

## **THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY**

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# THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY

By Daniel C. Prefontaine and Joanne Lee\*



## I. Introduction

In this 50th anniversary year of the *Universal Declaration of Human Rights*,<sup>1</sup> it is particularly appropriate to survey the legacy of those who drafted the basic principles enunciated in that document, which have guided so many countries making the transition to democratic systems of government during the last fifty years. This gives us an opportunity both to celebrate the progress that has been made, and to recognize how much more needs to be done.

This paper will focus on the rule of law principles underlying the right to a fair trial, especially the role of an independent judiciary. Following a consideration of the major international instruments in this area will be a brief examination of some of the ways that these international standards have been implemented in a selection of jurisdictions, including those of international criminal tribunals. Some of the current threats to judicial independence will be highlighted, including attacks on the judiciary by the media and the legislature even in well-established democracies.

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<sup>1</sup> *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d. Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter *UDHR*].

There is increasing acknowledgement that an independent judiciary is the key to upholding the rule of law in a free society. This independence may take a variety of forms across different jurisdictions and systems of law. But the same principle always applies, namely, the protection of human rights is dependent on the guarantee that judges will be free and will reasonably be perceived to be free to make impartial decisions based on the facts and the law in each case, and to exercise their role as protectors of the constitution, without any pressure or interference from other sources, especially government. This basic premise is crucial to the maintenance of the rule of law.

At the same time, laws must be public knowledge, clear in meaning, and must apply to everyone equally,<sup>2</sup> including the government. Unless the government subordinates itself to the law, and to the sovereignty of the people through the constitution, that government may rule *by law*, but its authority will not be grounded in the rule *of law*.<sup>3</sup> Rule *by law* still allows governments to use their power arbitrarily to deny fundamental rights to citizens, or to cover up their own corrupt practices. Once citizens lose confidence in the fairness of the legal and political systems, they may turn to other means to assert their basic rights, and inevitably this results in violence and loss of human life.<sup>4</sup>

Most countries in transition from dictatorships and/or statist economies recognize the need to create a more stable system of governance, based on the rule of law. In fact, rule of law reform in "developing" countries is considered so important that it is becoming a major category of international aid.<sup>5</sup>

But it takes time and patience to turn around deeply entrenched political interests and values. We should be cautious when trying to promote externally-imposed rule of law reform as some kind of "elixir" or "panacea" for all the ills of countries in transition.<sup>6</sup> First, the principles underlying the rule of law must be properly understood and respected by all those who will be affected by the new laws. Then, even in well-established democracies, experience tells us that we need to be vigilant to ensure that respect is maintained for the law and for those who administer the law.

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<sup>2</sup> T. Carothers, "The Rule of Law Revival" (1998) 77 *Foreign Affairs* 95 at 96.

<sup>3</sup> There has been some criticism to this effect of some Asian countries' attitudes toward law reform. See *ibid.* at 101.

<sup>4</sup> As in Indonesia, where many students have lost their lives in mass demonstrations against the present and former governments.

<sup>5</sup> Carothers, *supra* note 2 at 103.

<sup>6</sup> *Ibid.* at 105.

## II. The *Universal Declaration of Human Rights* (1948)

Although the *UDHR* was originally an aspirational, non-binding document, its provisions are now regarded as having become the accepted norms of customary international law,<sup>7</sup> including those provisions on the right to a fair trial.

The *UDHR* establishes in Article 10 that all persons are “entitled in full equality to a fair and public hearing by an independent and impartial tribunal” whenever criminal charges are laid against them.<sup>8</sup> As stipulated in Article 11, they must be presumed innocent until it is proven otherwise, and may not be charged with an offence, or a dealt penalty, that was not part of the law when they are alleged to have committed the offence.<sup>9</sup>

Further, Articles 6 to 8 prohibit arbitrary arrest, detention or exile, and provide rights to equal recognition before the law, and an effective remedy for everyone under the law.<sup>10</sup>

These are the absolute minimum standards required under international law.

## III. The *International Covenant on Civil and Political Rights* (1966)

Similar provisions in the *International Covenant on Civil and Political Rights*<sup>11</sup> have received widespread support from the international community. The *ICCPR* generally provides more detail and expands the scope of the rights set out in the *UDHR*. For example, it gives rights to accused persons to prepare adequately for their defence, to be informed as to the charge against them, to have an interpreter if required, and even to communicate with legal counsel of their choice.<sup>12</sup> But these provisions are binding only on States parties to the *Covenant* and subject to various interpretations and degrees of implementation by them.

In this context and reality, the Human Rights Committee is currently considering a *Draft Third Optional Protocol to the ICCPR*, “Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy”.<sup>13</sup>

<sup>7</sup> See e.g. H.J. Steiner & P. Alston, *International Human Rights in Context: Law, Politics, Morals* (New York: Oxford University Press, 1996) at 124.

<sup>8</sup> *UDHR*, *supra* note 1.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> 19 December 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR*]. The *ICCPR* has approximately 60 signatories and 140 parties.

<sup>12</sup> *Ibid.*, s. 14.

<sup>13</sup> The *Optional Protocol* is one of the annexes to a report entitled *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening*, UN ESCOR, 1994, E/CN.4/ Sub.2/ 1994/24.

This would provide that no derogation is possible from certain rights under Articles 9 and 14 *ICCPR*, even when a state of emergency has been declared. So the right to a fair trial would be guaranteed under all conditions, in those States that sign the *Optional Protocol*.

#### IV. Other international instruments and standards

The right to a fair trial is affirmed by two other significant international conventions : the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984)*<sup>14</sup> and the *Convention on the Rights of the Child (1989)*,<sup>15</sup> with respect to trials involving children. In addition, the major regional human rights conventions also promote the principles asserted by the *UDHR*,<sup>16</sup> as does modern international humanitarian law to a considerable extent.<sup>17</sup>

In 1985, the United Nations General Assembly adopted the *Basic Principles on the Independence of the Judiciary*,<sup>18</sup> which outline the fundamental elements of an independent judiciary. These include a requirement that the independence of the judiciary be guaranteed by the state and enshrined in the constitution or some other legislative instrument. The *Principles* also emphasize the importance of selecting and training judges appropriately, and making provisions for their discipline, suspension or removal with suitable complaints handling mechanisms.

The General Assembly in 1990 adopted *Guidelines on the Role of Prosecutors*<sup>19</sup> and *Basic Principles on the Role of Lawyers*.<sup>20</sup> This was in recognition of the fact that the judiciary can only fulfil its role effectively when it is

<sup>14</sup> GA Res. 39/46, UN GAOR, 1984, UN Doc. A/39/46, art. 12-15.

<sup>15</sup> [1992] C.T.S. 3, art. 37, 40.

