ICJ, Art. 31(2) and (6).

23 Fitzmaurice, *Barcelona Traction Case*, Sep.Op., 113.

addressed to the Court after the 1962 South West Africa Case.<sup>24</sup> Although criticism may be warranted in some cases and serve to strengthen a court, it may also amount to efforts to sway the court in a particular matter.

3. *The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.*

The jurisdiction of international courts is routinely challenged when cases are submitted for decision and the courts decide each challenge as presented. Only in the ICJ case of Nicaragua v. United States has a State been unwilling to recognize the court's decision on its competence. In that instance, the United States withdrew its acceptance of the jurisdiction of the International Court of Justice claiming that judicial bias led to the exercise of jurisdiction when there was no basis for it. Other indirect pressure has been reported in regard to the request of the World Health Organization for an advisory opinion of the ICJ on the legality of nuclear weapons.<sup>25</sup> Both events demonstrate a lack of confidence in the ICJ, but more importantly reflect an effort to pressure the Court in its decision-making.

4. *There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.*

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

The question of review of international decisions or displacement of international tribunals is an almost uncharted area, although problems have arisen in this regard in international administrative tribunals. The question of the independence of the UN Administrative Tribunal from the General Assembly arose in the 1950s when the United States government exerted pressure on the Secretary-General to dismiss US nationals suspected of communist sympathies. The Administrative Tribunal overturned their dismissals and the US argued that the General Assembly, having created the Tribunal, had the authority to review and rescind the judgment.

24 Koretsky, *South West Africa Case* 1966, Diss.Op. 242.

25 According to the Lawyers Committee on Nuclear Weapons, nuclear power States objected and in at least one case threatened to reduce or eliminate funding for WHO unless it withdrew the request.

The General Assembly requested an advisory opinion from the ICJ, which replied that "the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member." The Court found that the Tribunal was established, "not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions." The composition of the Tribunal and its statutory independence support this decision, although the Tribunal is "lay" because of the absence of a requirement that the members have legal training or judicial qualifications. In its 1954 advisory opinion, the ICJ excluded any possibility of the General Assembly acting as a review organ:

"...[T]he General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ - considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them - all the more so as one party to the dispute is the United Nations Organization itself."<sup>26</sup>

The only means by which the decisions of the Tribunal could be reviewed would be by amendment of the Statute to provide a regular appellate procedure.

Subsequently, the General Assembly amended the Statute of the Administrative Tribunal, adding Article 11, to provide a process of judicial review. A Committee of Member States who most recently served on the General Committee of the United Nations screens requests by Applicants, the Secretary-General, or a Member State for advisory opinions of the ICJ to review a decision of the Administrative Tribunal. The Committee may request such an opinion if there is "a substantial basis" for finding that the Tribunal exceeded its jurisdiction or competence, or that it failed to exercise jurisdiction vested in it, or erred on a question of law relating to the provisions of the UN Charter, or committed a fundamental error in procedure which occasioned a failure of justice. In Application for Review of Judgment No. 158, the ICJ held that the Committee is an organ of the United Nations capable of requesting advisory opinions pursuant to UN Charter Article 96(2).<sup>27</sup>

Criticisms have been made of the Committee on Applications for Review, because it is a political organ intervening in a judicial process. Judge Gros asserted that "one cannot have a political

26 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, [1954] I.C.J. 47,56.

27 [1973] I.C.J. 166, 171-83. For a further discussion of ICJ review, see Joanna Gomula, "The International Court of Justice and Administrative Tribunals of International Organizations," 13 *Mich.J.Int'l. 83* (1991).

committee, discretionary and secretive in operation, set up a hurdle, and at the same time claim to have provided 'machinery' for initiating a procedure of judicial review."<sup>28</sup> However, given the inability of direct access by individuals to the ICJ, creation of an organ for this purpose is necessary. Nothing, however, requires that it be a political organ and the criticisms are warranted. In at least one case, the State seeking review also sat on the Committee.

A final decision of an international tribunal not subject to review should be enforced. In the European human rights system, Convention Article 54 provides that "the judgment of the Court shall be transmitted to the Committee of Ministers, a political body, which shall supervise its execution." What is not clear is if this is a political function or judicial in nature.<sup>29</sup> The rules do not clarify the matter. The State concerned is obligated by virtue of Article 53 to abide by the Court's judgments; however, the Court does not have the power to prescribe the remedial action to be taken by the State.<sup>30</sup> The Committee of Ministers in "supervising" execution of the judgment may also lack the power to take or recommend specific measures be applied by the State; it remains

uncertain whether the Committee has a power of review, or merely transmits the judgment of the Court.<sup>31</sup> The power of review by this political organ could infringe on the Court's prerogatives.

6. *The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.*

All international tribunals have been given the power to enact rules governing proceedings before them, but the rules must conform to the treaties and statutes establishing the tribunals. This limits the ability of the court to provide full procedural equality between parties when one of them is not a State. In most international tribunals, individuals lack standing to initiate actions. Even international human rights courts currently limit access to their respective commissions and to States, although individuals are permitted to participate through the commissions. Thus, courts must devise mechanisms to ensure a fair hearing to those most directly affected by the court's decisions.

28 [1973] I.C.J. at 263.

29 On this subject see Hans-Jurgen Bartsch, "The Supervisory Functions of the Committee of Ministers under Article 54" in *Protecting Human Rights: The European Dimension* (F. Matscher & H. Petzold eds. 1988) 47-63.

30 In contrast, Article 63(1) of the American Convention on Human Rights confers on the Court authority to rule that the consequences of the measure or situation that constituted the breach be remedied.

31 The Security Council has this power under Article 94(2) of the UN Charter, in cases of non-execution of a judgment of the International Court of Justice.

International tribunals generally draft written rules to govern procedure, but develop rules of evidence through jurisprudence. This approach allows flexibility in admission and weighing of submissions by the parties, but may lead to perceptions of bias when the rules are abruptly changed from one case to another.

*7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.*

To function properly, each tribunal must have adequate resources, both human and material. Budgets should not be used as a means of undermining judicial independence. On the other hand, all institutions must be financially accountable.

The finances of the ICJ are referred to in Court's Statute. Article 33 provides that the expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly. The budget of the Court is thus incorporated in the budget of the United Nations. States which are not members of the United Nations but which are parties to the Statute pay - according to an undertaking which they make when they become parties to the Statute - a contribution fixed by the General Assembly in consultation with them.<sup>32</sup>

In practice, a preliminary draft budget is prepared by the Registrar of the ICJ. If the Court is not sitting, approval is given by the President. If the Court is sitting, the draft is submitted to the Budgetary and Administrative Committee of the Court and then to the Court itself. After approval, the draft budget is forwarded to the Secretariat of the UN for incorporation in the draft budget of the United Nations, where it is first examined by the Advisory Committee on Administrative and Budgetary Questions. Following this, it is submitted to the Fifth Committee of the General Assembly and finally voted by the General Assembly in plenary meeting. Since 1974, the budget has been presented biennially. The budget of the Court for the biennium 1992-1993 was set at \$17,484,000.

The Registrar executes the budget, with the assistance of an Accountant-Establishment Officer. He ensures that proper use is made of the funds and that no expenses are incurred that are not provided for in the budget. He alone may incur liabilities on behalf of the Court. The accounts are audited every year by auditors of the Secretariat of the UN and by the Board of Auditors appointed by the General Assembly.

There is less information about other tribunals. The Inter-American Court prepares and submits its budget directly to the OAS General Assembly, rather than having it go through the

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32. By resolution 46/221 of 20 December 1991, the General Assembly decided that the three States should pay for 1992-1994, Nauru and San Marino should each pay 0.01%, while Switzerland's contribution is 1.16%. 47 YB ICJ 1992-1993, 283.

normal budget process applicable to OAS organs. This makes it less dependent on the organization's bureaucracy, but ultimately the amount of funding is still controlled by the governments.

The expenses of the Iran-United States Claims Tribunal are borne equally by the two governments (Article VI). The Tribunal prepares its own budget and allocates the funds received.<sup>33</sup> Article 58 of the European Convention on Human Rights provides only that the expenses of the Court are borne by the Council of Europe.

In addition to having a degree of financial independence, it is important that tribunals have the right to appoint key staff members without interference. The IACtHR, for example, appoints its Secretary, a full-time officer who must possess not only legal knowledge and experience, but also knowledge of the working languages of the Court. He serves the Court in a position of trust and is elected by the judges for a period of five years. No less than four judges must vote in secret ballot for removal of the Secretary.<sup>34</sup> The Deputy Secretary is appointed by the Secretary in consultation with the Secretary General of the

OAS. All other members of the Secretariat are appointed by the Secretary-General in consultation with the Secretary of the Court. In practice, thus far, the Secretary-General has always made the appointments recommended by the Secretary of the Court.

