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THE HUMAN RIGHT TO AN INDEPENDENT JUDICIARY: INTERNATIONAL NORMS AND DENIED APPLICATION BEFORE A DOMESTIC JURISDICTION

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INTRODUCTION

On August 17, 1949, on the occasion of the first session of the Consultative Assembly of the Council of Europe, Sir Winston Churchill expressed the wish that once an agreement on Fundamental Human Rights was achieved on a European level, it would be possible to create an International (European) Court before which any violation of such rights might be submitted for judgment by the civilized world.¹

Churchill's wish reflected the concern that, absent the creation of an international judicial organ empowered to enforce human rights, internationally established rules for safeguarding those rights might remain a mere proclamation of principles.

Recently, Rolv Ryssdal, the present Chief Justice of the European Court of Human Rights, acknowledged the creation of such an international judicial organ. He expressed his conviction, however, that it would be impossible for such an international court to cope with its tasks without support from national courts.² These national courts would ensure that, within the boundaries of their domestic system, individual victims of human rights violations were granted the remedies unavailable to an international court.

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¹ Winston S. Churchill, Address Before The Council of Europe (Aug. 17, 1949), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897-1963, 7842 (Robert Rhodes James ed., 1974).

² Rolv Ryssdal, *Vers une Cour Constitutionnelle Europeenne* [On the Road to a European Constitutional Court], Winston Churchill Lecture given in Florence, Italy, before the Academy of European Law (June 21, 1991), in *Cour* (91) 181, 4 *passim*.

Undoubtedly, these same considerations inhered in the remarks of Judge Edward Re in a paper presented this year at the University of Akron School of Law.³ Choosing from among the several ways in which "internationally accepted moral norms may become legal norms enforceable by the various organs of government," he elected to discuss the role of courts, entitling his remarks "Judicial Enforcement of International Human Rights."⁴

In discussing the role of courts in the implementation of human rights protected by internationally accepted legal norms, it is customary to refer to the most well-known of those rights: the right to life; the right to liberty and security of the person; the right to a fair trial; and the rights of those arrested not to be subjected to cruel, inhuman, or degrading treatment.

Taking into account the vital role of the judge in the human rights system,⁵ I propose to concentrate on that human right which may be considered the logical premise of all the others—the right to an independent and impartial judge.⁶ Without this right, the safeguarding of such other rights could not be guaranteed.

On the one hand, this choice affords me the opportunity to dwell briefly on a part of little-known history which concerns the process of developing international judicial independence standards. On the other hand, it allows me to speak of a case where an internationally recognized rule regarding the fundamental right to be judged by an independent tribunal was denied application by a domestic jurisdiction. This case was the subject of a lively debate in Italy.

³ Edward D. Re, *Judicial Enforcement of International Human Rights*, 27 AKRON L. REV. 281 (1994).

⁴ *Id.* at 286.

⁵ Sargos, "Les principaux domaines d'application de la Convention en droit pénal et un droit civil" in "Convention Europeene des droits de l'homme et droit communautaire," Paris, 1988, at 41.

⁶ The right to an impartial and independent tribunal is embodied in Article 10 of the Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/811 (1948). This right is also incorporated in Article 14 of the *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). European countries included this right in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted Nov. 4, 1950, art. 27, 213 U.N.T.S. 222, 228.

I. THE PROCESS OF THE DEVELOPMENT OF INTERNATIONAL PRINCIPLES ON JUDICIAL INDEPENDENCE

It is obvious that the existence in a given country of an independent judiciary is necessary to implement the internationally recognized human right to have an independent and impartial tribunal adjudicate an individual's case. Following the enshrinement of the right to an independent judge in the Universal Declaration of Human Rights and in a variety of general international instruments, most states which formerly did not embody in their basic laws a similar rule found no difficulty embodying in such laws solemn proclamations regarding judicial independence.⁷

On the other hand, problems could, and in fact did, arise when it became necessary to state, by means of specific, internationally recognized provisions, the standards needed to ascertain whether judicial independence existed. This, for instance, involved ascertaining whether, within each legal system, there were the following appropriate provisions: to prevent the other state powers from dismissing a judge from his post;⁸ to assure