<sup>16</sup> See *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, art. 6-7 [hereinafter *European Convention on Human Rights*] ; OAS, General Assembly, *American Convention on Human Rights*, 22 November 1969, O.A.S.T.S. no. 36, OR OEA/Ser.K/XVI/1.1 (1969), art. 8-10 ; *African Charter on Human and Peoples' Rights*, 27 June 1981, 21 I.L.M. 58 (entered into force 21 October 1986), art. 7.

<sup>17</sup> See art. 3 common to the four *Geneva Conventions*, 12 August 1949, 75 U.N.T.S. 31 ; various fair trial guarantees for prisoners of war in the *Third and Fourth Geneva Conventions* ; *Protocol I to the Geneva Convention*, OR I, Part I, at 154-161, art. 75, and *Additional Protocol II to the Geneva Convention*, OR I, Part I, at 193, art. 6, (1977).

<sup>18</sup> GA Res. 40/32 and 40/146, 1986, UN GAOR, 40<sup>th</sup> Sess, UN Doc. A/40/32, A/40/146. The *Principles* were originally adopted by the *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan, August, 1985*, UN GAOR. A/CONF.121/22/Rev.1 at 53 [hereinafter *Principles*].

<sup>19</sup> GA Res. 45/166, UN GAOR, 45<sup>th</sup> Sess., Supp No. 49, UN Doc. A/45/166 (1990) The *Guidelines* were originally adopted by the *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba, August/September, 1985*, UN Doc. A/CONF.144/28 at 188 [hereinafter *Guidelines on the Role of Prosecutors*].

<sup>20</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba, August/September, 1985*, UN Doc. A/CONF.144/28 at 117 [hereinafter *Principles on the Role of Lawyers*].

assisted by independent, fair-minded prosecutors,<sup>21</sup> and an independent bar. In the common law adversarial system, in particular, legal counsel on both sides must be able to remain faithful to their duty to respect the law, over and above the interests of their clients and of those responsible for investigating crimes. So, for example, the *Guidelines on the Role of Prosecutors* stress the need to ensure that all the evidence for the Prosecution has been obtained lawfully, and that any evidence more favourable to the accused's case should be presented as well.<sup>22</sup> In this way, an impartial judge can weigh the evidence more accurately, and reach a fairer decision according to the law and the facts.

The *Principles on the Role of Lawyers* require governments to ensure certain guarantees for lawyers, in order to protect the rights of clients. One of these guarantees is that lawyers are not to be identified with their clients or their clients' causes, so they can advocate freely and effectively, without fear of repercussions for themselves, no matter how unpopular their client's cause.<sup>23</sup> Without such protection for lawyers, there would be no prospect of a fair trial for an accused person.

These three sets of principles on judicial independence, prosecutors and lawyers are just a starting point, however. Several major non-governmental organizations have created more comprehensive standards.<sup>24</sup> While these have yet to be endorsed at a governmental level, some of them were annexed to the *Draft Declaration on the Independence of Justice*<sup>25</sup> presented to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1985. However, this Draft Declaration has yet to be adopted by the General Assembly. So the three basic sets of principles that were adopted "are today the acknowledged yardstick by which the international community measures that independence."<sup>26</sup>

## V. Monitoring International Standards

Following the adoption of the aforementioned principles, the UN Sub-Commission on Minorities then turned its attention to establishing a mechanism for

<sup>21</sup> See *Guidelines on the Role of Prosecutors*, *supra* note 19, Preamble.

<sup>22</sup> *Ibid.* at 192-93, art. 16.

<sup>23</sup> *Principles on the Role of Lawyers*, *supra* note 20 at 122, s. 16, 18.

<sup>24</sup> See e.g. *Draft Principles on the Independence of the Judiciary (Syracusa Principles)* 1981 [hereinafter *Syracusa Principles*]; *Draft Principles on the Independence of the Legal Profession (Noto Principles)* 1982; *The Rule of Law and Human Rights (Declaration of Delhi, Law of Lagos, Resolution of Rio Declaration of Bangkok)*; Union Internationale des Avocats, *The International Charter of Legal Defence Rights*; International Bar Association, *Minimum Standards of Judicial Independence* 1982 [hereinafter *IBA Standards*]; *International Convention for the Preservation of Defence Rights* 1987; and *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*, adopted by the Sixth Conference of Chief Justices of Asia and the Pacific on 19/8/95.

<sup>25</sup> UN ESCOR, 27<sup>th</sup> Sess., UN Doc. E/CN.4/Sub.2/1985 (1985).

<sup>26</sup> D. Param Kumaraswamy, "The UN Basic Principles and the Work of the UN Special Rapporteur on the Independence of Judges and Lawyers" (ICJ Conference on The Rule of Law in a Changing World, Cape Town, South Africa, 20-22 July, 1998) at 5 [unpublished].

monitoring implementation. In 1994, the first Special Rapporteur on the Independence of Judges and Lawyers was appointed. The mandate is thematic, and incorporates investigatory, advisory, legislative and promotional activities.<sup>27</sup>

The current Special Rapporteur, Dato' Param Cumaraswamy, receives complaints of attacks on judges and lawyers from all over the globe, and endeavours to investigate as many of them as he can. Some complaints may be dealt with through an exchange of correspondence with the relevant personnel. But sometimes an *in situ* investigation of a series of allegations causing particularly widespread concern is warranted. In these situations, the Special Rapporteur is reliant upon governmental cooperation, which may not always be easy to secure. Most of the complaints are initiated by NGO's, some with perceived political agendas, and thus the Special Rapporteur's presence in a country may be seen as having political overtones.<sup>28</sup>

Nevertheless, the Special Rapporteur has provided four mission reports in the last four years, as well as four general reports detailing complaints received and measures taken to investigate these in approximately thirty-five "country situations" a year. His reports also highlight positive developments in rule of law reform and identify "theoretical issues of special importance," such as: the independence of judges of the lower courts and statutory tribunals, temporary judges, the use of "faceless" tribunals<sup>29</sup> and the need for satisfactory mechanisms for resolving conflicts between the legal profession and the judiciary.

The Special Rapporteur advises many countries on ways to improve structural weaknesses in their judicial systems. With the number of nations progressing from autocratic styles of governance to democracy in recent years, the Special Rapporteur has a challenging workload. Added to this is the need for constant vigilance, even in the most developed nations. As the Special Rapporteur noted earlier this year, judicial independence "is not safe even in countries where one would imagine it to be."<sup>30</sup> He refers specifically to recent attacks on judicial independence in the United States, the United Kingdom, Australia and Belgium.

As well as the Special Rapporteur's reports, the Centre for the Independence of Judges and Lawyers (CIJL) publishes an annual report, *Attacks on Justice*<sup>31</sup>, and until recently the Lawyers' Committee for Human Rights published

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<sup>27</sup> *Ibid.* at 8.

