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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF: INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Written statement* submitted by the International Criminal Defence Attorneys Association (ICDAA), a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[10 February 2005]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

CIVIL AND POLITICAL RIGHTS:
INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

The United Nations, through the work of the General Assembly, the Commission on Human Rights ("Commission") and Special Rapporteur continues to pursue the goals of promotion of an independent and impartial judiciary, jurors and assessors and the independence of lawyers. In support of the report of the Special Rapporteur on the Independence of Judges and Lawyers, the International Criminal Defence Attorneys Association (ICDAA), a non-governmental organization in special consultative status with the Economic and Social Council of the United Nations, submits the following comments.

Justice in International Criminal Courts and Tribunals is an increasingly important area due to the growth of these Courts. The independence of the judiciary and lawyers is an integral element recognised by the ICDAA. At present it is not an issue considered by the Special Rapporteur. The ICDAA recommends that Commission on Human Rights incorporate Justice in International Criminal Courts and Tribunals into the scope of the mandate of the Special Rapporteur on the Independence of Judges and Lawyers and to request a report by the Special Rapporteur on the status of the independence of the judges and lawyers at these tribunals at the 62nd session of ECOSOC to be held in Spring 2006.

With the end of the Cold War, the two ad hoc tribunals for the former Yugoslavia and Rwanda were created respectively in 1993 and 1994, followed by the International Criminal Court in 2002. With regards to Justice in International Criminal Courts and Tribunals the ICDAA would like to highlight two areas of concern which, if not dealt with effectively, will result in the violation of the human right to a fair trial:

1. Firstly, the independence of the legal profession within International Criminal Courts and Tribunals, which, although entrenched in international legal and political documents,[1] has not been fully implemented.

2. Secondly, the need for an independent and stronger system of defence.

A strong, independent defence protects more than the right to a fair trial. It protects more general individual human rights that can be involved in the criminal justice system. These include the right against arbitrary arrest and detention, the right against torture and inhumane conditions of detention, and rights such as freedom of speech, religion and association which may be infringed by over-expansion of substantive criminal law. The credibility of the ICC, as with any criminal court rests on the impartiality of the judiciary and the independence of the legal profession from political influence.

Professional independence can be defined as guaranteeing that lawyers are able to advise and represent their clients "*in accordance with their established professional standards and*

[1] Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; Council of Europe, Committee of Ministers, Recommendation Rec(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer; International Criminal Court Rules of Procedure and Evidence, Rules 20(2)&(3).

judgement without any restriction, influences, pressures, threats or undue interference's from any quarter."[2] In the case of defence counsel, freedom from outside influence includes improper influence from judges, prosecutors and court officials. How credible is a lawyer whose right to practice or income can be cut off by the judge hearing the case, a prosecutor whom he or she has offended or a court official who believes the case is dragging on?

The international rule of law is not only about treaties, it is about court cases. For the ICC, those cases will not just be about the application of abstract principles to simple, well-known facts. They will be about how groups of people confronted complex political situations – even turning points in history – with some individuals accused of horrible crimes and others seeking compensation for grievous harm. Obviously, many such cases will involve political and moral controversy, and passionate differences of opinion. The facts will not always be clear; the evidence may be highly ambiguous. Such cases will challenge lawyers as much as they will judges and new legal institutions. Lawyers will be challenged to observe the highest professional standards – and they will need strong institutional support to succeed. In such cases, it is vital that a well-organized and independent legal profession is provided.

There is a misconception – held by many people today – that a strong defence weakens the court system … by winning cases and gaining acquittals. Another version of this misconception is that giving criminals a fair trial indicates weakness or lack of resolve. But the core principle is that if the trial is worth conducting, it is worth conducting fairly. Courts that apply this principle become stronger, not weaker. Courts that compromise it lose their credibility and legitimacy as independent deliberative bodies. Courts must demonstrate by example that they are governed by law – rather than the passions or politics of any particular case.

A court with strong, independent defence lawyers may see some acquittals of unpopular accused persons – a handful of Nazis were acquitted at Nuremberg. But it becomes stronger as an institution with each case. By the same token, any court where defence lawyers are not well prepared runs an institutional risk. It risks becoming, over time, a kangaroo court. This will not happen all at once, in an individual case. It will happen, over *time.* Insufficient energy will be devoted to the process of battle and debate required to ensure a fair trial. A pattern will creep up: the prosecution will tend to win consistently primarily because its political cause is popular and because the defence is institutionally weak – not because its evidence consistently meets tough legal tests.

The intensive political and public attention focussed on the vigorous prosecution of alleged war criminals heightens the importance of ensuring that the court is perceived to be impartial and to have a reputation for fairness. A full and fair defence is vital to the establishment of such legal and political legitimacy as the rule of law is extended to the international level.

It follows that the ICC will gain strength by encouraging a strong defence. Though the resulting controversy in any given case might make some people angry, it will enrich the cause of democracy and strengthen international tribunals. A well-prepared defence is vital to the credibility and to the political legitimacy of the trial process. As always, it helps to promote judicial independence.

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[2] Ibid. p. 69.

Most voters and politicians ardently support the right to a fair trial in the abstract. But not when the accused is unpopular and appears "obviously guilty" … not when the trial may prove long and expensive … and, above all, not when the accused person might be acquitted. Such widespread attitudes point to the need for independent defence lawyers. Lawyers who do not play to the majority, who act as spoilers who stir up controversy … and who challenge. Challenge the evidence … challenge conventional wisdom … and challenge the jurisdiction of the court when necessary.

Defending the alleged perpetrators of these violations will be politically and legally controversial (as it was at Nuremberg). But allowing the controversy to happen will enrich the cause of democracy. It will enrich international political culture. It will strengthen the credibility of the ad hoc tribunals and the ICC. It will eliminate doubts that these courts could become an instrument of revenge (or "political justice") by 'winning regimes' rather than institutions of international justice. This is vital if 'impunity' is to be eliminated over time and if these courts are to play a significant role in bringing peace to war-torn countries.

One of the main things that distinguish criminal justice from war is "the right to a fair trial." For this reason, the ICC must not only end impunity by convicting those guilty of crimes against humanity. It must do so using a fair process. It must be guided by the ideal of fairness stated by the British judge, Lord Hewart:

> "*Justice should not only be done, but should manifestly and undoubtedly be seen to be done*." "[3]

It is essential that the fair trial rights of accused persons are protected by maintaining the independence of the legal profession within the developing international justice field, and by strengthening the system of defence that is provided. Over time, ensuring fair trials in the international criminal justice system will increase the chances that all parties will eventually rally to the ICC … and the ideals of international criminal justice.

The ICDAA feels that the independence of the legal profession in the International arena is being jeopardised by the lack of objective observation and reporting mechanism via the United Nations Commission on Human Rights.

As such the ICDAA urgently requests the United Nations Commission on Human Rights include Justice in International Criminal Courts and Tribunals within the scope of the mandate of the Special Rapporteur on the Independence of Judges and Lawyers, in order to promote and protect human rights within the International Criminal Justice system.

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[3] (R. V. Sussex Justices, Ex p. McCarthy [1924] K.B. 256 at page 259)