The Statute of the ICJ similarly provides that the Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary (Art. 21). No such provision is found in the European Convention on Human Rights;<sup>35</sup> however, Rule 11 of the Rules of Court provides for the election of the Registrar by the plenary Court after the President has consulted the Secretary-General of the Council of Europe.<sup>36</sup> The Registrar is elected for a term of seven years and may be reelected. Other staff members and necessary equipment and facilities are provided by the Secretary-General of the Council of Europe upon request of the President of the Court or the Registrar on his behalf.<sup>37</sup> The practice of the Iran-United States Claims Tribunal is for individual judges to engage legal assistants. Finally, the European Court of Justice employs its own staff. This currently numbers around 700 officers,

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33 This has on occasion created problems with the staff of the Tribunal due to the judges allocating funds to judicial salaries and benefits at the expense of staff compensation.

34 Compare this to the position of Executive Secretary of the Inter-American Commission, who may be removed by the Secretary-General of the OAS in consultation with the Commission, Article 21(3), Statute of the Inter-American Commission on Human Rights.

35 Article 37 provides for a secretariat for the Commission, provided by the Secretary-General of the Council of Europe.

36 A recent election indicated some difference of views over the extent of the Court's discretion in this regard. In particular, the issue arose over whether the Council of Europe's mandatory retirement age necessarily applied to the Registrar.

37 Rule 13.

about one third of them lawyers, most of whom work in the Language Service, because the case law is published in all the official languages of the Community.<sup>38</sup>

8. *In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.*

Although this principle is concerned with the civil and political rights of judges, in a broader sense it raises issues of the compatibility of all outside activities with judicial functions. Judges on international courts hold more concurrent offices than national judges, because only the ICJ and the ECJ are full time courts.<sup>39</sup> Impartiality and independence are more difficult when judges hold other positions; in some cases questions may be raised about judges' compliance with the

relevant statutory requirements on incompatibility.

The Statute of the International Court of Justice prescribes in Article 16(1): "No member of the court may exercise any political or administrative function or engage in any other occupation of a professional nature." Certain private functions are also excluded. In one case, the President suggested that Sir Percy Spender resign from certain company directorships.<sup>40</sup>

Judges on the ICJ are excluded from representing their country in an international capacity or acting as legal advisor and may not sit in a case in which they have been active in another capacity.<sup>41</sup> However, they are not obliged to withdraw from a case merely because their own country is a party. This can lead to perceptions of bias or conflict. However, exclusion due to nationality might deprive a case of some of the most experienced and able judges.

The Rules of the European Court of Human Rights provide that "a judge

38 See C. Kohler, "The Court of Justice of the European Communities and the European Court of Human Rights," in *Supranational and Constitutional Courts in Europe: Functions and Sources* (I. Kavass, ed. 1991)19.

39 The Inter-American Court is a part-time Court. The draft statute envisaged a permanent body, but the General Assembly of the OAS refused to sanction the creation of a full-time tribunal on the grounds that it would be too expensive to maintain until it had a full case load. See S. Davidson, *The Inter-American Court of Human Rights* (1992), p. 35.

40 Shabtai Rosenne, *The World Court: What it Is and How it Works* (3rd rev. ed. 1973) 55 and n. 11.

41 Sir Muhammad Zafrulla Khan was excluded from sitting in the *South West Africa Case 1966* because he had been active in the UN proceedings against South Africa. South Africa applied to disqualify another judge, but the order was rejected. *South West Africa, Order of 18 March 1965, 1965 ICJ Reports 3.*

may not exercise his functions while he is a member of a government or while he holds a post or exercises a profession which is incompatible with his independence and impartiality. In case of need the plenary Court shall decide."<sup>42</sup> In 1977, the Parliamentary Assembly of the Council of Europe adopted a resolution requesting its members not to vote for candidates "who, by nature of their functions, are dependent on government" unless they undertake to resign such functions on election.<sup>43</sup> In practice, several judges have been members of their national judiciaries. This is problematic, because the knowledge of national issues and cases could influence or be seen to influence the way a judge views a case on the international level. This is particularly true because the rules provide that the chamber to hear a case must include the judge who is a national of any State party concerned. If the national judge is unable to sit or withdraws or if there is none, the State is entitled to appoint a member of the court of a different nationality or an *ad hoc* judge. There is no reason, in principle, why the exclusion of a "member of a government" should be limited to the executive branch; those serving in the national legislature or judiciary have similar conflicts of interest and present at least the appearance of bias.

Article 71 of the American Convention on Human Rights provides

that the position of a judge is incompatible with any other activity which might affect independence or impartiality. Article 18 of the Court's Statute elaborates that incompatibility arises if a judge is a member or high ranking official of the executive branch of government or an official of an international organization.<sup>44</sup> The former category does not include diplomatic agents who are not Chiefs of Mission to the OAS or to any of its member States. Article 18 also prohibits any other activity which might prevent judges from discharging their duties or that might affect their independence or impartiality or the dignity and prestige of the office. The Court decides on the issue and if it is unable to do so, the matter will be determined by the OAS General Assembly. The Statute provides that judges shall "remain at the disposal of the Court, and shall travel to the seat of the Court or to the place where the Court is holding its sessions as often and for as long a time as may be necessary..."

Although conflicts are a problem, a court may benefit from having well-connected people as judges. They can call directly to those who are needed to ensure enforcement of judgments, induce States to accept the court's jurisdiction and help prepare resolutions. However, such connections also may lead to pressure. In addition, if judges fail to respect the ethical

<sup>42</sup> Rule 4. Earlier, the rule referred to "a profession likely to affect confidence in his independence."

<sup>43</sup> Resolution 655 (1977).

<sup>44</sup> The same objection may be raised here as in the Council of Europe to disqualifying only members of the executive branch of national government; national legislators and judges should also be excluded from serving as international judges.

constraints of the judicial position e.g. the prohibition on *ex parte* communications between the bench and a litigant, the court can suffer as a result.

All international judges must take an oath, or make a declaration, that they will perform their duties impartially and independently. The question of impartiality is partly a question of personal integrity, but is complicated when there is no consensus on the substantive rules and sources of law to be applied by the tribunal. Subjective attitudes of the individual judge then assume increased importance as does the experience and position of the judge.

*9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.*

International courts lack the support of an organized bar association. On the national level, support by the bar can be extremely important in protecting the independence of the judiciary. The European and Inter-American

Courts have held regular consultations which can assist in building professional solidarity, but this should be broadened to include all international tribunals.

*10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.*

The primary focus of attention on the independence of international tribunals has been on the methods of selecting judges and their qualifications. This is understandable given the relatively small number of judges and the important tasks they perform. There is some commonality in the requirements to be an international judge, but there is also variety among the tribunals in terms of the degree of political influence over the selection process.<sup>45</sup>

<sup>45</sup> None of the current procedures mimic those of the Central American Court of Justice. The first international court, it functioned during the ten years of the Treaty of Peace and Amity (1907-1917). The judges were appointed by the legislative branch of each country and were required to take their oath before the competent authority of each respective country. Justices enjoyed the "personal immunity" granted to magistrates of the Supreme Courts in the country of their appointment and the privileges and immunities of "diplomatic agents" in other countries. However, Article 13 of the Convention provided "The Central American Court of Justice represents the national conscience of Central America, wherefore the Justices who compose the Tribunal shall not consider themselves barred from the discharge of their duties because of the interest which the Republics, to which they owe their appointment may have in any case or question. With regard to allegations of personal interest the rules of procedure which the Court may fix, shall make proper provision."

All treaties establishing international tribunals compromise between guaranteeing the independence of the judges and making the judges appointment dependent upon the consent of the Member States. Without any exceptions the relevant provisions set forth that the judges in the exercise of their functions are exempt from any instructions and that they have to fulfil their duties impartially. Not since 1907 and the Central American Court of Justice has each State subject to the jurisdiction of a court had the power to directly appoint a judge of its choice.<sup>46</sup> Today, the agreement of other States is required and usually obtained through a vote in a plenary body.

Article 2 of the Statute of the ICJ provides:

"The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized

competence in international law."