⁷ See, e.g., Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INT'L L. 139, 150 (1992) (discussing incorporation of judicial independence in Colombian Constitution and creation of new independent Colombian judicial institutions); Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Development*, 23 GA. J. INT'L & COMP. L. 155, 175 (1993) (discussing intention of drafters of new Lithuanian Constitution to incorporate judicial independence); Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475, 503-04 (1991) (discussing German Democratic Republic's constitutional amendments to strengthen independence of judiciary); Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 182-90 (1994) (listing multiple factors that affect independence of judiciary in Japan); Robert G. Vaughn, *Proposals for Judicial Reform in Chile*, 16 FORDHAM INT'L L.J. 577, 583-601 (1992-93) (tracing history of judicial independence from Chile's military government to Chile's present transition government). *But see*, e.g., Jack B. Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 2-4 (1994) (addressing problems with judicial independence in Peru). See generally PETER MEYER, HISTORICAL INTRODUCTION TO THE INTERNATIONAL BILL OF HUMAN RIGHTS xxiii, xxxviii-xxxix (Paul Williams ed., 1981) (discussing how principles embodied in Universal Declaration of Human Rights took on "life of their own").

⁸ This provision was embodied in Articles 11, 12, 17, 18, 19, and 20 of *Basic Principles on the Independence of the Judiciary*, SECRETARIAT, SEVENTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, REPORT PREPARED BY THE SECRETARIAT, at 58, U.N. Doc. A/CONF.121/22/Rev.1, U.N. Sales No. E.6.IV.1 (1985) [hereinafter *Basic Principles*]. The *Basic Principles* consist of twenty principles that serve to assist States in secur-

judges the freedom from fear of being pursued or sued in court simply for having disposed of a case in favor of one of the parties;⁹ to provide for the general security of judges;¹⁰ to assure them an adequate remuneration, status and dignity of office;¹¹ and to avoid issues of a judicial character being placed under the adjudicative authority of organs not enjoying the same guarantees of independence.¹²

Just a few years after the Universal Declaration of Human Rights,¹³ the International Association of Judges¹⁴ deployed intense international preparatory efforts to achieve recognition by the international community of a nucleus of such standards. These efforts were, however, dramatically intensified in the wake of two major international events. First, the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Caracas in 1980, entrusted to the U.N. Committee on Crime Prevention and Control in Vienna the task of drafting guidelines relating to the judiciary's independence.¹⁵

ing and promoting the independence and impartiality of judges as well as freeing them from undue influence. *Id.* The United Nations formally endorsed the *Basic Principles* at the General Assembly's 40th session on November 29, 1985, and December 13, 1985. See G.A. Res. 32, U.N. GAOR, 40th Sess., Supp. No. 53, at 205, U.N. Doc. A/40/53 (1985); G.A. Res. 146, U.N. GAOR, 40th Sess., Supp. No. 53, at 255, U.N. Doc. A/40/53 (1985); see also William M. Cohen, *Principles for the Establishment of a Rule of Law Criminal Justice System*, 23 GA. J. INT'L & COMP. L. 269, 274-75 (1993) (incorporating *Basic Principles* in new "Rule of Law" criminal justice system); *Seventh Crime Congress Tackles Problems of World-Wide Crime, Adopts Milan Plan of Action*, UN MONTHLY CHRON., Sept. 1985, at 38 (reporting on U.N. conference in Milan).

⁹ This provision is embodied in Article 16 of the *Basic Principles*. *Basic Principles*, *supra* note 8.

¹⁰ This provision is embodied in Article 2 of the *Basic Principles*. *Basic Principles*, *supra* note 8. See generally LAWYERS COMMITTEE FOR HUMAN RIGHTS, IN DEFENSE OF RIGHTS: ATTACKS ON LAWYERS AND JUDGES IN 1989 (1990) (providing approximately 280 detailed accounts of violence or threats against lawyers, judges, law professors, and law students around the world).

¹¹ This provision is embodied in Article 11 of the *Basic Principles*. *Basic Principles*, *supra* note 8.

¹² This provision is embodied in Article 5 of the *Basic Principles*. *Basic Principles*, *supra* note 8; see also *supra* note 8 and accompanying text.

¹³ See generally Universal Declaration of Human Rights, *supra* note 6. See also *supra* note 5 and accompanying text.

¹⁴ The creation of the International Association of Juvenile Court Judges was endorsed by the United Nations Economic and Social Council on June 6, 1952. U.N. Doc. E/2249 (1952).

¹⁵ SECRETARIAT, SIXTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, Caracas, 25 August-5 September 1980, G.A. Res. 171, U.N. GAOR, 35th Sess., U.N. Doc. A/CONF.87/14/Rev.1, U.N. Sales No. E.81.IV.4 (1980).