<sup>28</sup> *Ibid.* at 8-9.

<sup>29</sup> *Ibid.* at 18.

<sup>30</sup> *Ibid.* at 2.

<sup>31</sup> *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers*, online: International Commission of Jurists <<http://www.icj.org/attacks/attacks.htm>> (last modified : 8 May 2000) [hereinafter *Attacks on Justice*].

*Attacks on Lawyers and Judges*<sup>32</sup>, also annually. The CIJL report of 1997 showed an increase of 25% in such attacks, since the 1996 report.<sup>33</sup>

## VI. Implementation of International Standards

The following is a necessarily brief and selective survey of some of the ways that judicial independence has been and is being implemented around the globe. The intention is to provide illustrative examples of the types of progress being made in many other countries towards rule of law reform, and to highlight some of the threats to judicial independence in those countries that may feel tempted to take the rule of law for granted within their own borders.

The first illustrative example is Canada, which has a comprehensive, well-established structure for guaranteeing the independence of the judiciary and the rule of law.

### A. The Canadian Experience

In Canada, the independence of the federally appointed judiciary is guaranteed by the *Canadian Constitution*, more specifically, sections 96 to 100 of the *Constitution Act, 1867*<sup>34</sup>, which provide for the appointment of superior court judges, their security of tenure and financial security, and its Preamble, which provides for a constitution "similar in principle to that of the United Kingdom,"<sup>35</sup> and incorporates fundamental rights of judicial independence which date back to the *Act of Settlement* of 1701.<sup>36</sup> Judicial independence is also guaranteed in the *Canadian Charter of Rights and Freedoms*<sup>37</sup>, which provides in s. 11(d) that every person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.<sup>38</sup> The fundamental rights incorporated in the preamble and the *Charter* provision apply as well to judges of the Provincial Court who are appointed by the provinces.

The Chief Justice of Canada in a recent judgment explained the importance of judicial independence :

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<sup>32</sup> See online : Lawyers' Committee for Human Rights <<http://www.lchr.org>>.

<sup>33</sup> *Attacks on Justice*, *supra* note 31.

<sup>34</sup> (U.K.), 30 & 31 Vict., c.3 [hereinafter *Constitution Act, 1867*].

<sup>35</sup> *Ibid.*

<sup>36</sup> 1700 (U.K.), 12 & 13 Will. III, c. 2.

<sup>37</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Canadian Charter*].

<sup>38</sup> *Ibid.*

Judicial independence is valued because it serves important societal goals – it is a means to secure those goals. [...]

One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.<sup>39</sup>

An excellent summary of the decisions of the Supreme Court of Canada in this area is to be found in the judgment of McLachlin J. in *MacKeigan v. Hickman*.<sup>40</sup> To summarize, judicial independence as a constitutional principle fundamental to the Canadian system of government possesses both individual and institutional elements. Actions by other branches of government which undermine the independence of the judiciary therefore attack the integrity of our *Constitution*. As protectors of our *Constitution*, the Courts will not consider such intrusions lightly.<sup>41</sup> In an earlier decision, Chief Justice Dickson noted the importance and influence of international instruments in reaffirming the basic principles governing the independence of the judiciary.<sup>42</sup>

In *Valente v. The Queen*,<sup>43</sup> the Court defined the notion of judicial independence as follows:

[...] judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.<sup>44</sup>

He concluded that “[...] judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions [...]”.<sup>45</sup> In the same case, Justice LeDain enunciated the three core characteristics of judicial independence as:

<sup>39</sup> *Re Provincial Court Judges*, [1997] 3 S.C.R. 3 at 34 [hereinafter *Re Provincial Court Judges*].

<sup>40</sup> [1989] 2 S.C.R. 796 [hereinafter *MacKeigan*].

<sup>41</sup> *Ibid.* at 825-828.

<sup>42</sup> See *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at 74-75, which refers to the *Syracusa Principles*, *supra* note 24, the *IBA Standards*, *supra* note 24 and the 1983 *Montreal Declaration*.

<sup>43</sup> [1985] 2 S.C.R. 673 [hereinafter *Valente*].

<sup>44</sup> *Ibid.* at 687.

<sup>45</sup> *Ibid.* at 689.

- (1) security of tenure,
- (2) financial security, and
- (3) administrative independence.<sup>46</sup>

### *Security of Tenure*

Security of Tenure of federally appointed judges is assured in s. 99 of the *Constitution Act, 1867*, which provides :

- (1) Subject to subsection 2 of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and the House of Commons.<sup>47</sup>

The *Judges Act*<sup>48</sup> establishes the Canadian Judicial Council, which consists of all chief justices and associate chief justices of Superior Courts. The Canadian Judicial Council receives complaints, and if investigation warrants, the Council may direct a committee to conduct an inquiry to determine whether the judge has become "incapacitated or disabled from the due execution of the office of judge" by reason of age, infirmity, misconduct or failure in the due execution of the office.<sup>49</sup> This Committee usually consists of three Chief Justices appointed by the Council, and two lawyers appointed by the Minister of Justice. The Minister or the Attorney General of a province may also request that an inquiry be held.<sup>50</sup>

Following such an inquiry, at which the judge may be represented by counsel and has an opportunity to be heard, Council as a whole considers the report and recommendations of the Inquiry Committee. If in the opinion of the Judicial Council the judge has become incapacitated, Council may recommend that the judge be removed from office. In cases where the Inquiry Committee has decided that the conduct complained of does not merit removal from office, the Committee may express its disapproval of the conduct.

In 1996, a Canadian Federal Court judge in Quebec was found unfit for office by an Inquiry Committee. The judge had "berated a jury and made insensitive remarks about women and Jews"<sup>51</sup> while sentencing a woman found guilty of murdering her husband, which remarks had created a storm of controversy. The Inquiry Committee believed "that the judge undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system."<sup>52</sup>

<sup>46</sup> *Ibid.*

<sup>47</sup> *Constitution Act, 1867*, *supra* note 34.

<sup>48</sup> R.S.C. 1985 c. J1 [hereinafter *Judges Act*].

<sup>49</sup> *Ibid.* s. 65(2).

<sup>50</sup> *Ibid.* s. 63(1).

<sup>51</sup> Cumaraswamy, *supra* note 26 at 15.

<sup>52</sup> *Ibid.*

The full Judicial Council recommended to the Minister that the judge be removed from office. However, the judge resigned before his matter came before Parliament.

Most of the provinces have established Judicial Councils, to investigate and inquire into complaints against Provincial Court judges, who are appointed by the Province.