Primary responsibility for getting good judges lies with those that nominate them. In the case of the ICJ, the nomination is indirectly by governments. Judges of the ICJ are elected by the General Assembly and the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration or, for those States not represented therein, from a list of persons nominated by national groups appointed for the purpose by their governments. Article 6 requires that extensive consultations be held by the national groups to obtain various opinions. The two United Nations organs vote independently of each other. There is campaigning, with candidates appearing before the election to make themselves known among those voting.

Many judges are elected after long experience in United Nations or in national affairs.<sup>47</sup> Often ICJ judges come from official posts within their States. In fact, some countries have been accused of seeing their judge as a "legal ambassador" to the Court. In the past suspicions were voiced about

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46 In the Iran-United States Claims Tribunal, two thirds of the arbitrators are appointed directly by the parties.

47 Earlier studies noted that two thirds of all ICJ judges have served their own countries in an official capacity. G.M. Bechman, "Judges of the International Court of Justice," *3 International Lawyer* 593, 594 (1969); N.J. Padelford, "The Composition of the International Court of Justice" *The Relevance of International Law* (K.W. Deutsch and S. Hoffmann eds. 1968) 231-237.

judges from several countries.<sup>48</sup> In any case, selection of former diplomats is seen by some as a danger to their objectivity and independence and to the integrity of the judicial process, leading to several attempts to disqualify judges in specific cases.<sup>49</sup> Problems arose in particular when a judge as a former diplomat had participated in discussions in the United Nations political bodies on the issue before the Court.<sup>50</sup>

Most judges have considerable international experience, and membership in the International Law Commission is particularly important. Of the fifteen judges on the Court in February 1988, nine of them had served on the Commission.<sup>51</sup> There is some movement of judges from regional courts. Other judges have repeatedly appeared as agents for parties before the Court. Although such appearances

do not present problems, there may be concerns where judges previously have been confidential lawyers for one or more States. The judges are supposed to abstain in such cases, but due to the confidentiality of their prior work, it is impossible to know if they all do.

At the ICJ, nationality plays an important informal role in the elections and may affect independence. The call for representation of the most important legal systems of the world, contained in Article 9 of the Statute, has been seen by some as implying that an international judge should represent the values of his national legal system.<sup>52</sup> This may be exacerbated by the allocation of seats on the Court: a series of understandings has led to *de facto* allocation of seats on a regional basis, paralleling in general the regional allocation of seats on the Security Council. This dis-

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48 "Can a Soviet judge of the International Court of Justice be an 'independent' judge? Can his solemn declaration to perform his duties as a judge impartially be taken seriously? By 'independence' of a person we ordinarily mean that he does not act on instructions from superior authorities, and that he is not accountable to them. We do not, of course, mean ideal independence, implying absence of any environmental influence. We should insist, however, that this influence stop short of destroying the individual's ability or willingness, or both, to search for facts, to question dogma and to articulate his thoughts." Z. L. Zile, "A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy," 58 *AJIL* 859 (1964). Some suggest that the ICJ has resisted the practice of law clerks assisting individual judges in part because former eastern European judges were concerned that the clerks would report on them.

49 Shabtai Rosenne, "The Composition of the Court," in *The Future of the International Court of Justice* (L. Gross ed. 1976), 388-92.

50 In the South West Africa cases several members of the Court were challenged by the Government of South Africa. Judge Padilla Nervo had represented his country in the General Assembly and expressed its views on the problem of South-West Africa. The Court denied the government's challenge to his participation.

51 Rosenne, p. 59.

52 Judge Moreno Quintana referred to himself in one opinion as "a representative on this court of a Spanish-American legal system." Moreno Quintana, *Arbitral Award Case*, Sep.Op., 218.

tribution allocates seats to Western Europe and Others 5 seats, Eastern Europe 2 seats, Latin America 2 seats, Asia 3 seats and Africa 3 seats.<sup>53</sup> Having agreement on candidates within each group helps the geographic representation and election.

In the best of circumstances the election process is affected by political issues and sometimes the merits of recent court decisions. For example, dissatisfaction with the *South West Africa Case* 1966 led to proposals to adopt a new method of election of the judges and to increase the number of judges to ensure a large participation of African and Asian judges. Judge Schwebel has noted that despite "the general and traditional excellence of the composition of the Court, it was universally agreed that the predominance of bloc voting was a flaw in the current election system."<sup>54</sup> While it is not possible to remove all politics from the election process, it is important that the Court itself should be kept depoliticized as far as possible. Nonetheless, the *Institut de droit international* rejected several proposals which

aimed at securing greater independence of national groups in the Permanent Court of Arbitration in the nomination process, on the basis that only those candidates who command the support of their respective governments were likely to be elected.<sup>55</sup>

Among other tribunals, it is not surprising that the greatest degree of national control and least articulation of objective criteria for selection of members is found on the Iran-United States Claims Tribunal. The tribunal consists of nine members or larger multiples of three as Iran and the United States agree are necessary to conduct business expeditiously.<sup>56</sup> Each government appoints one-third of the members and the appointed members appoint the remaining one third and the President, who must be one of the last third. The Tribunal is governed by the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), "except to the extent modified by the Parties or by the Tribunal to ensure that th[e] Agreement can be carried out."<sup>57</sup>

53 In fact the five permanent members of the Security Council are assured seats as is Japan. Within Europe, there is a "southern European" seat and one for northern Europe (generally Scandinavian or German). In Africa, language often accounts for the distribution of the three African seats: one to a Francophone, one to an Anglophone and one to a speaker of Arabic (North African). Latin American is perhaps the most difficult area because there are so many countries and only two seats. The reservation of seats to the Security Council is objected to by some and cited as the reason for the under utilization of the Court. Rosenne, 59.

54 *Judicial Settlement of International Disputes* (H. Mosler and R. Bernhardt eds. 1974), 181.

55 Helmut Steinberger, "The International Court of Justice" in *Judicial Settlement of International Disputes* (Mosler & Bernhardt eds. 1974) 280.

56 The Tribunal has consisted of nine members throughout its functioning.

57 Article 3. For the application of the Rules, see Matti Pellonpää and David Caron, *The UNCITRAL Arbitration Rules as Interpreted and Applied: Selected Problems in Light of the Practice of the Iran-United States Claims Tribunal* (1994).

The UN Administrative Tribunal also has little in the way of qualifications or criteria. The UNAT consists of seven members from seven different States who sit in panels of three; there is no requirement that any have legal training. The UN General Assembly appoints the members for three-year terms and members may be reappointed.

On the regional level, the European Court of Justice consists of thirteen judges and six advocates-general, appointed for six years. They may be and frequently are reappointed. The President of the Court is elected for three years by the judges. Proposals to curb the influence of national governments on the procedure of determining the judges have not been adopted. Governments are not eager to lose their nominating prerogatives and there is no indication of judges seeing themselves as national agents.

The European Court of Human Rights, according to Convention Article 38, consists of a number of judges equal to the number of members of the Council of Europe. The size of the Court and the election arrangements are designed to ensure that the composition of the Court reflects the diversity of the European States. Judges not only reflect different national cultural and legal systems, but must be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence" (Art. 39(3)). The wording is similar to that governing the other tribunals, although competence in international law is not specifically required.

Each member State nominates three candidates. The judges are elected for a term of nine years by the Consultative Assembly of the Council of Europe. In practice, the person listed first by the nominating State is normally elected, in effect allowing each State to appoint a judge. Judges may be reelected. No two judges may be nationals of the same State, but they need not necessarily come from a Member State of the Council of Europe.

The IACtHR is composed of seven judges who must be nationals of the Member States of the OAS. They are elected from among jurists of the highest moral authority and recognized competence in the field of human rights. They must possess the qualifications which would enable them to exercise the highest judicial functions in conformity with the law of their States. No two judges may be from the same State. Upon appointment, all judges must by oath or solemn declaration state that they will exercise their functions "honorably, independently and impartially" and that all their deliberations shall be kept secret.

Judges are elected in secret ballot by an absolute majority of votes of the States parties to the Convention. The election takes place in, and is supervised by, the OAS General Assembly. Each State party may nominate up to three persons; where three are nominated, at least one must be of a State other than the nominating State. Six months before the expiration of the terms to which the judges were elected, the Secretary-General of the OAS addresses written requests to each of the States parties asking them to

nominate their candidates within ninety days. The Secretary-General then draws up an alphabetical list of the nominated candidates and sends the list to the States parties.

Judges are elected for a six year term and may be reelected only once. Like the ICJ, the American Convention uses a system of *ad hoc* judges when none of the judges is a national of the State concerned. Although judges are appointed, rather than nominated by States parties, the judges must meet the qualifications applicable to elected judges. An unqualified judge could be objected to by other parties.

