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International Legal Standards Concerning the Independence of Judges and Lawyers

Robert K. Goldman

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under study by the International Law Association—active and expert study. In the International Law Association we owe an immense debt to its American members, and to the American Society of International Law, currently to Cecil Olmstead and Monroe Leigh, and I could name a dozen more. I want to recognize this debt, and the contribution made in so many areas. I hope it is not impertinent to say that I believe that by extending your interests beyond your famous association into the international area you are serving your own interests as well as those of the international community.

INTERNATIONAL PROTECTION OF THE INDEPENDENCE OF THE JUDICIAL PROCESS

(Cosponsored by the International Human Rights Committee, Section of International Law; and the Human Rights Committee, Young Lawyers Division, both of the American Bar Association)

The workshop was convened at 8:00 a.m., April 24, 1982, by Stephen Klitzman, the Moderator.

The MODERATOR began the workshop which would focus on problems of lawyers and judges in dozens of countries throughout the world. Lawyers and judges were harassed in a variety of ways. They were arrested, detained without charges or trial, disbarred, forbidden to join professional associations, forced into exile, tortured and assassinated, simply for exercising their sworn professional responsibility in defense of the rule of law and on behalf of unpopular clients. This problem was so widespread that in many countries it was impossible for certain types of defendants to receive a fair trial or to secure the services of defense counsel.

These questions would form the basis of the workshop: What were the existing legal standards that could protect judicial and attorney independence? To what extent were those standards derogated? What was the pattern of violations of these standards? Did the standards themselves need to be strengthened or was it merely a matter of implementation? What were governments and nongovernmental organizations (NGOs) doing to implement these standards? What could individual lawyers do to implement them? Was there a need to educate defense lawyers and others about the remedies available on the international level and about international human rights law in general? How could governments, NGOs and individual practitioners help people whose human rights were being violated because the judicial process was not independent?

INTERNATIONAL LEGAL STANDARDS CONCERNING THE INDEPENDENCE OF JUDGES AND LAWYERS

*by Robert Kogod Goldman***

This paper identifies the principal international law standards governing the independence of judges and lawyers, some of the methods employed by states to

* Of the District of Columbia Bar; Chairman, Subcommittee on the Independence of Lawyers in Foreign Countries, American Bar Association.

**Professor of Law and Director of the Graduate International Studies Program, The Washington College of Law, The American University, Washington, D.C.

disregard, both lawfully and unlawfully, these standards, and then briefly discusses some of the efforts of international organizations and nongovernmental bodies to monitor state compliance with these standards and to elaborate new standards in the field.

Experience has shown that the independence of the judicial process in a society is indispensable to the existence of the rule of law and to the effective protection of internationally recognized human rights. The concept of the rule of law was addressed by Hans Thoolen, Executive Secretary of the International Commission of Jurists (ICJ), at a conference several years ago. Dr. Thoolen noted that:

. . . the rule of law is concerned with legality, but it implies far more than mere legality and far more than ensuring that what is done by those in authority is done in accordance with law. It implies the application of hallowed principles of justice both in the context of the law and in the procedures and institutions by which it is enforced. The law can and should be an instrument of justice, a protection of the freedom and dignity of the human person.¹

He also correctly observed that in order for basic human rights to be respected under the rule of law, it is not sufficient merely to proclaim or guarantee these rights by general statement in constitutions or municipal laws. Rather, they must be spelled out in detailed laws and procedures designed to make them operative standards with appropriate and effective remedies for their enforcement.

It is abundantly clear that in those countries where the judiciary is not formally and in fact independent from the other branches of government, or where its independence is not formally respected, or where lawyers are intimidated and persecuted for merely attempting to discharge their professional obligations on behalf of certain kinds of persons, there are no effective domestic defenses against or remedies for human rights violations. This relationship between the independence of judges and lawyers and the domestic protection of human rights is recognized either expressly and/or impliedly in key U.N.-sponsored and regional human rights instruments.

International Standards Prescribing Judicial Independence

The independence of the judiciary is expressly recognized in these instruments. For example, Article 10 of the Universal Declaration of Human Rights² proclaims: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal. . . ." Article 14(1) of the International Covenant on Civil and Political Rights³ specifically guarantees everyone's entitlement to "a fair and public hearing by a competent, independent, and impartial tribunal in the determination . . . of any charge against him." In addition, Article 8(1) of the American Convention on Human Rights⁴ states, *inter alia*, that in connection with a criminal proceeding "every person has the right to a hearing . . . by a competent, independent, and impartial tribunal, previously established

¹ Thoolen, *Individual Rights and the Rights of Defense*, in PROCEEDINGS OF SYMPOSIUM ON THE STATE OF EMERGENCY AND HUMAN RIGHTS IN URUGUAY 44 (1978).

² Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

³ International Covenant on Civil and Political Rights, Dec. 19, 1966, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), *reprinted in* 6 ILM 368 (1967).

⁴ American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OAS/Ser. L/V/VII. 23 Dec. 23 Rev. 6 (1979), *reprinted in* 9 ILM 99 (1970).

by law. . . .” And Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵ similarly guarantees that “[e]veryone is entitled to a fair and public hearing . . . by an independent and impartial tribunal by law.”

International Standards Relating to the Independence of Lawyers

In contrast to their express recognition of judicial independence, none of these instruments contains express provisions guaranteeing the independence of lawyers. However, such independence is recognized impliedly in the context of the fair trial guarantees set forth in these conventions.

Article 11 of the Universal Declaration proclaims that everyone charged with a penal offense is entitled to a public trial “at which he has had all the guarantees necessary for his defense.” Article 14(3) of the Covenant expressly defines these guarantees to include in the case of persons accused of a criminal offense the right, inter alia, “(b) to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing” and “. . . to defend himself in person through legal assistance of his own choosing” and “. . . to have legal assistance assigned to him” where justice so requires and gratis if he is unable to afford counsel.

Articles 8(2)(d) and (e) of the American Convention provide that a person accused of a criminal offense has the right “to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel” and “the inalienable right to be assisted by counsel provided by the state . . . if the accused does not defend himself personally or engage his own counsel within the time period established by law.” Further, Article 6(3)(c) of the European Convention similarly provides the accused the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

A State Party’s Obligation to Give Effect to These Fair Trial Guarantees Under Domestic Law

Many of these international and regional instruments that are elaborated in binding treaty form create obligations on state parties to give effect to these basic fair trial guarantees under their domestic laws. In this regard, Article 2(3) of the International Covenant requires state parties “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . .” and “to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities . . .” and “to develop the possibilities of judicial remedy.” This obligation to provide and to ensure judicial remedies to claimants is set forth in substantially identical language in Article 25 of the American Convention and in Article 13 of the European Convention. See also Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination.⁶

In this connection, Justice Frank Newman and other scholars have noted that the drafters and promulgators of these human rights instruments “had in mind

⁵ [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

constantly that 'justice,' 'judicial,' 'judge,' 'court,' 'tribunal,' 'trial,' and 'judgment' necessarily implied the Concept of Independence [of the judicial process]."⁷ Inclusion of "effective judicial remedies" clauses in these treaties underscores and supports the correctness of Justice Newman's contention.

*Suspension of the Right to a Fair Trial and
Consequent Diminished Freedom of the Judicial Process*

Despite the express prescription of fair trial guarantees and implicit recognition of an independent judicial process in these treaties, state parties have suspended or disregarded these fundamental guarantees in conformity with these treaties' provisions, but, most often, in violation thereof.

Derogation clauses in human rights conventions

The right to a fair trial is made derogable by state parties in these treaties under certain defined "public emergency" situations. For example, the International Covenant permits suspension of this basic right "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," but only "to the extent strictly required by the exigencies of the situation." Article 15 of the European Convention similarly authorizes derogation "in time of war or other public emergency threatening the life of the nation . . . to the extent strictly required by the exigencies of the situation." Article 27 of the American Convention contains the broadest grounds for derogation, "in time of war, public danger, or other emergency that threatens the independence or security of a State Party . . . to the extent and for that period of time strictly required by the exigencies of the situation." Importantly, all three conventions require that derogation measures not be "inconsistent" with the state party's "other obligations under international law." Article 27 of the American Convention interestingly prohibits the suspension of the "judicial guarantees essential" to the protection of specifically nonderogable rights. This article thus contemplates that, insofar as the rights to due process of law and to a fair trial are necessary for safeguarding the rights to life, to humane treatment, to freedom from ex post facto law, and other nonderogable rights, they come within "the essential judicial guarantees" clause of Article 27.

The permissible suspension of minimum due process guarantees is a glaring defect in and is inimical to the stated purpose of these human rights instruments. Accordingly, the derogation clauses in these treaties must necessarily be constructed narrowly in light of the subject matter and purpose of these instruments. None should be read to permit the continued suspension of fair trial guarantee once the objective situation that led to their suspension ceases to exist. Thus, a state of emergency which does not "threaten the life or independence" of the nation, or which, in fact, does not exist cannot be invoked to justify under these derogation clauses the suspension of basic rights. Further, a state party that derogates from the fair trial guarantee should have the burden of proving that its derogation measures are proportionate to the actual situation.

