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Session 4: The Legal Profession and Human Right: Questions and Answers Moderated by Desmond Fernando

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SESSION 4: QUESTIONS & ANSWERS

MODERATOR: *Desmond Fernando**

QUESTION: I am Chairman of a Subcommittee of the IBA on Satellite Communications. This at first may not seem to be related to human rights, but, having met Mr. Adama Dieng just before this meeting, he said I was completely wrong, and I must agree with him.

I would suggest that we have been discussing yesterday and today human rights and world communications. Even world communications themselves need protection as part of human rights, human communication rights, as there are countries already trying to block certain information, and the new technologies. We will certainly see more of that later on because, as you have rightly said, the better they can be spread this information, the more dangerous they are to governments violating human rights. May I suggest that both the U.N. and the Human Rights Institute look closely into these matters in the near future before they get really dangerous.

MR. FERNANDO: Hans, would you like to comment on that?

MR. CORELL: Thank you very much. My position is, of course, that these are matters that are dealt with by Member States. They take them up in their various human rights commissions, the Third Committee of the General Assembly, and then this may lead to further work, which at the end of the day might lead to a Declaration, followed by a Convention if necessary.

But basically, I would suggest that much of this is really covered by the fundamental provisions in the Covenant. If you study the Covenant, you will see it's very far-reaching. Naturally, there are possibilities of limiting certain rights laid out in the Covenant, and that is a very delicate matter. This is one of the most delicate matters that a national legislature deals with, actually. But certainly the very fact that the matter is mentioned here means that it has already come to the attention of the parliamentary bodies of the Organization that work with it.

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MR. FERNANDO: Thank you, Hans. Are there any more questions?

MR. SHESTACK: I have a question for the audience. How many here are involved in human rights efforts within their own nations and bar associations or NGOs or otherwise? Can I see a show of hands? That part is very encouraging, but it would be more encouraging if every hand went up.

It seems to me lawyers are sometimes asked what is their obligation for pro bono service. It seems to me there is an obligation for pro bono service, part of the common decency; part of what Fali said — much is given to us, much is expected. And finally, how can you commit to a profession as a lawyer without committing to the larger interest of justice? So perhaps at another meeting every hand would go up.

MR. NARIMAN: Permit me to add to what Jerry said. The U.N. Basic Principles on the Role of Lawyers also require pro bono activities on the part of lawyers.

MR. FERNANDO: Thank you.

QUESTION: We have spoken a good deal this afternoon about the International Commission of Jurists, which reminded me of the meeting that we had some two years ago at which the theme was "The Role of the Lawyer in the Enforcement of Economic, Social, and Cultural Rights." Now, the International Covenant on Economic, Social, and Cultural Rights can be regarded as the twin of the International Covenant on Civil and Political Rights, but it is a neglected twin. That is for understandable reasons, one of which, an important one, is that while most of the rights in the ICCPR do not involve a great deal of expenditure, most of the rights in the ICESCR do involve expenditure, and therefore the ability to comply with that Covenant is limited by the means of the state which is a signatory of it.

Nevertheless, it does seem to me that this is a Covenant whose importance ought to be considerably greater than it is now. I wonder if the very distinguished panel in front of us would agree that we really do need to place the International Covenant on Economic, Social, and Cultural Rights considerably higher on our agenda as lawyers than we have been used to doing in the past?

MR. FERNANDO: Fali, would you like to respond to that?

MR. NARIMAN: Yes. Thank you, William. That was a very

important remark. I think that the International Covenant on Economic, Social and Cultural Rights has always taken a back seat until recently. One of the ventures which I submit does help in its taking a slightly better seat than the back seat is the United Nations Human Development Ratio and Human Development Index which they come out with from year to year. I think that has shaken up quite a few governments. It has shaken up mine.

As to all the great things that you are supposed to be doing for democracy in your country — ultimately, you wind up not spending half as much as you should on essential matters, like education, and spending far too much on buying weapons. Now, that is itself a great reminder.

I share the feeling that much more is required to be done in the sphere of economic and social rights as much as in the realm of political rights, because I don't think that in our lifetime we will see the Optional Protocol, which is still in a very negative sort of stage, a stage which will probably never see the light of day, at least in our lifetime.

So it's up to us lawyers actually to do something about it. So far as words can help, some of us in the ICJ have formulated a plan of action, and that was last year. We could perhaps use that as some sort of a measure of what needs to be done in each and every country. But certainly, in all the developing countries this is a prime concern — not merely political rights, but economic and social rights.

MR. FERNANDO: Jerry, would you like to comment?

MR. SHESTACK: When the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights were adopted, the theory was that they were interdependent, that one did not have a primacy over the others. Sometimes repressive nations say, "Well, we have to worry about our economic rights, and when we're through we'll do our civil and political rights." But the two are related.