### *Financial Security*

Section 110 *The Constitution Act, 1867*, imposes on Parliament the duty of fixing the salaries, allowances and pensions of the federally appointed judges.<sup>53</sup> In 1975, the Parliament of Canada amended the *Judges Act* to provide for the establishment, every three years, of an independent commission appointed by government to inquire into the adequacy of salaries and benefits of the federally appointed judges.<sup>54</sup>

Until 1997, salaries of provincial court judges were fixed by the executive in most provinces. In 1997, the Supreme Court of Canada decided that the procedures by which salaries of provincial court judges were fixed were unconstitutional, as providing insufficient guarantees of financial security to assure independence of the judiciary, or its perception.<sup>55</sup> The Court held that the system which required that judges negotiate their salaries and benefits with the executive could lead to the perception of a lack of independence.<sup>56</sup> The Court recognized that the provincial legislature had the authority to reduce salaries when warranted by economic conditions.<sup>57</sup> The Court concluded that the existence of an independent body to make recommendations regarding salaries and benefits was essential to avoid the possibility of political interference through economic manipulation. The recommendations would not bind Parliament but require a response which would withstand the rationality test.<sup>58</sup>

### *Administrative Independence*

In *Valente*,<sup>59</sup> the Supreme Court of Canada defined administrative independence in relatively narrow terms as control by the courts "over administrative decisions that bear directly and immediately on the exercise of the

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<sup>53</sup> *Constitution Act, 1867*, *supra* note 34.

<sup>54</sup> *Judges Act*, *supra* note 48. Recent amendments, including s. 26(2), provide for the appointment of a Commission every four years, and require the Minister to table a response in Parliament within a limited time.

<sup>55</sup> *Re Provincial Court Judges*, *supra* note 39.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Valente*, *supra* note 43.

judicial function” and include such matters as the assignment of judges, the determination of sittings of the court and court lists, and related matters of allocation of court rooms, and the direction of the administrative staff carrying out these functions.<sup>60</sup>

Generally, in Canada, few problems have arisen in this respect, and courts are achieving greater control over budgets allocated to the court, court staff and other administrative functions.

### *Immunity*

Another feature necessary for the continuation of judicial independence and impartiality is the immunity afforded to judges respecting their function as judges. In Canada, judges enjoy absolute immunity from criminal and civil actions in respect of judicial decisions. A judge cannot be compelled to answer questions relating to judicial or administrative decisions made by the judge in the exercise of his/her judicial functions.<sup>61</sup>

### *Accountability*

Aspects of security of tenure and of immunity may be viewed by some as unnecessarily limiting accountability on the part of judges. Nevertheless, such autonomy is necessary to ensure an independent judiciary.

However, this does not mean that judges are not accountable. First, judges are bound by the rule of law. They must decide cases in accordance with the evidence before them and the law. With the exception of the highest appellate level, the judgments of all trial courts and appeal courts, as well as the manner in which the proceedings have been conducted by them, are subject to appeal and, if warranted, correction or modification by the court of appeal.

All judicial proceedings are conducted in open court, under the scrutiny of the bar, the public and the press. The reasoning in judicial decisions and the conduct of proceedings are subject to criticism by courts of appeal, by other judges, the legal profession, academics, and by the press and the public.

In addition to the complaints process outlined above, chief justices, chief judges and judicial colleagues continue to exert considerable moral suasion.

Recently, a Working Committee of the Canadian Judicial Council, with the cooperation of the Canadian Judges Conference and in consultation with the

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<sup>60</sup> *Ibid.*

<sup>61</sup> *MacKeigan, supra* note 40.

judiciary and the Bar, have undertaken the drafting of ethical guidelines for judges.<sup>62</sup> The *Ethical Principles* are to be advisory in nature, and will provide assistance to judges in making decisions on the difficult ethical issues which confront them.<sup>63</sup>

All judges in Canada also have access to non-compulsory continuing education or training programs, which include substantive law, language training, as well as social context issues such as gender and cultural sensitivity. Control and approval of programs falls within the jurisdiction of the Canadian Judicial Council, and the courts of each province.

The protection and maintenance of judicial independence is left to the courts, as is every other constitutionally guaranteed right.

#### *International assistance*

Canadian judges are involved in a range of programs for international judicial training and development. The Commonwealth Judicial Education Institute provides assistance to the judiciary of developing countries, drawing on the expertise offered by judges from all over the Commonwealth. The Commissioner for Federal Judicial Affairs in Canada also liaises with External Affairs and the Canadian International Development Agency to help provide international judicial education and training by Canadian judges. The Chief Justice of the Supreme Court of Canada believes there is a "moral" duty to be involved in such programs.<sup>64</sup> In addition, both Justice Canada's International Law and Activities section, and the Canadian Bar Association's International Development Committee are actively involved in international assistance.

#### *The right to a fair trial*

In keeping with international standards, the Canadian *Charter* provides extensive protection for accused and detained persons. Section 15 provides for equality before the law.<sup>65</sup> Sections 7-11 follow closely the relevant provisions of the

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<sup>62</sup> Canada, Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa : Canadian Judicial Council, 1998) [hereinafter *Ethical Principles*].

<sup>63</sup> *Ibid.*

<sup>64</sup> N.K. Orr, "Opportunities for International Judicial and Legal Training" [1998] *Vox Judicia* 6.

<sup>65</sup> *Canadian Charter*, *supra* note 37. However, this provision is qualified by the words "without discrimination", which have been held by the Supreme Court of Canada to require proof of discrimination, not just inequality : see *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143.

ICCPR pertaining to life, liberty and security of the person;<sup>66</sup> unreasonable search and seizure;<sup>67</sup> arbitrary detention and imprisonment;<sup>68</sup> safeguards pertaining to arrests<sup>69</sup> and criminal and penal proceedings.<sup>70</sup> The interpretation of section 7 has involved a consideration of a wide range of issues, such as a prisoner's right to counsel at disciplinary hearings,<sup>71</sup> and an accused person's right to pretrial disclosure, the limits of which right have yet to be determined conclusively. In *R. v. Stinchcombe*,<sup>72</sup> the Supreme Court of Canada initially imposed a broad duty of disclosure on Crown prosecutors, to enable the accused to prepare properly for trial. The Court relied on the principles set down by Mr. Justice Rand in *Boucher v. The Queen*,<sup>73</sup> regarding the public duty role of the prosecutor, which does not involve "winning" or "losing" cases. As one commentator has expressed it, "It followed that the fruits of the investigation which are in the possession of counsel for the Crown are not its property for use in securing a conviction but the property of the public to be used to ensure that justice is done."<sup>74</sup>

However, this obligation to disclose is not absolute. The Crown retains a discretion to withhold some information, such as material it considers to be irrelevant, but these discretionary aspects remain controversial.<sup>75</sup>

As a further check on the discretionary powers of prosecutors, the Supreme Court of Canada has held that Crown attorneys and attorneys general are generally immune from civil action, but not in the case of malicious prosecutions.<sup>76</sup> This ruling was based on public policy considerations that balanced the need for prosecutors to be shielded from disgruntled accused persons – in order to maintain impartiality when deciding which cases to pursue – against the rights of citizens to seek redress when the process has been abused.