Second, at a meeting held in the same year in Geneva, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a special rapporteur to whom it entrusted the task of undertaking a study on the independence and impartiality of judges, jurors and assessors, and the independence of lawyers.¹⁶ On behalf of the Sub-Commission, the rapporteur was to present subsequently the findings to the U.N. Commission on Human Rights.¹⁷

I do not intend to give here a full list of the various conferences, study-meetings, and congresses in which the International Association of Judges actively participated and which assisted the United Nations' special rapporteur with his task. I would simply mention that, initially at the Seventh U.N. Congress held in Milan in September 1985, the committee selected over 100 detailed articles, many of which were subdivided into paragraphs to be included in the principles on the independence of the judiciary. After several meetings of U.N. experts, the collection was drastically reduced to a mere forty-four articles.

It is not without emotion that I recall the dramatic moments of the first days of September 1985. Our group of delegates to the Congress was confronted with the extreme of indifference on the part of most delegates, and, to an even greater extent, the persistent efforts of some official delegations determined to oppose the success of the draft through accusations that it was long-winded and repetitive.

The future of the draft was determined one night when a tightly-knit group of delegates, particularly from non-governmental organizations in consultative status with the U.N. (NGO's), reduced the number of its principles to an indispensable minimum of twenty articles. Any accusation of long-windedness could no longer be upheld. The next morning, the opposition was void of excuses and ceased their objections. I suggest that these delegates lacked the courage to reveal their true motives—the fear that statement of precise rules might

¹⁶ *Report on the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. GAOR, 33rd Sess., U.N. Doc. E/CN.4/1413/Corr.1 (1981).

¹⁷ In 1982, Mr. Justice Abu Sayeed Chowdhury, Special Rapporteur, submitted his final report entitled *Report on Measures to Combat Racism and Racial Discrimination and the Role of the Sub-Commission to the Sub-Commission on Prevention of Discrimination and Protection of Minorities*. U.N. Doc. E/CN.4/Sub.2/1982/7 (1982). This report was sent to the Commission on Human Rights. U.N. Doc. E/CN.4/1983/4 (1982).

provide an international indication to the individual states as to specific guarantees which had to be provided in order to safeguard the genuine independence of the judiciary. The opposition's ultimate capitulation was probably dictated, at least in part, by their hope that the rules on judicial independence approved in Milan would remain mere statements of principles. Fortunately, their expectations were incorrect.

The rules became the United Nations Basic Principles on the Independence of the Judiciary¹⁸ and were approved in the same year, 1985, by consensus of the U.N. General Assembly. All governments were formally invited to respect the Principles and to take them into account within the framework of their domestic legislation and policies.¹⁹

Even more significant than the initial adoption of the Principles was the approval by consensus of the General Assembly in 1989 of procedures for their effective implementation.²⁰ This action obligated the Secretary-General of the United Nations to compile a report (drafted on the basis of information from NGO's) every five years in order to monitor the observance of the Principles in the various countries throughout the world. Additionally, in 1990, the International Association of Judges insisted that the Secretary General of the U.N. indicate in the report the

¹⁸ See notes 8-12 and accompanying text.

¹⁹ See G.A. Res. 32, *supra* note 8; G.A. Res. 146, *supra* note 8.

²⁰ See *U.N. Programme in Crime Prevention and Criminal Justice: Report of the Secretary General*, in 1989 ANNUAL REVIEW OF U.N. AFFAIRS 652-56 (Kumiko Matsuura et al. eds., 1992). The committee praised the "visible impact" of the Milan Plan. Significantly, it was reported that "[m]any countries were undertaking far-reaching and comprehensive legal reforms, providing for the improvement of their criminal justice systems, the transparency of legal proceedings and the protection of judges and lawyers." *Id.* at 653. The Assembly adopted resolution 43/99, which welcomed:

the efforts made by Member States and the Secretary-General to translate into action the recommendations contained in the Milan Plan of Action, and urged those Governments that had not yet done so to inform the Secretary-General about their implementation. The Assembly further stressed the need for Member States to continue to make concerted and systematic efforts to strengthen international cooperation in crime prevention and criminal justice.

Id. at 655.

Finally, in 1990, the General Assembly passed the *Implementation of United Nations Standards and Norms in Criminal Justice*. See *id.* at 751-58. The procedures for U.N. assistance to Governments interested in implementing the Basic Principles included, *inter alia*, the "incorporation of the United Nations instruments in national legislation and making them available in the appropriate language and form to all concerned." *Id.* at 757.

name of countries which were not yet respecting the Principles. Eventually, this was in fact done.