Someone once observed that a slave with a full belly is still a slave and a free man who is hungry is also a slave.

The problem is that when you're dealing with civil and political rights you are essentially dealing with negative rights. You are saying to a government "thou shalt not repress free

speech, thou shalt not torture, thou shalt not deny my right to leave.” When you’re dealing with economic and social rights you are dealing with affirmative rights — “you shall provide health, you shall provide social security, you shall provide education” — and the resources for the less-developed nations are not there to do it. The developed nations have done it through welfare laws and social security laws. So there has to be a readjustment in that regard.

These are not just aspirations, as some people say about economic and social rights. They are rights under the International Covenant — not just dreams and hopes, they are rights — and when people don’t get those rights their rights are being violated. It is in this area that the Western world has to recognize those rights and use its resources not to exploit the less-developed nations, but to see to it that those rights are part of the system of the world order.

QUESTION: I am a member of the IBA Human Rights Council. My comment is that I would like to congratulate all the speakers this afternoon. I tend to like the last statement made by the last speaker, that by the activities this afternoon we have patched a big hole in the human rights quest.

QUESTION: I was one of a number of lawyers who have been observing recent subversion trials in Indonesia recently. We have to write a report about that. The trials were under anti-subversion statutes. I don’t really want to ask the panel to comment on those questions, but on the general question, which involves, I suppose, the sovereignty of a state which can define treason or subversion in a statute and then arrest and charge individuals with breach of that statute. However independent the judges, however vigorous the lawyers, the facts may compel a finding of guilty.

So the question, I suppose, is: how do you analyze human rights in relation to a treason statute or a subversion statute? If Mrs. Arbour wants to answer that, I’d be very happy to hear her answer.

MADAM JUSTICE ARBOUR: In my remarks earlier I think I mentioned the efforts that are being made internationally in creating these Tribunals are very much a first. I think we are a very long way from having the capacity to actually not only moni-

tor, but have an effective enforcement and control procedure for that.

The problem that you mentioned is a problem that both Tribunals, but particularly the Tribunal for the former Yugoslavia, faces constantly — and, in fact, I should say it's also true of the Tribunal for Rwanda.

Because these two Tribunals are perceived to be applying international norms, acceptable norms of justice, there is a flood of requests by people who assume that they are likely candidates for prosecution domestically who would like to call on the Tribunal to be charged and tried before international justice. Now, that speaks volumes to what I said earlier, which was the unwillingness or the inability of domestic states, particularly after very traumatic political events leading to armed conflict, to deal in a credible fashion with their own prosecutions.

I don't know what the answer is to that. The one thing that's very clear is that there cannot be an international institution that would become a shelter to provide a forum in which, say, abuses — in my case it's abuses, violations of human rights, have to be prosecuted. Possibly there could be some kind of international appeal route by which the integrity and the legitimacy of domestic proceedings could be monitored.

That is certainly very much a role that the Yugoslav Tribunal has accepted to play under a project that's called the Rules of the Road Project, by which the parties to the Dayton Peace Accords have voluntarily submitted their own prosecution to essentially a vetting process by the Tribunal. So that might be a route by which the international community could develop a mechanism to provide not only, as you mentioned, a scrutiny of the procedural fairness, but of the very legitimacy of embarking on these kinds of prosecutions. I think that's some way down the road, though. Again, state sovereignty is still a pretty potent obstacle to that kind of effort.

MR. NARIMAN: Your question really is a problem of definition. What if a state defines treason in a certain manner, sedition in a certain manner, causing anxiety — and then prosecutes and said, "Well, I have not violated any rule. It's exactly according to my statute." Well, there is a superior standard now by which these things have to be judged, and that is in this book. That's my answer. That's all in this book.

MR. CORELL: That is an answer.

MR. NARIMAN: But I think this is free.

MR. CORELL: Unfortunately not.

MR. NARIMAN: One word. We had this problem many years ago in India, how would you define sedition. Now, under the British regime, sedition, according to what the Privy Council told us, was affection for your government; therefore, you could be locked up for life for anything that was disaffection for the government. Fortunately for us, English judges in the Federal Court held that no, that's not the true definition of sedition; sedition really means disaffection of government by means of disorder, by bringing disorder into the state, so that some violence has to accompany it. Fortunately for us, our Supreme Court, when it had to deal with this question under our Constitution, followed the Federal Court and refused to follow what the Privy Council said.

So definitions keep altering from time to time, and I think there are standards by which they have to be judged. The better standards are the international instruments. That is why Mr. Corell kept repeating his second or third proposition, that we must always try within our national systems to see that the international instruments are also brought in, and there should be a greater appreciation of them both by our judges and by our lawyers.