## B. The United States

Some jurisdictions in the United States have taken the notion of judicial independence and accountability much further than in other democracies. The U.S.

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<sup>66</sup> *Ibid.*, s. 7.

<sup>67</sup> *Ibid.*, s. 8.

<sup>68</sup> *Ibid.*, s. 9.

<sup>69</sup> *Ibid.*, s. 10.

<sup>70</sup> *Ibid.*, s. 11.

<sup>71</sup> *Howard v. Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution*, (1985) 45 C.R. (3d) 242.

<sup>72</sup> [1991] 3 S.C.R. 326.

<sup>73</sup> [1955] S.C.R. 16.

<sup>74</sup> D. Stuart, "Prosecutorial Accountability in Canada" in P.C. Stenning, ed., *Accountability for Criminal Justice: Selected Essays* (Toronto: University of Toronto Press, 1995) 330 at 348-49.

<sup>75</sup> *Ibid.* at 350.

<sup>76</sup> *Nelles v. Ontario*, [1989] 2 S.C.R. 170.

federal courts have had complete administrative autonomy since 1939.<sup>77</sup> The Chief Justice of the U.S. Supreme Court appoints a Director of the Administrative Office, after consultation with the Judicial Conference of the U.S. The Administrative Office is responsible for the administration of all federal courts except the U.S. Supreme Court, which is managed by the judges themselves. Most state courts also manage their own budgets, including budget requests.

While U.S. judges at the federal level are all appointed and enjoy security of tenure, most State judges and district attorneys are elected by a popular vote and face re-election on a regular basis. This approach has caused considerable disquiet amongst some defendant lawyers, particularly in States where the district attorney has been elected mainly because of his or her propensity to seek the death penalty for convicted persons, rather than a propensity for impartiality or outstanding ability. However, those in favour of popularly elected judges and public attorneys would argue that this is far more democratic and leads to greater accountability.

### C. Australia

The issue of judicial independence has often been in the media spotlight in Australia, particularly in recent years. In June of this year, the New South Wales Judicial Commission referred the matter of a certain State Supreme Court judge to the State Parliament, because they considered him to be a "procrastinator" and not fit for office. He had acquired a reputation for taking an extraordinarily long time to deliver his reserved judgments, the worst example of which was said to be a sentence that he handed down ten months after the hearing.

The Judge was asked to make a statement in person to the Parliament, at the Bar of the Upper House, in which he explained that he had been suffering depression, which had caused him to have severe doubts about his judgments, such that he delayed writing them. Now that he was over the depression, he argued, he should not lose his job simply because of a past illness that was now cured. The Upper House debated the issue at length, and the motion for his removal was finally defeated 26:16 on a conscience vote.

The judge's speech was broadcast on television, which added yet another dimension of scrutiny to the whole process, namely public scrutiny, and helped to fulfil the judge's aim of bringing attention to the little understood plight of those who suffer depression, particularly judges. The broadcast also increased public understanding of the relationship between the judiciary and the legislature.

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<sup>77</sup> Canada, Canadian Judicial Council, *A Place Apart : Judicial Independence and Accountability in Canada* by M.L. Friedland (Ottawa : Canadian Judicial Council, 1995) at 108.

#### D. China

With the signing of the *ICCPR*, China continues its march in legal and judicial reform.

The 1982 *Constitution of the People's Republic of China*<sup>78</sup> provides that the people's courts independently exercise their judicial power and are not subject to interference by any administrative organ, social organization or individual.<sup>79</sup> In 1983, the *Organic Law of the People's Courts* was amended to incorporate this constitutional principle.

In 1995, the *Judges Law*<sup>80</sup> came into force to ensure, as stipulated in the first Article, that the people's courts will independently exercise judicial power according to the law and that judges will fulfill their duty according to the law.<sup>81</sup> The Law also provides some general principles and rules regarding the responsibilities, qualifications, rights, obligations, selection, appointment, removal, rank, performance evaluation, training, reward, punishment and discipline, salary and benefits of judges. The adoption of this law was an important step forward in implementing the principle of judicial independence in the Chinese justice system.

In 1996, China adopted some major amendments to the *Law of Criminal Procedure*, incorporating the presumption of innocence as well as the right to defense counsel in the pre-trial process. Under the old law, access to counsel was restricted to trial and seven days prior to trial. To implement the constitutional principle of judicial independence, some important changes were introduced under the amendments.

For many years, decisions were often made by the judicial committees in Chinese courts rather than the trial judges. Cases were often pre-judged behind closed doors by the members of these committees that usually included the chief and deputy chief judges of the courts or other high-ranking court officials. Consequently, the trial became a show to announce the judgment that was not made by the trial judge but by the committee.

With the passage of the amendments, this system has started to change gradually. Under the amended *Law of Criminal Procedure*, the trial judges must make their own judgment at the trial unless they decide to pass the case on to the judicial committee in the event that it is a complicated case or a major case and the trial judges have difficulties to make their own judgment.<sup>82</sup> The key points in the judicial and scholastic interpretations of this provision are: first, the trial judges shall have the power to make independent judgments in ordinary cases; second, the

<sup>78</sup> *The Constitution of the People's Republic of China* (China) 1982, 5<sup>th</sup> National People's Congress, 1<sup>st</sup> ed. (Beijing: Foreign Language Press, 1983).

<sup>79</sup> *Ibid.*, s. 126.

<sup>80</sup> *The Judges Law, 1995* (China).

<sup>81</sup> *Ibid.*, s. 1.

<sup>82</sup> *Law of Criminal Procedure, 1996* (China), art. 149.

trial judges shall exercise this power only in the trial rather than before the trial; third, the trial judges shall decide whether or not to pass a complicated and/or major case on to the judicial committee for a decision; fourth, unless the trial judges decide to do so, the committee shall not step in and take over; fifth, in a case whereby the committee is requested to make a decision, the Chief Judge of the court can decide to return the case and order the trial judges to make their decision.<sup>83</sup>

Another major change introduced by the amendments to the *Law of Criminal Procedure* is the abolition of the system of "exemption from prosecution." Under the old law, Chinese prosecutors could convict an accused person by exempting him from prosecution if the case is considered minor. This kind of decision was made by the prosecutor internally without involving the judiciary and defense counsel. Although this was intended as a form of leniency, it in fact gave the prosecutors the power to convict people without trial. Therefore, it was challenged as a violation of the principles of judicial independence and open trial.