In the process of election to the Inter-American Court, States will negotiate with each other for support of particular candidates. Inter-State conflicts that are independent of the Court can have an impact on the process. As with the ICJ, an effort is made to have regional diversity, with judges from North America, the Andean States, Central America, the Caribbean and the Southern Cone. Campaigning can be political, and may be exacerbated when there is a track record; i.e. for reelection. The President and Vice-

President are always at the OAS General Assembly meeting and represent the Court.

There is no selection process within each country, like that used for the International Court. Thus, it is up to each government how to select the candidate and whether to renominate when the term is up. In the election, the personal prestige of the judges is important, but the country as well may be a factor, e.g. Haiti, El Salvador are unlikely to have judges on the Court in the near future.

As international scholar Shabtai Rosenne states "[t]he natural aspiration of those having power to appoint judges in whom they have confidence, persons sympathetic to their political and social aims and ideals, is not always reconciled with equally natural desires for an independent judiciary (though it must not be assumed that there is an unbridgeable gulf between the two)..."<sup>58</sup> The choice of the international judge is political, within limits designed to ensure the selection of qualified persons. The process on the whole has produced a highly qualified and respected body of judges.

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58 Shabtai Rosenne, *The World Court: What it Is and How it Works* (1988), 51

11. *The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.*

Security of tenure and salary are among the important guarantees of an independent judiciary. In this respect, the international courts generally provide adequate guarantees, although the tenure on many tribunals is rather short.

All international tribunals have limited, renewable tenure for the judges and consequent problems due to the judges' desires to be reelected. The fifteen judges of the ICJ serve for a term of nine years and may be reelected. The longest-serving judge was Manfred Lachs, who was on the court from 1967 until his death in 1993 (26 years). Each three years, one-third of the court is elected. Fitzmaurice has commented on the "sinister implications" of the frequency of elections for the International Court. He says they

"afford occasions on which various political and psychological pressures can be brought to bear on the Court and its members... These are very far from being merely theoretical or hypothetical possibilities. They have caused uneasiness for many years an uneasiness which

time and more intimate experience has only served to confirm."<sup>59</sup>

Most judges are not nominated for a second term. This is perhaps due to a desire to allow the participation of judges from as many States as possible. However, renominations and reelections do occur. The threat to withdraw support for renomination can have an impact and some see the defeat of the Australian nominee to succeed Sir Percy Spender as deliberate retaliation for Spender's deciding vote in the *South West Africa Case 1966*.<sup>60</sup>

The European Court also has a nine year tenure, with possibility of reelection. In contrast, the tenure for a judge on the Inter-American Court is six years and he or she maybe reelected only once. These restrictions are no doubt due to the small size of the court (seven judges) compared to other international tribunals.

The salaries of the judges of the ICJ are fixed by the UN General Assembly, but Article 32 of the Statute provides that the amount received may not be decreased during the period of office. Salaries, allowances and compensation received by judges "shall be free of all taxation" (Statute, Art. 32, para.8). In 1991, the annual salaries were fixed at \$145,000, to be reviewed every three years. The President and the Vice-

59 G. Fitzmaurice, "The Future of Public International Law and of the International Legal System in the Circumstances of Today," Special Report in *Livre du Centenaire* (IDI 1973) 289.

60 Prott P. 25.

President receive an additional special allowance. Under current General Assembly regulations, retired judges are given pensions, after age 60 and three years of service. The amount of the pension is dependent upon the number of years of service.

The part-time nature of the regional courts makes the remuneration less certain in amount. The European Court of Human Rights mitigates this by giving the judges both a daily allowance and an annual retainer. The IACtHR judges receive no salary, but an *honorarium* based on the limitations imposed on their other activities and the importance and independence of their office, together with daily and travel allowances. The Convention provides that judges of the Court shall receive emoluments and travel allowances in the form and under the conditions set forth in their statutes, "with due regard for the importance and independence of their office" (Art. 72).

The symbols of judicial authority are conferred on all the permanent Courts: robes, formal hearing rooms with raised chairs and traditional speech as the session opens and closes. In the Iran Claims Tribunal, the setting differs depending on whether the litigants are parties or the two governments. In the latter case, the Tribunal uses the smaller hearing room at the Peace Palace. For private litigants, the setting is more informal.

*12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.*

Apart from natural expiration of their terms, judges have security of tenure. At the ICJ, a judge can only be dismissed if, in the unanimous opinion of his colleagues, he has ceased to fulfil the required conditions; no other body has the right to impeach a judge. The European Convention on Human Rights provides that "the members of the Court shall hold office until replaced" (Art 40(6)). Rule 4 provides that the plenary Court decides if there is a question of independence or impartiality.

*13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.*

*14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.*

In courts using chambers, such as the European Court of Human Rights, the President of the Court generally assigns the judges to constitute the chamber (Rule 21, Rules of Court) for a particular case.

*15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.*

The rules of the international tribunals invariably provide for secrecy in the deliberations of the court.<sup>61</sup>

*16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.*

The traditional immunity of judges has particular and expanded meaning when applied to international courts. Almost by definition, the judges of international courts are required to exercise their functions in States other than those of their nationality. They need broad immunity to protect themselves from interference. Indeed, in some cases they may need immunity or protection from their State of nationality, as well as from other States. Perhaps for this reason, the privileges and immunities of international tribunals is one of the most detailed aspects of their independence.

Article 19 of the Statute of the ICJ provides: "The Members of the Court, when engaged on business of the Court, shall enjoy diplomatic privileges and immunities." An exchange of correspondence between the President of the Court and the Minister of Foreign

Affairs of the Netherlands, dated 26 June 1946, provides that judges enjoy, in a general way, the same privileges, immunities, facilities and prerogatives as Heads of Diplomatic Missions accredited to the Netherlands.<sup>62</sup> General Assembly Resolution 90(1) of 11 December 1946, approved the agreement and recommended that "...if a judge, for the purpose of holding himself permanently at the disposal of the Court, resides in some country other than his own, he should be accorded diplomatic privileges and immunities during the period of his residence there" and that "judges should be accorded every facility for leaving the country where they may happen to be, for entering the country where the Court is sitting, and again for leaving it. On journeys in connection with the exercise of their functions, they should, in all countries through which they may have to pass, enjoy all the privileges, immunities and facilities granted by these countries to diplomatic envoys." Members of the UN are called upon to recognize and accept the UN laissez-passer, issued to judges of the Court since 1950. In addition, the agents, counsel and advocates of the parties and the Court's officials enjoy the privileges and immunities necessary to the independent exercise of their functions.

In regard to the Inter-American Court, the Agreement between Costa Rica and the Court<sup>63</sup> contains several

61 See e.g. Rule 19(5) of the Rules of the European Court of Human Rights and Rule 14(2) of the Rules of the Inter-American Court of Human Rights.

62 I.C.J. *Acts and Documents* No. 5, pp. 200-207.

63 OAS, *Handbook of Existing Rules Pertaining to Human Rights* (1988), p. 139.

important protections for the Court, its judges and staff. The Court's juridical personality includes the right to enter into agreements of cooperation with law schools, bar associations, court academies and educational or research institutions. The premises and archives of the Court are inviolable and immune from search, requisition, confiscation, expropriation and any other form of interference (Art. 6). The Court is exempt from taxes and other fiscal measures (Art. 7). The Court has control over its own funds, which it may hold in foreign currency (Art. 8). The Court enjoys considerable immunity from judicial or administrative process (Art. 9) and is given additional protection for its communications. In particular, its correspondence and official communications cannot be censored and it has the right to use codes and send and receive correspondence by courier or sealed pouch.

Judges, whether elected or *ad hoc*, and their families have the privileges and immunities afforded by Costa Rica to diplomats who are heads of missions, and at a minimum those granted by the Vienna Convention on Diplomatic Relations and the OAS Agreement on Privileges and Immunities.<sup>64</sup> In addition, judges of the Court have the right to

hold a Costa Rican diplomatic document. If the country of nationality of a judge does not issue a diplomatic passport to the judge, the Court must ask Costa Rica to issue a diplomatic passport, if it is considered necessary. This affords judges protection in case of actions by their governments during periods when the court is not in session and they are in their home countries.<sup>65</sup> Indeed, the diplomatic protection of Costa Rica is extended in Article 12, to permit the aid of its diplomatic missions or consuls in countries where judges are on official visits and in which Costa Rica has diplomatic envoys. Article 19 of the Statute provides that "when engaged on the business of the Court," judges enjoy diplomatic privileges and immunities

From the moment of their election and throughout their term of office, judges enjoy the immunities and privileges accorded to diplomatic agents under international law and such diplomatic privileges as are necessary for the performance of their duties. They are exempt from all liability for any decisions or opinions issued in the exercise of their functions. By application of the Vienna Convention on Diplomatic Relations (Art. 38), the judge's own State must respect the inviolability of

64 The only exception is that Costa Rican nationals are not granted "tax or patrimonial exemptions... except with respect to their official acts or in relation to their service with the Court." In any case, "they shall not be subject to measures of administrative or judicial restriction, execution or compulsion, unless their immunity has been waived by the Court" (Article 11).