II. THE HUMAN RIGHT TO AN INDEPENDENT JUDGE AND THE BASIC PRINCIPLES OF INDEPENDENCE: A CASE BROUGHT BEFORE THE ITALIAN COURTS

The excursus into the development of the Basic Principles might provide a better understanding of the importance and value of the kind of rules which were at issue in an actual case. The case demonstrates the extent to which U.N. Principles securing the right to an independent judge have been given effect in the domestic court of Italy.

The case challenged a law of 1988 which was designed to, within certain limits, render judges accountable for damages caused by serious fault in the exercise of their functions.²¹ The challenge was successful in the Italian local court and was subsequently referred for decision to the Constitutional Court of Italy.²²

The referral was argued to the court on the grounds that the law was not in line with Article 16 of the Basic Principles.²³ This article provides that "judges should enjoy personal immunity from civil suits from monetary damages for improper acts or omissions in the exercise of their judicial functions."²⁴

It was argued that the new provision on judicial accountability should be declared void as unconstitutional because Article 10 of the Italian Constitution²⁵ requires the Italian legal system to conform with the generally recognized rules of international law and the referral directly conflicted with Article 16 of the Basic Principles.

The referral was rejected by the Constitutional Court mainly

²¹ See MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 93-98 (1989).

²² Racc. uff. corte cost., opinion n. 18 of 11-19 January, 1989, 34 *Giur. It. I*, 1989, 62 ff.; Trib. ammin. reg. per la Regione siciliana, Catania's Division, May 12, 1988, *Coco v. USL of Acireale*, in 33 *Giur. It. Cost.*, 1988, 2962 ff.

²³ See *Basic Principles*, *supra* note 8.

²⁴ *Id.* But see CAPPELLETTI, *supra* note 21, at 94-95 (detailing substantive and procedural limitations on Italian judicial liability).

²⁵ Art. 10 COST. della Repubblica Italiana, *officially published in the Gazzetta Ufficiale* December 22, 1947, translated in, MAURO CAPPELLETTI ET AL., *THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION*, app. A (Stanford University Press 1967). Article 10 of the Italian Constitution provides that "[t]he Italian legal order shall conform to the generally recognized rules of international law." *Id.*

on the basis of two considerations. The Court held that, according to the international practice, the norms contained in the U.N. resolutions "in the form of declaration of principles" are not compulsory in character, and they do not constitute a "source of law, although they can have an influence on the formation of customary practices and agreements modeled upon their contents."²⁶ Furthermore, the Court added, "the principles of immunity embodied in the provision invoked was not necessarily implying total immunity from accountability."²⁷

Commentary on the decision expressed the view that the Court's second line of reasoning conflicts with the clear wording of Article 16 of the Basic Principles. Doubts were also cast as to the accuracy of the Court's view that resolutions of the U.N. General Assembly do not constitute "sources of law." I would add that in speaking of such resolutions expressed in the Basic Principles, the Court did not take into account that, at the time the Court considered the case, the Basic Principles had been buttressed by the specific procedures for their implementation.

CONCLUSION

To conclude with the cases I have just referred to, we shall briefly return to the terms of the basic matter at stake; namely, the challenge of ensuring the enforcement of internationally accepted norms and the protection of human rights in the various domestic legal systems of the world.

This circumstance has occurred in the well-known *Nelson* case²⁸ which Judge Re has discussed extensively in his writings.²⁹

²⁶ Racc. uff. corte cost., opinion n. 18 of 11-19 January, 1989, 34 Giur. It. I, 1989, 62 ff.; Trib. ammin. reg. per la Regione siciliana, Catania's Division, May 12, 1988, *Coco v. USL of Acireale*, in 33 Giur. It. Cost., 1988, 2962 ff.

²⁷ *Id.*

²⁸ See *Saudi Arabia v. Nelson*, 507 U.S. 349, (1993). Nelson observed hazards and reported them to an investigative committee of the Saudi government while working as a hospital engineer. *Id.* at 352. As a result of his disclosure, Nelson alleged Saudi government agents "shackled, tortured, and beat" him. *Id.* at 353. Upon his return to the United States, Nelson sued the Saudi government in the United States District Court for the Southern District of Florida, seeking damages for personal injury. *Id.* Nelson asserted that the Court had jurisdiction pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605(a)(2) (West 1994). *Id.* at 354. The Foreign Sovereign Immunities Act provides that foreign states are not immune from suits "based upon a commercial activity carried on in the United States by the foreign state." *Id.* In reversing the Court of Appeals for the Eleventh Circuit, the Supreme Court held that Nelson's suit was not based on "commercial activity by a foreign state" and therefore the court lacked jurisdiction over the action. *Id.*

Attempts to recognize international norms as binding on domestic courts have met resistance at the highest level of domestic courts.