Now, the Chinese judges are required to act impartially and equally before all citizens and legal persons. They must base their decisions on the facts and in accordance with the law. They must conduct open trials except where state secrets, individual privacy or juveniles are involved. In late 1998, Chinese courts have started to open their doors to the public by allowing anyone to enter the court rooms to observe the trials without having to obtain approvals. In the meantime, the Supreme People's Court appointed some prestigious judges as superintendents to observe and supervise the work of local courts and investigate cases of judicial corruption. In addition, the Chinese courts are reviewing their organizational structures and administrative procedures as a continuing effort to implement the principle of judicial independence and improve the justice system.

With the signing of the *ICCPR*, the reform of China's judicial system is placed under international scrutiny. There are still some major difficulties that this reform has to overcome in the next few years, such as judicial corruption, local protectionism, lack of professionalism among some judges and the lack of financial support to raise the salaries of the Chinese judges. The Chinese judiciary and law reformers are making progress in addressing these problems.<sup>84</sup>

## **E. Peru**

Peru provides a striking example of a country struggling to come to terms with a violent, politically unstable past, and anxious to re-establish the rule of law as

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<sup>83</sup> See Z. Daoluan *et al.*, eds., *The Amendments and Application of the Law of Criminal Procedure* (Beijing : People's Court Publishing House, 1996). See also C. Guangzhong *et al.*, eds., *The Jurisprudence of Criminal Procedure (New Edition)* (Beijing : China University of Political Science and Law Publishing House, 1997).

<sup>84</sup> For a comprehensive review of the relevant issues, see C. Guangzhong *et al.*, eds., *The United Nations Standards and China's Legal System of Criminal Justice* (Beijing : Publishing House of Law).

swiftly as possible. Much of Peru was under a state of emergency between 1979 and 1992, in response to extreme political violence initiated by both the Shining Path group (Sendero Luminoso) and the Tupac Amaru Revolutionary Movement (MRTA).

In 1992, democratically elected President Alberto Fujimori Fujimori established a Government of Emergency and National Reconstruction pursuant to Decree Law 25.418.<sup>85</sup> This involved implementation of a number of extreme measures including : a purge of the judiciary, which had developed a reputation for either corruption or giving in to intimidation by terrorists; introduction of a new constitution and dissolution of the Constitutional Court, to be replaced by a new Constitutional Tribunal; dismissal of the Attorney-General and the Comptroller General of Peru, as well as numerous prosecutors; and “exceptional procedures” to prosecute civilians charged with terrorist-related crimes and treason.

Of these “exceptional procedures,” of most concern to defence lawyers and human rights activists in Peru was the use of “faceless” civil and military tribunals for trying crimes of terrorism and treason. These tribunals were introduced to protect the identity of those who were to prosecute and adjudicate at such hearings, so they could safely convict terrorists and those accused of treason, without fear of threats to their own personal safety being made later by the convicted person’s colleagues. The proceedings were always conducted in private, with the judges and prosecutor hidden behind a one-way mirror. In addition, voice-distorting microphones were used by the judge and prosecutor, and the identity of police and military witnesses was generally kept secret as well. Clearly, such a hearing violates most of the international standards for a fair trial.

The UN Special Rapporteur on the Independence of Judges and Lawyers, Mr. Kumaraswamy, visited Peru in September 1996 at the invitation of the Peruvian government. The primary focus of his mission was to observe these “faceless” tribunals in operation, and to evaluate them for himself.<sup>86</sup> He concluded that “the concealing of the judge’s identity erodes public accountability of judges handling terrorist-related crimes or treason.”<sup>87</sup> He did not consider that the judges were at risk, as judges had not at that time been the targets of terrorist-related violence since 1992. He also expressed concern over the fact that at the military tribunals, which tried cases of treason, only one in five of the judges was legally qualified. The others were all military personnel, who arguably could be influenced by their duty to follow the orders of their superiors, rather than being entirely impartial arbiters.

At the conclusion of his mission, the Special Rapporteur called for the abolition of both civil and military “faceless” tribunals. He noted that the recently

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<sup>85</sup> See D. Param Kumaraswamy, Special Rapporteur on the Independence of Judges and Lawyers, *Report on the mission to Peru*, UN Doc. E/CN.4/1998/39/Add.1, (1998).

<sup>86</sup> *Ibid.* The Rapporteur also investigated the need for judicial reform in Peru, and considered some of the amendments to anti-terrorist legislation in light of international standards.

<sup>87</sup> *Ibid.* at 17.

created *Ad Hoc* Commission on Pardons had already identified several innocent people who had been convicted by these tribunals, and that "it was also clear that these tribunals no longer protected the security of judges, prosecutors and witnesses."<sup>88</sup> Unfortunately, he also added, "In any event, in the light of the considerable improvement in the security situation, there is no longer any justification to continue with these tribunals."<sup>89</sup> It was unfortunate because, only two months later, on 8 November 1996, an attempt was made against the life of the President of the Constitutional Tribunal, Mr. Nugent. Then, in December 1996, members of the Revolutionary Movement of Tupac Amaru stormed the residence of the Ambassador of Japan in Lima and held more than seventy people hostage for days, attracting international media attention. Not surprisingly, institutional reforms of the administration of justice in Peru were put on hold while the Peruvian government re-assessed its earlier decision to water down its anti-terrorism measures. How do you find the right balance between the need for due process for those accused of terrorist activities, and the right to life, liberty and security of those who have to uphold the law? There simply are no easy answers in such circumstances. We can only hope that gradual progress will continue to be made towards full implementation of human rights in those countries still struggling to establish and maintain basic law and order.

## VII. Threats to Judicial Independence

The greatest threat to judicial independence is complete disregard by a government for the provisions of the constitution. Unfortunately, many military governments today refuse to subject their authority to a constitutional system, ignoring court orders made against them, and providing few mechanisms for the protection of human rights. Even some democratically elected governments still dominate and control the courts in their country, so there is no check on the potential excesses of unfettered and arbitrary political power.

All four reports to date of the Special Rapporteur on the Independence of Judges and Lawyers detail numerous examples of other kinds of attacks on judicial independence and the rule of law from all over the world, including: abductions of human rights lawyers, often allegedly by government forces; threats by the President of Belarus to suspend the Constitutional Court after it ruled that certain Presidential Decrees were unconstitutional;<sup>90</sup> attacks on the independence of the Malaysian Bar

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<sup>88</sup> D. Param Kumaraswamy, Special Rapporteur on the Independence of Judges and Lawyers, *Question of the Human Rights of all Persons Subjected to Any Form of Detention or Imprisonment*, Commission on Human Rights, 53<sup>rd</sup> Sess., U.N. Doc. E/CN.4/1997/32 (1997) at 11 [hereinafter "1997 Report"].

<sup>89</sup> *Ibid.* at para. 11.