65 The problems that can arise are well illustrated in a nonjudicial setting by the case of the independent expert Dumitru Mazilu. Mazilu, a Romanian national, was appointed Special Rapporteur by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities. For three years, the government prohibited Mazilu from leaving the country to present his report to the United Nations. See Applicability of Article VI, Section 22 of the Convention on Privileges and Immunities of the United Nations [1989] I.C.J.177.

his or her person, staff, archives, correspondence, means of transportation and communication.

The part-time nature of the IACtHR's work requires differentiating court activities to which privileges and immunities apply, and private or economic professional activities of the judges. For these, the privileges and immunities are those provided in Article 31, paragraphs 1-3, of the Vienna Convention on Diplomatic Relations.

The Secretary and Deputy Secretary of the Court and their families receive privileges and immunities akin to those of judges; however, they are not accorded the status of chief of mission. Technical and administrative staff are covered by the OAS Agreement on Privileges and Immunities.

The work of the Court and its independence are further facilitated by Article 19 which permits free entry and residence to all judges, professional staff members of the Court, and their relatives, and persons who visit Costa Rica at the request of the Court to fulfil official missions. This would presumably include experts appointed by the Court in particular cases. Persons appearing before the Court are granted privileges and immunities in Article 26. It provides that Costa Rica will, grant a visa, and if necessary a travel document, to all such persons and immunity from all administrative or judicial proceedings during their stay in the country. The provisions apply from the moment the Court informs Costa Rica of the summons until the end of the case. The latter term can certainly give

rise to numerous questions about when a case ends. The Court may waive the immunity of persons appearing before it when it considers it necessary. No one can be held responsible with regard to words spoken or written or acts done in the course of a case or proceedings before the Court.

The privileges and immunities of the judges can only be waived by the Court. The President of the Court has the power and duty to waive the immunity of the professional staff when immunity would impede the course of justice and can be waived without prejudice to the interests of the Court (Art. 23). The Court also has the duty to cooperate to prevent abuse of the privileges and immunities.

*17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.*

*18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.*

Security of office is a key test of judicial independence. None of the treaties provides for a unilateral recall of the judges by the States. ICJ Statute Article 18(1) provides "No member of

the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions."

The practice of the Iran-United States Claims Tribunal, Article 111(2) of the Claims Settlement Declaration indicates the strains that can arise on this issue. The agreement makes it clear that the only method by which an arbitrator may be removed from office is through challenge by a party and decision by the Appointing Authority pursuant to Articles 11 and 12 of the UNCITRAL Rules. A challenging party can challenge on the basis of circumstances which give rise to justifiable doubts" as to impartiality or independence. The Tribunal considered several circumstances in its cases: relationship with an affiliate of an expert witness; relationship with the parent corporation of a party; physical assault on a fellow arbitrator, and the handling of a proceeding.

The applicable UNCITRAL rules concerning composition of the Tribunal include a requirement that any arbitrator prior to his appointment and afterwards inform the parties of any circumstances that might give rise to justifiable doubts as to his impartiality or independence. The Tribunal added that arbitrators must declare to the President any circumstance that might give rise to doubts in respect of any particular case before the Tribunal. The two governments may challenge a member of the Tribunal, pursuant to Article 10, due to

justifiable doubts as to the impartiality or independence of the person. However, challenges by the party who appointed the arbitrator can be made on those grounds only if they became known after the appointment was made. Articles 11 and 12 govern the procedure concerning challenges. Within six months of the appointment of the third State arbitrators, Iran challenged one of the neutral judges on the Tribunal. The reason given was that the judge had commented on summary executions in Iran. The judge refused to resign and the United States opposed the Iranian government. The Tribunal heard the challenge and issued a decision on 13 January 1982. It noted by a majority that as a general principle any right of a State party to remove an arbitrator from office by unilateral decision would seriously impair the integrity of the arbitration process.<sup>66</sup> The Tribunal insisted on application of the UNCITRAL Rules, over the dissent of two Iranian arbitrators who argued that the arbitrators were appointed by the consent of the two governments and that the withdrawal of that consent for political disqualification was not subject to judicial scrutiny.<sup>67</sup> The UNCITRAL procedure was then followed and an authority appointed to hear the matter rejected the Iranian challenge. Again in 1989 another challenge was lodged by Iran, this time in following the UNCITRAL procedure. The basis for the challenge was alleged to be an arbitrator's "totally improper course of conduct" in a prior case. The issue concerned memoranda used to calculate

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66 Re Judge Mangard, 1 Iran-U.S.C.T.R. 114 (198142).

67 Id. 116.

the amount of damages and the challenge amounted to an appeal from the earlier decision.

In addition to attempting to disqualify arbitrators, Iran forced the resignation of several of its nationals. In August 1983, the Iranian government notified the Tribunal that Judge Sani had resigned from the Tribunal effective 10 August. The US protested, stating that a resignation was not effective until accepted by the Tribunal. On 5 September, the Tribunal voted to accept the resignation, to be effective when his replacement was able to assume his duties. In the meantime, the chamber made several awards, explaining the absence of Judge Sani.<sup>68</sup> This procedure has encouraged the Iranians to continue participating rather than abandoning the procedure to Western arbitrators.

The Tribunal has decided that a member must address his resignation to the Tribunal and the Tribunal would decide whether to accept it and if so, its effective date. The Iranian member had boycotted the meeting before voting, but not before arguing that resignation was a unilateral act of the concerned member which was solely within the discretion of that member. There had been allegations that the resignation was imposed by the government, but the judge wrote to deny this. Parties

may not in fact withdraw an arbitrator with a view to frustrating arbitration. Although the tribunal owes its existence to the will of the parties, once this will is exercised, the tribunal gains an autonomous legal existence independent of the parties. Such independence is essential for the proper functioning of its judges. The independence and judicial character of the arbitrator will be adversely affected if his is subject to the will of the parties. The issues reflect the hostility and suspicion between the two governments.

*19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.*

The Statute of the ICJ provides for circumstances in which judges must disqualify themselves or be disqualified from hearing a case by the Court. Article 19(1) provides that judges may not take part in matters in which they or their families have a direct interest or where they have been agents, counsel or advocates in a particular case. Judges who have served as members of a national or international court or an investigatory committee or in any other manner in a case are also prohibited from deciding it at the Court.

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<sup>68</sup> The opinion of arbitrator R. Most in "Craig v. Ministry of Energy", 3 *Iran-US C.T.R.* 280, 294-6 (1983) discusses the international and municipal law authorities providing that arbitral tribunals may proceed with their work after the resignation or absence of an arbitrator.

*20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.*

At the Inter-American Court, the General Assembly has general disciplinary competence over the judges of the Court under Article 73 of the Convention. However, this provision allows the OAS General Assembly to exercise its disciplinary powers only at the request of the Court itself, which must give reasons for the request based on the Statute of the Court. Sanctions against judges must be approved by two thirds majority vote of the OAS General Assembly and by a two thirds majority vote of the States parties to the Convention.

## Conclusion

International tribunals, like national ones, benefit from provisions designed to ensure their independence. However, again like national tribunals, these guarantees provide only the foundation for an independent judiciary and depend on respect for the Rule of Law by the governments that create the tribunals and the judges and staff that serve them. Additional thought should be given to lengthening the tenure of judges, perhaps without possibility of reelection, and to strengthening the norms on incompatibility of functions. Overall, however, the independence of the international judiciary compares favorably with that of many national legal systems.