Illegal suspensions of the right to a fair trial

Despite the strict limitations on the scope and duration of derogation measures under these treaties, many state parties, either consistent with or in viola-

⁷ Newman, U.N. Law Concerning the Independence of Judges 2 (June 1981), presented to first meeting of the Committee of Experts on the Independence and Impartiality of the Judiciary.

tion of their own constitutions, have declared states of siege or of internal war, enacted national security laws, or imposed martial law in response to civil and political disturbances. Such measures typically have deprived the civilian judiciary of its constitutional powers: (1) to act on writs of amparo and habeas corpus when lodged to test the constitutionality of a given official action or law; (2) to enforce its decisions; (3) to hear certain categories of cases; (4) to try civilians by making military law applicable to common crimes or crimes of "lese majeste" which often are applied retroactively by military tribunals.

In addition, during such states of exception, the independence of the judiciary has been severely eroded by measures affecting tenure of judges, which may authorize their transfer, removal, or dismissal without cause or place them on "probation" at the executive power's discretion. Judges also have been forced to resign as a result of official threats and other forms of crude intimidation and, on occasion, have been murdered or simply have "disappeared."

Judges, however, are not the only ones to be so affected. Lawyers willing to defend certain types of persons, particularly political prisoners, increasingly have become in many countries the objects of officially directed or condoned acts of violence and intimidation. For example, in El Salvador, Argentina and Uruguay, defense of supposed "subversives" has effectively become a de facto criminal act on the ground that defense counsel is aiding and abetting subversion. Many defense lawyers in these and other countries have been murdered, tortured, jailed, disbarred or forced into exile for merely representing unpopular clients.

Such actions not only violate lawyers' basic human rights but also undermine the independence of the judicial process and violate the rights of the client to receive a fair trial and to secure the services of a defense lawyer, as guaranteed by these international human rights instruments.

Judicial Independence Guarantees under International Humanitarian Law

It is important to consider the increasing importance and relevance of contemporary international humanitarian law, *i.e.*, the law of armed conflict, in safeguarding fair trial guarantees and judicial independence.

Specifically, where a state party to one or more of these human rights conventions suspends basic fair trial guarantees under a public emergency situation resulting from an internal armed conflict and that state is one of the 153 contracting parties to the 1949 Geneva Conventions,⁸ the government of that state and other parties to the internal conflict are legally bound to apply, as a minimum, the provisions of Article 3 common to the four Geneva Conventions. This article, which is described frequently as "pure human rights law," prohibits, *inter alia*, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized peoples."

⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

Article 3 is not subject to derogation under any circumstance. Moreover, since this state is legally bound by human rights instrument(s) and the Geneva Conventions, and these human rights treaties specifically require that derogation measures be consistent with the state's "other obligations under international law," the fact that Article 3 is explicitly made nonderogable should preclude that state's suspension of fair trial guarantees under these human rights treaties.

If, in addition, this state has ratified Protocol II of 1977⁹ additional to the Geneva Conventions applicable to noninternational armed conflicts, its government and other parties to the conflict must apply the minimum individual guarantees set forth in Article 6. This article, which, properly viewed, should be regarded as the authoritative interpretation of common Article 3, requires, *inter alia*, that in the prosecution and punishment of criminal offenses related to the armed conflict:

No sentence shall be passed and no penalty shall be executed on a person found guilty of an offense except pursuant to conviction pronounced by a court offering the essential guarantees of independence and impartiality.

Further, Article 6(2)(a) guarantees to an accused person "all necessary rights and means of defense" before and during trial. Since Protocol II has only recently entered into force and has not yet been formally applied to a given situation, it is unclear whether the clause "all necessary rights and means of defense" impliedly guarantees an accused the right to legal counsel. However, it is certainly arguable that the clause's guarantees cannot be realized without some access to defense counsel. And, as Daniel O'Donnell has written regarding this right under human rights law: ". . . if this implies an obligation to make available legal assistance, it must perforce be independent legal assistance, for legal assistance which is not independent is not capable of fulfilling this function."¹⁰

Thus, based on relevant standards under human rights and humanitarian law, it is indeed arguable that the right to a fair trial by a regularly constituted, impartial tribunal observing minimum due process guarantees, whether in times of peace or armed conflict, should be regarded as a preemptory norm of international law.