<sup>90</sup> *Ibid.*

in 1997;<sup>91</sup> and the reported assassination of a Colombian ombudsman, also in 1997.<sup>92</sup>

*Public criticism of the judiciary and their conduct*

One key topic that the Special Rapporteur has been pursuing is the relationship between the media and the judiciary.<sup>93</sup> This relationship has become particularly strained in recent times in democratic societies, where greater access to technology and constitutional protection of the right to freedom of expression have allowed the media to have an increasingly visible role, especially in criminal trials. While media coverage of trials is to be encouraged, such coverage is not always fair, accurate and unbiased,<sup>94</sup> nor does it necessarily encourage greater respect for the judicial process. Decisions by judges to exclude evidence, the use of the reasonable doubt rule to acquit someone charged with a serious offence, perceived leniency in sentencing and the protection of minority rights often all bring on a barrage of criticism against the judiciary, as being contrary to the will of the majority, who have erroneously been convinced that Courts are "soft on crime," and that crime is ever more prevalent.

Attacks on the judiciary by both the media and politicians are causing grave concern in many common law jurisdictions at present, particularly the United States and Australia. This has prompted one Australian High Court judge to state that criticism of the judiciary in his country has "gone too far." Unless there is a measure of mutual restraint, the judicial institution will be damaged [...].<sup>95</sup> Justice Kirby was responding to a bombardment of verbal abuse from politicians, the media, even academics and lawyers,<sup>96</sup> in response to the High Court's 1996 decision in *Wik v. Queensland*<sup>97</sup> upholding native title rights on some pastoral properties.<sup>98</sup> The Federal Attorney General, Mr. Williams, recently announced that he would draw up guidelines to limit politicians' criticism of judges, after he himself had been criticized by judges for failing to defend the judiciary against such attacks, a role traditionally taken on by the Attorney General. The guidelines will set the limits of

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<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.* at para. 47.

<sup>94</sup> See generally V.M. Bonventre & J.A. DeMarco, "Court Bashing and Reality : A Comparative Examination of Criminal Dispositions at the New York Court of Appeals and Neighboring High Courts" (1997) Winter, *The Judge's Journal*, 9.

<sup>95</sup> Hon. Justice M. Kirby, "Attacks on Judges — A Universal Phenomenon", (Winter Leadership Meeting, American Bar Association, Section of Litigation, Maui, Hawaii, 5 January 1998) at 25-26 [unpublished].

<sup>96</sup> *Ibid.* at 2-3.

<sup>97</sup> [1996] 141 A.L.R.

<sup>98</sup> *Ibid.* at 129.

“appropriate commentary” for politicians about the courts as well as for judges about the government.<sup>99</sup>

Similar criticisms of judges were expressed in Canada after the adoption of the Canadian *Charter* and s. 52 of the *Constitution Act*, 1982, which granted to the Courts the power to declare legislation inoperable to the extent that it conflicts with the basic human rights and freedoms protected by the *Charter*.<sup>100</sup> With that amendment, an independent judiciary took on an increased importance in Canada’s constitutional framework. Yet, the use of this power by the courts has resulted in increasingly severe criticism of the judiciary by some politicians, the media and other commentators who decry the so-called “activist judges” who have struck down legislation as inconsistent with the *Charter*, or have otherwise protected *Charter* rights. This has led to calls for limitations in the discretion, power and independence of the judiciary, and has included calls for greater accountability, term limits and judicial elections. It must be noted that the Canadian Judicial Council has recently published “Ethical Principles for Judges” to guide them in their work and public image.

Much debate in this area has focussed on whether to allow more television cameras in courtrooms. As Justice Kelly of the Supreme Court of Nova Scotia points out in a recent paper on the subject,<sup>101</sup> there are significant advantages to allowing more widespread coverage of entire trials, as well as disadvantages. For instance, the televising of complete court proceedings will avoid the filtering of those proceedings through a journalist’s eye, which may be looking for something sensational to focus on, or guided by an editorial perspective that may be biased against a particular accused person. In Canada, as in a number of jurisdictions, many hearings are broadcast live in their entirety, such as important constitutional cases before the Supreme Court of Canada. On the other hand, jurors might be improperly influenced by commentary on televised proceedings, while witnesses, lawyers and others may be unduly affected by the presence of the cameras.

Clearly more thought needs to be given to the role of the media in maintaining respect for the judiciary and the rule of law, even in countries where the rule of law is frequently taken for granted.

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<sup>99</sup> B. Lagan, “A-G will act to curb attacks against judges”, *The Sydney Morning Herald*, 9 December 1998, online : Sydney Morning Herald Homepage <<http://smh.com.au>> (date accessed : 9 December 1998).

<sup>100</sup> *Canadian Charter*, *supra* note 37.

<sup>101</sup> Justice F.B.W. Kelly, “Free Press v. Fair Trial : Judicial-Media Interaction”, Paper presented to the International Society for the Reform of Criminal Law Ninth Annual Conference, Santa Monica, California, December 1995 [unpublished].

## VIII. International developments

### *Ad Hoc Tribunals*

International criminal tribunals particularly require high standards of judicial independence and other provisions for a fair trial, lest the tribunal be misused by powerful States for purely political ends, which may adversely affect whole nations.

In the case of the civil wars in the former Yugoslavia and Rwanda, the UN Security Council felt it was necessary to set up *ad hoc* international criminal tribunals<sup>102</sup> that were completely separate from the domestic legal systems, in order to obtain the most impartial forum for the trials of those charged with war crimes and crimes against humanity. At the time, there was concern that even those territorial governments that retained the means for prosecuting their citizens for war crimes, may lack the will to do so.<sup>103</sup> The International War Crimes Tribunals for Yugoslavia and Rwanda were also intended to raise the "symbolic profile" of their proceedings and thus have a more widespread deterrent effect.<sup>104</sup>

The right to a fair trial was enshrined in the statute of each tribunal,<sup>105</sup> implementing most of the standards required under the *ICCPR*, not just the minimum standards set by the *UDHR*. Article 21(2) of the *Statute of the Tribunal for the Former Yugoslavia*<sup>106</sup> sets out the rights of the accused, including the right to a "fair and public hearing,"<sup>107</sup> subject to the need to protect the victim's identity.<sup>108</sup> There is a right of appeal,<sup>109</sup> and of review where a new and potentially decisive fact

<sup>102</sup> See S.C. Res. 808, UN SCOR, 1993, U.N. Doc. S/25704, *Report of the UN Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, UN SCOR, 1993, U.N. Doc. S/25704 & Add. 1 (1993); S.C. Res. 827, UN SCOR, 1993, UN Doc. S/RES/827(1993); S.C. Res. 935, UN SCOR, 1994, UN Doc. S/RES/935 (1994) and S.C. Res. 955, UN SCOR, 1994, UN Doc. S/RES/955 (1994).