# Book Reviews

## *Volunteers Against Conflict*

Adama Dieng\*

The book *Volunteers Against Conflict* provides a brilliant insight into the type of work that UN Volunteers can and have achieved in the field under particularly difficult circumstances. The UN Volunteers who have contributed to the making of this book are exceptional individuals who show exceptional dedication. Despite the tremendous odds they face during their respective missions, the UN Volunteers display a high degree of professionalism characterized by their outstanding degree of competence and commitment. Their spirit of initiative constantly displayed in the book is positive demonstration of the achievements of UN workers. The personal narratives by UN Volunteers who worked in UN operations in the former Yugoslavia, Mozambique, Somalia, Cambodia and Rwanda enable the reader to gain a unique perception of one significant aspect of UNV's work.

After reading the book two important features emerge. First, the personalisation of different articles enables the reader to live the experience with the UN Volunteer as he relates it. This represents the unique quality of the book; their personal accounts bring home the work of the UN Volunteer,

the UN operation in general and the reaction of the local population to such endeavours. Second, of primary significance also, are the recommendations and suggestions offered by the UN Volunteers at the end of each testimony. These suggestions and recommendations provide an exceptionally useful source of information on the operation of UN field missions and their potential improvement.

As mentioned above, the book gives the reader a unique firsthand depiction of UN field operations. Arguably, the most interesting aspect of such a depiction is its description of how the local population perceive these operations. Ms. Nandini Srinivasan describes the thirst for knowledge about democracy and the democratic experiences in other countries displayed by Cambodians during civic education sessions. According to Ms. Diane Cocklin, her behaviour as an election observer in South Africa, both in formal and informal circumstances, was monitored by the South Africans. Ms. Cocklin felt that the observers were being watched by the entire cross-section of the population. This scrutiny was to decide whether they could be trusted, and

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\* Secretary-General, International Commission of Jurists.

ultimately if confidence could be placed in the UN, the election process and the ongoing change.<sup>1</sup>

The experiences described in the book also illustrate the manner in which UN work at the grassroots levels is accomplished, its impact on the population and the participation of the latter. The UN Volunteers' duties included involving the local population in the tasks to be achieved, counting votes or humanitarian work - thus increasing the visibility of the work done by the UN. Moreover, such local involvement often had the effect of boosting the confidence of the population in the changes being brought about. Mr. Glauca Vaz Yoshiura recounts his observation of the harsh working conditions of Mozambicans who registered voters and the overwhelming support they received from fellow Mozambicans. Mr. Yoshiura who was an election observer was keenly aware that: 'Mozambicans were engaged together in a giant effort to make the elections possible. They were working hard for what democracy might bring them continued peace.'<sup>2</sup>

The UN Volunteers were sometimes deployed in remote areas where other UN staff did not go. This increased visibility of the UN had positive effects on the UN mission. Ms. Nandini

Srinivasan [p.19] explains this clearly when she describes her work in preparing the elections in Cambodia. She says that: "The first and most effective message conveyed to the local people was that we UN Volunteers, as part of the United Nations Transnational Authority in Cambodia (UNTAC) staff, were going to live with them in their villages for the ensuing months and work towards holding free and fair elections. Communicating such a plan alone made for the beginnings of a healthy, warm, personal relationship with the people." She concludes that such a method of work complemented the work of UNTAC, built local support and established a rapport at the grassroots.<sup>3</sup>

Mr. Ben Otim who worked as a UN Volunteer for the UNHCR in the former Yugoslavia reinforced the above by stressing the importance of understanding people and their culture. Furthermore, during his mission, he found that developing working relationships with the community leaders proved to be an asset in trying to protect vulnerable minorities. Mr. Otim illustrates this by an account of his successful appeal to a Serb mayor. M. Otim managed to obtain permission to evacuate Muslims who were in imminent danger of death. A drink with the mayor coupled with some diplomacy on his part achieved what senior UNHCR

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1 Diane Conklin, *The Politics of Reassurance: International Presence at the Local Level in South Africa*, p. 53.

2 Glauca Vaz Yoshiura, *Voting for Peace: Preparing for Post-War Democracy in Mozambique*, p. 27.

3 Nandini Srinivasan, *Organizing Elections in a Mine Field: The Cambodian Challenge*, p. 19.

and senior officers from Zagreb had tried to do in vain.<sup>4</sup>

As mentioned earlier, the second most important aspect of the book is the recommendations and the suggestions made by the UN Volunteers. One can learn valuable lessons from the articles in this book because they provide first-hand descriptions of difficulties encountered during the various field missions. Perhaps each UN staff assigned to a similar mission could be strongly recommended to read the recommendations; they could prove to be very useful guidelines.

The experiences of each UN Volunteer vary completely. Nevertheless, some similarities are to be found. The first such similarity resides in the desire expressed by most of the volunteers to have stayed after the completion of the mission to be involved in some follow-up work. Mr. Stephen P. Kinloch expressed his shock at the fact that in Rwanda there pervaded a 'lack of links between the emergency operation and mid- or long-term development and reconstruction.' He points out that 'UN Volunteers can be natural bridges between crisis and development' because of their close contact with the local populations and their experience in development projects.<sup>5</sup>

The other volunteers who worked in South Africa, Cambodia and Mozambique echoed Mr. Kinloch's feelings; they conveyed their sense of frustration at not having done the work to its full extent. Perhaps in future missions, the UN could avoid imparting the impression that it lacks consistency by the scarcity or inadequacy of its follow-up programmes to crisis response operations.

Some UN Volunteers expressed the wish that the UN itself articulate a clear distinction between its human rights and humanitarian role on the one hand, and its role in finding political solutions to conflicts on the other hand. Mr. Otim opined that if this is not achieved the UN will receive more criticism. He regretted that "in the former Yugoslavia, humanitarian assistance has taken place in the absence of any political and military solution, thereby fuelling the conflict."<sup>6</sup> According to Mr. Antony C. Nweke, the UN's inability to set priorities between humanitarian, peacekeeping and reconciliation was what lead to the ultimate failure of its mission in Somalia.<sup>7</sup> On the other hand, Mr. Kinloch felt that humanitarian relief cannot be provided without the assistance or protection of the military.<sup>8</sup> These three opinions highlight significant issues that need to be addressed.

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4 Benny Ben Otim, *Caught in the Crossfire: Dilemmas of Human Rights Protection in Former Yugoslavia*, p. 127.

5 Stephen P. Kinloch, *Back from Rwanda: Confronting the Aftermath of Genocide*, p. 151.

6 See note 4 *supra*, p. 129.

7 Anthony C. Nweke, *Behind the Compound Wall: Volunteerism under Challenge in Somalia*, p. 173.

8 See note 5 *supra*, p. 148.

The implementation of the respect for international human rights norms is a primary concern for the types of missions in countries such as Somalia, Cambodia and the former Yugoslavia. Mr. Otim felt that the mission in Yugoslavia "highlighted the need for strong and clear policies encompassing ground rules for dealing with parties that flagrantly abuse international norms."<sup>9</sup>

Mr. Nweke expressed his sense of disappointment because he spent most of his time in Somalia doing work that he did not expect to do as a UN Volunteer. The volunteers were mostly assigned to administrative and technical support work. Mr. Nweke felt that the UN Volunteers could have been assigned, for example, outside the UN compound; but that this possibility was never examined.<sup>10</sup> Although the peculiarity of the UN operation in Somalia should be examined when taking into account these criticisms, UN Volunteers should not be made to feel useless during an assignment because it could potentially jeopardize the programme of the UN Volunteer.

The fact that the UN Volunteers had some difficult interactions with the regular staff is a very common complaint. All the UN Volunteers felt that there was a lack of understanding and

appreciation of their role and achievements by other UN staff members. Mr. Glaucia Vaz Yoshiura's suggestion that "an awareness campaign about the UN Volunteers and their important contributions [be] developed and directed especially to career staff"<sup>11</sup> should be carefully considered. Moreover, they also advocated a more careful selection of peacekeepers. Some were not sufficiently motivated or were the root causes of social problems such as prostitution. Ms. Srinivasan's proposed that stricter guidelines governing the recruitment, briefing and training of peace-keeping personnel be used.<sup>12</sup>

In conclusion, the book "Volunteers Against Conflict" is excellent. UN bodies, non-governmental, inter-governmental organizations, academics and individuals interested in all facets of UN field missions will benefit from reading it. The final article entitled "The Art of Building Peace: Artisan Skills for Development and Peace for South Asia" is a fitting conclusion. Mr. Shantam Seth explains that through development programmes, potentially explosive racial, religious and caste divisions can be avoided.<sup>13</sup> His message, which is also the book's central idea, that prevention of conflicts must and can lessen social inequities and improving respect for all human rights should be heeded by all those concerned about human rights.

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9 See note 4 *supra*, p. 128.