Efforts of the United Nations and Regional Bodies to Implement Existing International Standards

A variety of U.N.-related and regional bodies have begun to interpret and implement legal standards governing the independence of judges and lawyers. Unfortunately, the United Nations' central policy organ in the human rights field, the Commission on Human Rights, has not played a very useful role in this regard. Although authorized to receive individual petitions, the Commission, following procedures detailed in ECOSOC Resolution 1503, considers these petitions only as sources of information concerning "particular situations revealing a consistent pattern of gross human rights violations," rather than as requests for individual relief. Moreover, individual complainants are precluded from par-

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 72 AJIL 502 (1978), 16 ILM 1442 (1977).

¹⁰ O'Donnell, *The Independence of Judges and Lawyers: U.N. Standard Setting and the Siracusa Draft Principles on the Independence of the Judiciary* (1982), appended to this workshop report *infra*, 326, at 328.

ticipating in the Commission's deliberations since they are secret under the "1503 procedure." However, in several exceptional cases involving truly shocking human rights situations, the Commission has sidestepped the 1503 procedure and gone public by creating ad hoc working groups to investigate and issue reports on these situations. For example, the reports issued by the Commission's Ad Hoc Working Group on Chile, established in February 1975, have examined the incompatibility of the suspension of fair trial guarantees and the civilian judiciary's loss of independence with Chile's international obligations under human rights instruments.

Unlike the Commission, the Human Rights Committee, operating under the Optional Protocol to the Covenant on Civil and Political Rights, is empowered to receive petitions from and provide redress to individuals, rather than just dealing with human rights situations in given countries.¹¹ The Committee's published decisions on particular cases reveal a developing jurisprudence on the permissible scope of a state party's derogation from basic fair trial guarantees under national security measures. Specifically, in a series of decisions finding that Uruguay had violated the Covenant, the Committee focused on Uruguay's failure to provide the victim access to independent legal assistance and a fair trial by impartial tribunals¹² in violation of Article 14 of the Covenant.

The European and Inter-American Commissions on Human Rights have been far more active and effective than have these U.N. bodies in monitoring state compliance with fair trial guarantees under the European and American Conventions. Whereas the European Commission and European Court of Human Rights have tended to develop a jurisprudence on the permissible suspension of fair trial guarantees under Article 15 of the European Convention on a case by case basis, the Inter-American Commission has tended to fashion a similar jurisprudence based on its study of general situations in OAS member states. As a result of its consideration of individual communications received under its petition procedures,¹³ the Inter-American Commission has conducted numerous on-site investigations in, and has issued public reports on, hemispheric countries where serious human rights situations have occurred. Its reports on situations in Chile, Argentina, Uruguay, Paraguay, El Salvador, and Nicaragua contain detailed information on violations of fair trial guarantees and, importantly, dicta on the diminished role of the civilian judiciary and the plight of defense lawyers during state of seige situations.

Efforts by Private Groups to Implement These Standards

The greatest impetus for implementing international legal standards has come from victims of human rights abuses, their representatives, and nongovernmental organizations that have filed complaints with the above-mentioned international and regional bodies. NGOs, such as the International Commission

¹¹ The victim of the alleged violation (but not his representative or a third party) must be subject to the jurisdiction of the state against which his complaint is directed, and that state must be a party to the Covenant and the Optional Protocol.

¹²See U.N. Press Releases HR/1854 (Aug. 31, 1979); HR/1941 (May 7, 1980); HR/982 (Dec. 3, 1980).

¹³ The Commission is empowered to receive complaints against states that are parties or nonparties to the American Convention. The victim or any person or group acting on his behalf may file a complaint with the Commission alleging a violation of the American Convention by a party thereto or of the American Declaration of Rights and Duties of Man if the violator is an O.A.S. member state, that is not a party to the Convention.

of Jurists, Amnesty International, the International League for Human Rights, the International Human Rights Law Group and the Lawyers' Committee for International Human Rights, have been particularly active and effective, since they routinely file petitions on behalf of individuals, such as the disappeared, who are unable to do so themselves. These groups, over the years, have prepared authoritative reports on the administration of justice in numerous countries, have sent missions to observe trials of political prisoners throughout the world, have sponsored initiatives in the United Nations and regional bodies, and have held press conferences and seminars on issues concerning the need for an independent judicial process. Through such activities these and other NGOs have helped to focus worldwide attention on serious human rights violators and to mobilize international pressure upon the authorities of those countries responsible for these violations.