<sup>103</sup> See *Report of Secretary-General to the Security Council of 5 December 1996*, in which he stated that: "According to information received from the Office of the Prosecutor, Croatia's cooperation with the International Tribunal leaves much to be desired", L.S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (The Hague: Kluwer Law International, 1997) at 278.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, Report of the Secretary General, *supra* note 99, Annex [hereinafter *Statute of the Tribunal for the Former Yugoslavia*]; *Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, S.C. Res. 955, *supra* note 99, Annex.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*, s. 22.

<sup>109</sup> *Ibid.*, s. 25.

comes to light after the initial proceedings,<sup>110</sup> as well as protection against double jeopardy if an “impartial and independent” tribunal has already “diligently prosecuted” the accused for the same serious violation of international humanitarian law.<sup>111</sup>

### *The International Criminal Court*

The two *ad hoc* tribunals paved the way for the creation of a permanent International Criminal Court (ICC). On 17 July 1998, the Statute for this Court was adopted in Rome at the UN Diplomatic Conference of Plenipotentiaries (“the Rome Statute”).<sup>112</sup>

Prior to this conference, Human Rights Watch had identified seven benchmarks for the new court that needed to be met in order to ensure that the ICC would be “an independent, fair and effective judicial institution.”<sup>113</sup> These benchmarks were :

- 1) a jurisdictional regime free of any state consent requirement;
- 2) independence from the Security Council;
- 3) an *ex officio* prosecutor;
- 4) qualified deference to state claims of jurisdiction (complementarity);
- 5) authority over war crimes whether committed in international or non-international conflicts;
- 6) clear legal obligation for state parties to comply with court requests for judicial cooperation; and
- 7) the highest standards of international justice respecting the rights of the accused and appropriate protection for witnesses.<sup>114</sup>

After the Rome Statute was finalized, Human Rights Watch stated, “Assessing the Conference results with these criteria in mind, we have a very good statute.”<sup>115</sup>

Of particular relevance to this paper are the provisions that cover investigations and prosecutions, those on the rights of suspects and accused persons, and those on the composition and administration of the Court. Despite considerable controversy, it was finally agreed that the ICC Prosecutor should be free to initiate investigations without first having to seek approval from states parties or the Security Council. These bodies can trigger investigations by referring “situations” to

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<sup>110</sup> *Ibid.*, s. 26.

<sup>111</sup> *Ibid.*, s. 10.

<sup>112</sup> *Rome Statute of the International Criminal Court*, 1998, UN Doc. A/CONF183/9, 17 July 1998 [hereinafter *Rome Statute*].

<sup>113</sup> Human Rights Watch, *The ICC Statute : Summary of the Key Provisions* (New York : Human Rights Watch, September 1998) at 1 [hereinafter *Human Rights Watch*].

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

the Prosecutor, but the Court will decide which individuals involved in those "situations" are to be investigated and prosecuted.<sup>116</sup>

The Prosecutor's decision to proceed with an investigation is then subjected to a pre-trial judicial hearing to determine whether there is a reasonable basis on which to proceed. If the Prosecutor decides not to proceed with an investigation, he must also advise the Pre-Trial Chamber, as well as the informant or referring body. The Pre-Trial Chamber may overturn the Prosecutor's decision not to proceed, only if the basis for the decision was merely "in the interests of justice."

Human Rights Watch is concerned that the powers of the Prosecutor may be insufficient to conduct a thorough investigation.<sup>117</sup> The Prosecutor will be heavily reliant on the cooperation of national authorities when trying to interview witnesses and conducting on-site investigations.<sup>118</sup> However, this was a compromise, effected to allay fears that the Prosecutor would have too much power over sovereign states.

The rights of suspects<sup>119</sup> and accused persons<sup>120</sup> are well protected under the *Rome Statute*, with all of the guarantees that are set out in detail in the *ICCPR*, plus others that implement some of the *Guidelines on the Role of Prosecutors*.<sup>121</sup> For example, the Prosecution must disclose any evidence that mitigates the guilt of the accused or affects the credibility of evidence for the Prosecution.

The judges of the ICC will be nominated by states parties and then elected by the Assembly of states parties. Judges may have either criminal or international law expertise, or both, and a "fair representation of female and male judges" must be taken into account during the selection process, as well as equitable geographical distribution. Consistent with judicial independence, judges may only be removed or disciplined if they are proved guilty of misconduct. The same applies to prosecutors. The judges will also be empowered to make Regulations which will govern the day-to-day administration of the Court.

The high level of consensus achieved with the acceptance of the aforementioned provisions of the *Rome Statute* demonstrates widespread acceptance throughout the international community of the principles first enunciated in the *UDHR* pertaining to fair trials and the independence of the judiciary, at an international level. No doubt the apparent congruity between so many states will be tested each time the jurisdiction of the ICC is invoked. But, as UN Secretary-General Kofi Annan stated after the *Rome Statute* was adopted, "The establishment of the Court is still a gift of hope to future generations, and a giant step forward in

<sup>116</sup> *Rome Statute*, *supra* note 112, art. 13-15, 53.

<sup>117</sup> *Human Rights Watch*, *supra* note 113 at 4.

<sup>118</sup> *Rome Statute*, *supra* note 112, art. 57, 99.

<sup>119</sup> *Ibid.*, art. 55.

<sup>120</sup> *Ibid.*, art. 67.

<sup>121</sup> *Guidelines on the Role of Prosecutors*, *supra* note 19.

the march towards universal human rights and the rule of law.”<sup>122</sup> It is hoped that the ICC will provide an exemplary model for states seeking to provide for, or strengthen, the independence of their judiciary, and respect for the rule of law across all jurisdictions.

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After 50 years, although the *UDHR* may still not be universal in its application, the signs are nevertheless encouraging. There is considerable support around the globe for rule of law reform and the international community can take considerable comfort from the progress made in Canada and similar jurisdictions. But there is still a long way to go. Civil unrest and conflict on almost every continent mean that many disputes are still not being settled by peaceful means, so that the rule of force will decide the outcome, not the rule of law. The fragility of the rule of law is even evident in more developed nations, where public attacks on the judiciary threaten the integrity of our constitutional system. So, the best safeguard will have to be the unrelenting proactive efforts of the legal profession, the judiciary, non-governmental organizations and institutions to promote the rule of law and judicial independence. Of necessity, this will need to be reinforced by all governments with the resources to do so, in order to achieve in the next century universal “freedom, justice and peace in the world.”<sup>123</sup>

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<sup>122</sup> United Nations, News Release, “Statement by the United Nations Secretary-General Kofi Annan at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court”, 18 July 1998, online : United Nations Homepage <<http://www.un.org/icc/>> (date accessed : 7 January 2000).

<sup>123</sup> *UDHR*, *supra* note 1, Preamble.