10 See note 7 *supra*, p. 172.

11 See note 2 *supra*, p. 84.

12 See note 3 *supra*, p. 33

13 Shantam Seth, *The Art of Building Peace: Artisan Skills for Development and Peace in South Asia*, p. 198.

## *Human Rights Education: New University Coursebook*

After a half century of the international human rights movement, it is no longer open to question whether universities around the world should offer courses in that field. A newly published coursebook intended for use by students – Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals* – adds importantly to the books that can serve this growing number of courses.

In many States, particularly in Europe and North America, human rights education has become customary in faculties as diverse as law, government, international relations, public health, economic development, religion and education. This is not surprising. The ideals animating human rights have become a part of modern consciousness, a universal discourse, a subject in their own right as well as a vital component of many others.

University courses in human rights must serve a number of purposes: spreading understanding of the field, making present students who will be in the future leaders of the human rights movement aware of its possibilities and competent to assist in the field's development, encouraging scholarship and criticizing the human rights movement itself with a view to improving it.

The new coursebook, published in 1996, by Oxford University Press,

meets these purposes. It can be used in courses in several of the academic fields listed above. The authors and editors are two well-known scholars – Henry Steiner, Professor at Harvard Law School and Director of its Human Rights Program, and Philip Alston, Professor at the European University Institute in Florence and at the Australian National University.

The book of 1,250 pages (including documents) consists of extensive author's texts and questions, sharply edited primary materials ranging from inter-governmental or NGO reports to treaties, resolutions and decisions and excerpts from secondary readings in law and legal theory as well as other relevant fields like international relations, political theory and anthropology. Its topics include civil and political rights, economic and social rights, inter-governmental and non-governmental institutions, universal and regional human rights regimes, foreign policy and human rights, democratization, women's rights, self-determination, individual criminal responsibility for war crimes and human rights and economic development. The book's themes include cultural relativism, the reach of the human rights movement both to State and non-State (private) activity and concepts of sovereignty and statehood that are now being transformed.

The Harvard Law School Human Rights Program has bought 300 of these coursebooks from OUP, which has sent them at the Program's request without charge to a number of leaders

of NGOs and teachers of human rights in developing countries. Anyone interested in the book (paperback UK£30/US\$45) should reach OUP in the UK.

# *Basic Text*

## *The Arab Charter on Human Rights*

On 15 September 1994, the League of Arab States approved the Arab Charter on Human Rights. The Charter was adopted through a procedural manoeuvre.

The process of drafting this Charter started in 1970 when the Arab League's Commission on Human Rights was requested to draft an Arab human rights charter. A text was presented in 1985, but the matter was systematically postponed. During the Ordinary Session no. 102, which took place in September 1994, Resolution 5437 was adopted approving the Charter. When this agenda-item was opened for discussion, the Chairman of the meeting, the then Jordanian Minister of Education, asked if there was any objection to approving the instrument. Kuwait asked to adjourn the discussion until the Council of Arab Ministers of Justice would finalise the Arab Declaration on Human Rights. The Chairman put the Kuwaiti motion to vote. Seven Arab States (out of 22) voted for the motion. They were: Bahrain, Kuwait, Oman, Saudi Arabia, Sudan, the United Arab Emirates and Yemen. The defeat of the motion was interpreted as an endorsement of the Charter.

The Charter was opened for signature by the 22 States which form the

Arab League. The Charter specifies that it will only enter into force two months after seven Arab States become party to its provisions. The only State that has signed the Charter to date, however, is Iraq - and it has not yet ratified it.

The Charter generally embraces many components of the individual rights affirmed by the Universal Declaration of Human Rights (UDHR), including the right of non-discrimination between men and women. The Charter also endorses the collective right of self-determination and affirms some fundamental principles, particularly in the area of criminal law, which are necessary for the protection of the rights of the accused.

Nevertheless, the Charter has many weaknesses. It affirms some, but not all, of the internationally recognised human rights. The most glaring omissions are those related to the freedom from slavery and the right to change one's religion. The omissions are perhaps based on the common assumption that these rights are not acknowledged in Islam.

The Charter, moreover, minimises the scope of many of the rights it recognises and does not provide adequate

remedies for their realisation. The introduction in the text of a distinction between citizens and others, is a cause for concern.

The Charter also allows for rights to be further restricted and permits their derogation in times of public emergen-

cy. It establishes a monitoring mechanism that is inadequate to oversee the effective implementation of its provisions.

The official text of the Charter exists only in Arabic. Below is an unofficial translation.

*[Unofficial Translation from the Arabic]*

General Secretariat  
General Department of Legal Affairs

## **The Arab Charter on Human Rights**

The Governments of:

The Hashemite Kingdom of Jordan  
The United Arab Emirates  
The State of Bahrain  
The Tunisian Republic  
The Algerian Democratic People's Republic  
The Republic of Djibouti  
The Kingdom of Saudi Arabia  
The Republic of Sudan  
The Syrian Arab Republic  
The Democratic Republic of Somalia  
The Republic of Iraq  
The Sultanate of Oman  
The State of Palestine  
The State of Qatar  
The Republic of the Comoros Islamic Union  
The State of Kuwait  
The Lebanese Republic  
The Socialist Libyan People's Arab Jamahiriyya  
The Arab Republic of Egypt  
The Kingdom of Morocco  
The Islamic Republic of Mauritania  
The Republic of Yemen

## Preamble

Stemming from the Arab Nation's faith in the dignity of man; from when God favoured it by making the Arab nation the cradle of monotheistic religions and the birthplace of civilisation; which has reaffirmed [man's] right to a life of dignity based on freedom, justice and peace.

Having achieved the everlasting principles established by the Islamic Shari'a and the other divine religions enshrined in brotherhood and equality amongst human beings.

Cherishing the humanitarian values and principles which [the Arab Nation] has established throughout its long history, having had a major role in spreading centres of knowledge between East and West, and made it the destination of people from all over the world and of those seeking knowledge, culture and wisdom.

For the Arab World, from one end to the other, has continued to call for preserving its belief, having faith in its unity, struggling for its freedom, defending the right of nations to self determination and to preserve their wealth, and believing in the Rule of Law, and that mankind's enjoyment of freedom, justice and equal opportunity is the hallmark of the profound essence of any society.

Rejecting racism and Zionism, both of which constitute a violation of human rights and a threat to world peace.

Recognising the close link between human rights and world peace.

Reaffirming the principles of the United Nations Charter, the Universal Declaration of Human Rights, the provisions of the two United Nations International Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Cairo Declaration on Human Rights in Islam.

Affirming all the above, [these governments] agree to the following:

## Part One

### *Article 1*

- A. All peoples have the right to self determination and to have control over their wealth and natural resources. By virtue of that right, they have the right to freely determine their political status and to freely pursue their economic, social and cultural development.
- B. Racism, Zionism, occupation and foreign control constitute a challenge to human dignity and are a fundamental obstacle to the human rights of peoples. It is a duty to condemn all such practices and to work towards their abolishment.

## Part Two

### *Article 2*

Each State party to the present Charter undertakes to ensure that every individual located within its territory and subject to its jurisdiction, shall have the right to enjoy all the rights and

freedoms recognised in this [Charter], without distinction on the basis of race, colour, sex, language, religion, political opinion, national or social origin, wealth, birth or other status, and without any discrimination between men and women.

#### *Article 3*

- A. There will be no restriction of any basic human right which is recognised or existent in any State party to this Charter, by virtue of law, treaties or custom. Nor may [these rights] be derogated from under the pretext that they have not been recognised in this Charter, or recognised to a lesser degree.
- B. No State party to this Charter shall derogate from the basic freedoms contained in [this Charter] and from which the citizens of another State benefit, which affords those freedoms to a lesser degree.

#### *Article 4*

- A. It is prohibited to impose limitations on the rights and freedoms guaranteed by virtue of this Charter unless where prescribed by law and considered necessary to protect national and economic security, or public order, or public health, or morals, or the rights and freedoms of others.
- B. State Parties may, in times of public emergencies which threaten the life of the nation, take measures that exonerate them from their obligations in accordance with this Charter to the extent strictly required by the circumstances.

- C. The limitations or derogations shall not affect the prohibition from torture and degrading [treatment], the return to [one's] country, political asylum, trial, the prohibition against retrial of the same act, and the principle of the legality of the crime and punishment.

#### *Article 5*

Everyone has the right to life, liberty, and security of person; these rights are protected by law.

#### *Article 6*

There can be no crime, or punishment, except for what is stipulated in law. Nor can there be any punishment for any acts committed previous to the enactment of that law. The accused benefits from a subsequent law, if it is in his interest.