And yet, notwithstanding this, I share the optimistic outlook expressed by Judge Re.³⁰ I consider the progress which has followed the milestone of the Universal Declaration of Human Rights to be unstoppable. This is especially the case in the field of the right of the individual to an independent judge where dramatic steps forward have been taken in every country. This is particularly true in Italy, where, as shown by recent judicial

But see Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 167 (D.C. Cir.), cert. denied, 115 S. Ct. 726 (1994). In *Cicippio*, the U.S. Court of Appeals of the District of Columbia affirmed the District Court's holding that the alleged hiring of kidnappers did not constitute "commercial activity" within the meaning of 28 U.S.C. § 1605(a)(2) (1988). *Id.* at 167. The Supreme Court, however, criticized the *Nelson* Court for abandoning the Second Circuit's categorical approach. *Id.* The Second Circuit advocated that "in determining whether a given government activity is commercial under the Act, we must ask whether the activity is one in which commercial actors typically engage." *Id.* (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992)).

²³ See Re, *supra* note 3, at 290-300. In discussing the important role of domestic courts in enforcing international human rights, Judge Re criticized the Supreme Court's decision in *Saudi Arabia v. Nelson*. *Id.* at 294-300. The author advocated the need for congressional intervention to address instances where courts have chosen not to provide an effective and available remedy to victims of international human rights violations through the application and reasonable interpretation of existing legislation. *Id.* at 298-300; see also Joan Fitzpatrick, *Reducing the FSIA Barrier to Human Rights Litigation—Is an Amendment Necessary and Possible?*, 86 AM. SOC'Y OF INT'L L. PROC. 338, 344 (1992) (citing H.R. NO. 1487, 94th Cong., 2d Sess. (1976)), reprinted in 1976 U.S.C.C.A.N. 6604, 6606.).

A principle purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that ensure due process.

Id. at 344.

³⁰ See Re, *supra* note 3, at 288. Judge Re refers to the immunity of the judiciary as a "benefit to the people" because the separation of powers serves the important function of removing judges from the political "clamor of the moment." *Id.* Judge Re reaffirms the United States as a traditional "beacon of hope" in the area of human rights and liberties, and calls upon the Supreme Court to continue this legacy and not to abandon its role as the protector of fundamental human rights. *Id.*; see also Edward D. Re, *Introductory Remarks*, 67 ST. JOHN'S L. REV. 465, 467 (1993) (urging legal profession to "do what is necessary to see to it that courts are granted jurisdiction to hear cases when legal wrongs need to be righted, and when human rights need to be vindicated"). *But see* Gennady M. Danilenko, *The Changing Structure of the International Community: Constitutional Implications*, 32 HARV. INT'L L.J. 353 (1991) (questioning ability of new world order to reach consensus on normative requirements of generally applicable international law).

cases reported in the press, the judiciary presently enjoys an independence which is equal, if not superior, to that of judges in any other civilized country.³¹

³¹ See, e.g., *Italian Scandal May Kill Long-Powerful Parties, Big Changes in Political System Loom*, SACRAMENTO BEE, Mar. 26, 1993, at A16 (reporting judiciary's increased strength resulting from independent investigative role in scandal); George Melloan, *Global View: Sell Il Duce's Patrimony and Save Italy*, WALL ST. J., June 14, 1993, at A15 (reporting great effort independent of Italian judiciary in conducting "massive assault" on political corruption); R. Emmett Tyrrell, Jr., *Political Anxieties Amid Malgoverno*, WASH. TIMES, Oct. 8, 1993, at A21 (recognizing judicial prosecution of Italy's corrupt political class).

But see Lisa Bannon, *Italy Gets New President, Ending Month-Long Crisis*, WALL ST. J. EUR., May 26, 1992, at 2 (reporting recent comments regarding criticism of Italian judiciary); Judith Harris, *Battling Italy's Goliath*, WALL ST. J. EUR., July 22, 1992, at 6 (alleging "purposeful negligence" inside sanctuary of Italian judiciary); Ed Vulliamy, *Turmoil in Italy; Could Those Responsible be Working From Within?*, MONTREAL GAZETTE, July 31, 1993, at B5 (determining judiciary "radical").