The ICJ has been particularly helpful in promoting respect for the rule of law and monitoring states' compliance with existing international standards governing the independence of the judicial process. In 1978 it created the Centre for the Independence of Judges and Lawyers (CIJL). The Centre's objectives are: (1) to inform judges and lawyers and their organizations throughout the world of the plight of their colleagues in many countries who are being harassed or persecuted for their professional work in upholding the principles of the rule of law; and (2) to mobilize these professionals and their organizations and to encourage them to take action in various ways in support of these colleagues. The Centre has examined the situation of the legal profession in over 30 countries and has publicized its findings in its semiannual publication, the *CIJL Bulletin*.

Certain local and national lawyers' associations have become active in this field. The Association of the Bar of the City of New York sent five distinguished members to Argentina in April 1979 to inquire into the independence of lawyers and the administration of justice in that country. Their *Report*¹⁴ has been widely disseminated and cited with approval by international and regional bodies concerned with the human rights situation in Argentina. The American Bar Association's House of Delegates in 1975 adopted the *Rule of Law Resolution* affirming the ABA's "support for the rule of law in the international community and its recognition of the need for an independent judiciary and for the independence of lawyers." The ABA subsequently established a Subcommittee on the Independence of Lawyers in Foreign Countries and in 1980 created a Network of Concerned Correspondents composed of U.S. lawyers who write letters and file petitions on behalf of foreign lawyers and judges subjected to governmental intimidation.

*Efforts to Elaborate New Standards
Concerning the Independence of Judges and Lawyers*

Although the principles of an independent judiciary and legal profession are recognized in international law, "[a]greement on the general principles," observes Daniel O'Donnell, "and disagreement or uncertainty about their meaning, coupled with growing concern about apparent violations of the principles, led to proposals to further define the rights and their meaning."¹⁵ These new standard-setting proposals have originated within the United Nations and NGOs.

¹⁴ *Report of the Mission of Lawyers to Argentina, April 1-7, 1979*, 34 REC. A.B. CITY N.Y. 473 (1979).

¹⁵O'Donnell, *supra* note 10, at 328.

U.N.-sponsored activity

In May 1980, the Economic and Social Council, through its decision 1980/24, authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to entrust Dr. L. M. Singhvi with preparation of a report on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers to the end that there should be no discrimination in the administration of justice and that human rights and fundamental freedoms may be maintained and safeguarded.

Dr. Singhvi has submitted a preliminary and an interim report, in 1980 and 1981 respectively,¹⁶ to the Sub-Commission. In his preliminary report he indicated his intention "to propose Draft Principles and submit the draft of an international declaration or covenant to effectuate the concept of independence."¹⁷ Although his report will not be submitted to the Sub-Commission until mid-1983, it is generally expected that it will contain draft principles comparable to those concerning the rights of the detained or imprisoned adopted by ECOSOC in 1979.

NGO-sponsored activity

NGOs concerned with the rule of law also have begun to formulate new standards in the field and have worked closely with Dr. Singhvi in this regard. The International Bar Association authorized its Committee on the Administration of Justice to undertake a "Project on Minimum Standards of Judicial Independence." The Committee has gathered detailed information on laws and practices regarding the independence of the judiciary in over thirty countries. In addition, it has elaborated 47 principles, mandatory in nature, concerning judicial independence which have been submitted for adoption by the IBA's General Assembly later this year.

Another important initiative was the designation of a Committee of Experts on the Independence of the Judiciary in 1981 by the International Association of Penal Law, the ICJ and its Centre for the Independence of Judges and Lawyers. The Committee, judges and lawyers from different geographical areas and legal systems, first met in Siracusa, Sicily in May 1981 to exchange information and to formulate principles that might assist Dr. Singhvi. The Committee approved a draft of 32 principles guaranteeing the existence and proper functioning of an independent judiciary as an essential condition for the respect and protection of human rights under the rule of law. These principles, designed to apply to all legal systems, cover these subjects: (1) definition of the independence of the judiciary; (2) qualifications, selection and training of judges; (3) posting, transfer and promotion of judges; (4) retirement, discipline, removal and immunity of judges; (5) organization of the judiciary, including working conditions, administrative and financial arrangements.

While it is not possible to cover the content of these draft principles in this paper, the following definition of judicial independence approved by these experts is worth noting:

Art. 2. Independence of the judiciary means

- (1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law

¹⁶ U.N. Doc. E/CN.4/Sub.2/L.731 (Aug. 14, 1980); U.N. Doc. E/CN.4/Sub.2/481, September 3, 1981.

¹⁷ U.N. Doc. E/CN.4/Sub.2/L.731, *supra* note 16, at 11.