#### *Article 7*

The accused is presumed innocent until proven guilty in a lawful trial where defence rights are guaranteed.

#### *Article 8*

Every person has the right to liberty and security of person. No one shall be subjected to arrest or detention or stopped without legal basis and must be brought before the judiciary without delay.

#### *Article 9*

Everyone is equal before the judiciary, and the right to judicial recourse is guaranteed for every person, on the territory of a State.

#### *Article 10*

Sentence of death will be imposed only for the most serious crimes; every individual sentenced to death has the right to seek pardon or commutation of the sentence.

#### *Article 11*

Under no circumstances may the death sentence be imposed for a political offence.

#### *Article 12*

Sentences of death shall not be carried-out on persons below eighteen years of age, or a pregnant woman, until she gives birth, or a nursing mother, until two years have passed from the date of [her child's] birth.

#### *Article 13*

- A. The State parties shall protect every person in their territory from physical or psychological torture, or from cruel, inhuman, degrading treatment. [The State parties] shall take effective measures to prevent such acts; performing or participating in them shall be considered a crime punished by law.
- B. No medical or scientific experimentation shall be carried-out on any person without his free consent.

#### *Article 14*

No one shall be imprisoned for proven inability to repay a debt or another civil obligation.

#### *Article 15*

Those punished with deprivation of liberty must be treated humanely.

#### *Article 16*

No person can be tried twice for the same crime. Anyone against whom such a measure is taken has the right to challenge its legality and request his release. Anyone who is the victim of an illegal arrest or detention has the right to compensation.

#### *Article 17*

Private life is sacred, and violation of that sanctity is a crime. Private life includes family privacy, the sanctity of the home, and the secrecy of correspondence and other forms of private communication.

#### *Article 18*

The recognition of a person before the law is a character attached to every person.

#### *Article 19*

The people are the source of authority. Political capacity is a right for every citizen of a legal age to be exercised in accordance with the law.

#### *Article 20*

Everyone residing on the territory of a State shall have freedom of movement and freedom to choose the place of residence in any part of the territory, within the limits of the law.

#### *Article 21*

Citizens shall not be arbitrarily or illegally deprived from leaving any Arab country, including their own, or their residency restricted to a particular place, or forced to live in any area of their country.

#### *Article 22*

No citizen can be expelled from his own country, or deprived of the right to return to it.

#### *Article 23*

Every citizen has the right to seek political asylum in other countries, fleeing persecution. A person who was pursued for a common crime does not benefit from this right. Political refugees shall not be extradited.

#### *Article 24*

No citizen shall be arbitrarily denied of his original nationality, nor denied his right to acquire another nationality without legal basis.

#### *Article 25*

The right to private ownership is guaranteed to every citizen. Under no circumstances shall a citizen be arbitrarily or illegally deprived of all or part of his property.

#### *Article 26*

The freedom of thought, conscience and opinion is guaranteed to everyone.

#### *Article 27*

Persons from all religions have the

right to practice their faith. They also have the right to manifest their opinions through worship, practice or teaching without jeopardising the rights of others. No restrictions of the exercise of the freedom of thought, conscience and opinion can be imposed except through what is prescribed by law.

#### *Article 28*

Citizens have the freedom of assembly and association in peaceful manner. No restrictions shall be imposed on either of these two freedoms except when it is necessary for national security, or public safety, or the protection of the rights and freedoms of others.

#### *Article 29*

The State shall ensure the right to form trade unions and the right to strike within the limits prescribed by law.

#### *Article 30*

The State shall ensure every citizen the right to work which guarantees a standard of living that provides the basic life necessities and ensures the right to a comprehensive social security.

#### *Article 31*

The freedom to choose employment is guaranteed, and forced labour is prohibited. Forced labour does not include compelling a person to carry out work in execution of a judicial decision.

#### *Article 32*

The State shall ensure to citizens equal opportunity in employment, and equal pay for work of equal value.

#### *Article 33*

Every citizen has the right to occupy public office in his country.

#### *Article 34*

Eradicating illiteracy is a commitment and an obligation. Education is a right for every citizen. Elementary education is compulsory and free. Secondary and university education shall be accessible to all.

#### *Article 35*

Citizens have the right to live in an intellectual and cultural atmosphere that reveres Arab nationalism and cherishes human rights. Racial, religious and other forms of discrimination are rejected, while international cooperation and world peace are upheld.

#### *Article 36*

Everyone has the right to participate in the cultural life, enjoy literary and artistic production, and be given the chance to advance his artistic thought and creative talent.

#### *Article 37*

Minorities shall not be deprived of their right to enjoy their own culture or follow their own religious teachings.

#### *Article 38*

- A. The family is the fundamental unit of society, and enjoys its protection.
- B. The State shall ensure special care and protection for the family, mothers, children and the elderly.

#### *Article 39*

The youth has the right to have greater opportunity to develop physical and mental abilities.

### **Section Three**

#### *Article 40*

- A. The member States of the [Arab] League Council, which are parties to the Charter, shall elect a Committee of human rights experts by secret ballot.
- B. The Committee shall consist of seven members nominated by State parties to the Charter. The primary elections for the Committee shall take place six months after the Charter enters into force. The Committee shall not include more than one person from the same State.
- C. The Secretary-General shall request the State parties to present their nominees two months before the election date.
- D. The nominees must have a high level of expertise and financial capability in the area of Committee work. Experts shall work in their individual capacity, and with total impartiality and integrity.
- E. Members shall be elected for a period of three years, three of whose membership may be renewed one time only. The names of the latter shall be randomly drawn from the ballot box, and the principle of rotation will be followed whenever possible.

F. The Committee shall elect its Chairman and will draw up its own internal rules of procedure, outlining how it will function.

G. The Committee shall hold its meetings at the League's General Secretariat headquarters at the invitation of the Secretary-General. The Committee may, with his approval, hold its meetings in another Arab country if the work so requires.

#### *Article 41*

1. State parties [to the Charter] shall submit reports to the Expert Human Rights Committee as follows:

a. An initial report one year from the date the Charter enters into force;

b. Periodic reports every three years;

c. Reports that contain the States' responses to inquiries by the Committee.

2. The Committee shall study the reports submitted by the State parties to the Charter in accordance with paragraph I of this article.

3. The Committee will distribute a report accompanied by the opinions and comments of the States to the Human Rights Committee of the Arab League.

### **Section Four**

#### *Article 42*

A. The Secretary-General of the League of Arab States shall submit this Charter after the League Council approves it to the State parties for signature, ratification or adherence.

B. This Charter takes effect two months after the seventh instrument of ratification or adherence has been deposited at the General Secretariat of the Arab League.

#### *Article 43*

This Charter takes effect in each State, after its coming into force, two months from the date of the deposit by that State of its instrument of ratification or adherence to the General Secretariat. The Secretary-General shall notify State parties upon receiving the ratification or adherence instrument.

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## *Recent ICJ Publications*

### *Nigeria and the Rule of Law*

*Published by the ICJ in English, 239pp. Geneva 1996, 17 Swiss francs,  
plus postage.*

Released in August 1996, this study documents the effects of military hegemony over all aspects of life in Nigeria between 1985-1995. It highlights Executive interference in the national system of justice, thereby eroding the Rule of Law. It urges the military government to abrogate immediately all its Executive decrees (retroactive or not) which violate international human rights norms. It urges the abolition of all military tribunals which have usurped jurisdiction over all constitutional matters under the army's reign of terror. It states that the government should restore the legitimate jurisdiction of regular civilian courts throughout the country. It also calls on the international community to take appropriate action. The study has annexes which, *inter alia*, contain recent government decrees and UN and African Commission resolutions concerning Nigeria.

### *Administration of the Death Penalty in the United States*

*Published by the ICJ in English, 265pp. Geneva 1996, 25 Swiss francs,  
plus postage.*

This is the report of a mission conducted to the USA in January 1996 and released in July 1996. The report states that the administration of the death penalty in the USA is arbitrary and racially discriminatory and that prospects of a fair hearing for capital offenders cannot be assured. The report finds that mounting pressure from the general public concerning the imposition of the death penalty has accentuated the likelihood of miscarriages of justice. It, *inter alia*, demonstrates that there is an excessive number of offences punishable by death at State and Federal levels and that the circumstances in which the penalty can be imposed continue to widen. It shows that the vast majority of cases where the death penalty is being sought involves defendants who have no financial resources and are accused of murdering white persons. The report also shows how the USA contravenes international law in that area of administration of justice.

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