MR. FERNANDO: Adama, would you like to respond?

MR. DIENG: Just a footnote to what Justice Arbour has said regarding the monitoring. I think if one takes the United Nations Working Group on Arbitrary Detention and Detention, it is already reviewing cases brought before that Working Group. That Working Group was established, as you know, by the United Nations Human Rights Commission. That, in fact, created a lot of concern, particularly during the last session of the Human Rights Commission, where Cuba was trying to dilute the mandate of the Working Group by arguing that the Working Group is interfering in cases which were already finally judged.

But what happened in this area you cannot claim interference. As we were saying earlier, in the field of human rights it is not only that the principle of noninterference is central, but, secondly, you have also the collective responsibility, I think, even of the state.

In this particular case you raised, I think this is right. We can certainly use this U.N. group at the first stage. Let's say, for instance, in the case of Indonesia, just as an example, that the people were tried, sentenced to death, and we felt that even if they were sentenced, their detention was arbitrary because we felt that the whole procedure was totally arbitrary. I think there is already that avenue which can be used.

QUESTION: I would like to address a question to Madam Justice Arbour. In the functioning of these two Tribunals has force been used against any state for enforcement of the orders or directions of these Tribunals? If so, I would like to have some particulars or details about it.

MADAM JUSTICE ARBOUR: I think it depends on what you mean by "force." What is available now is the denunciation of noncompliance. That to some it is already considerable force, an affront to their sovereignty, and perceived as such. These are essentially the means that are at the disposal of the Tribunal.

But every country, in whatever circumstances, has the obligation, for example, to execute arrest warrants and other orders and to respond to the Prosecutor's request for assistance or orders of the judges. Now these, presumably, in a domestic system would be seen as compulsion. So if you use "force" in that sense, this is all available under the statute and it has been used, in the sense that there are some countries that have executed arrest warrants, actually arrested, detained, and transferred indictees to the Tribunal against, if not their better judgment certainly, they would not have done so, I think, absent that form of compulsion. So force has been used, I suppose, force used as compulsion.

QUESTION: I am presently the Chairman of the Working Group on Arbitrary Detention. Since Mr. Adama Dieng brought the matter up, I thought that I would make some comment on it. I happened to be elected Chairman of the Group as of this year.

He mentioned the issue of Cuba and the issue of Indonesia. I might just indicate to you as to what is the procedure we follow in that Group and the problems that we face. This is also applicable to what Fali mentioned earlier about the problem of the Covenant on Civil and Political Rights and why we must talk of social and economic rights at the present juncture and put them in primacy.

We get a wealth of information and complaints from various

NGOs all over the world. The problem is we ask governments to respond, but eighty percent of the governments don't respond, and we have no means to make them respond. Of the twenty percent who do respond, we adjudicate the case and render a decision. When we render the decision a government does nothing about it. So the result is that it is true that we get complaints, it is true we do the follow-up procedure, it is true that we try to effectuate the disturbing situations that exist in very many countries and try to bring about some solution, but in effect it comes to nothing.

And then, in addition to that, the mandate of the group is challenged in the Human Rights Commission on the ground that we are seeking to interfere with the sovereignty of the nation, and that is the precise issue that Fali was talking about.

Now, the solution to the problem — of course, we have to do this because we have to keep the pressure on; we must continue to do this; we must not back off — but the real solution to the problem is to strengthen the domestic situation. How do you strengthen the domestic situation? You strengthen it by pouring in money, by making children literate, by giving primary education, by improving their economic standing, so that when they grow up they seek and they make demands for their rights themselves. When they make the demand for their own rights the government will respond. So these two things have to work in tandem. That is the comment that I wish to make. Thank you.

QUESTION: I am a practitioner in Canada in the human rights area as well as an author and teacher at the Faculty of Law. Following from the question that came there, I'm just wondering what role can the IBA and the United Nations play with respect to questions where religion or culture may be seen to supersede human rights, for example, the position of women with the Taliban moving into Afghanistan? If women have been evicted or pulled out of the educational system itself, how are we then to give them the opportunity to struggle for their own rights?

MR. SHESTACK: "How" is a different question. What is going on in Afghanistan as far as women is certainly wrong, and certainly a violation of the International Covenants on Rights of Women. To the extent that other nations can bring pressure through their economic and other assistance and make their voices felt, I think it's important. For the "have" nations, it

seems to me it's very important to tie in economic and military aid to observance of human rights standards. That's required in the United States. It's not always done by Congress, but at least that's the standard in our law. And pressure from other nations can do something.

Now, I don't suggest that you're going to have an immediate effect on the new government, but the new government has to know that they are violating international standards, and if they want recognition and respect within the family of nations, those kind of practices have to change. There is obviously no simple answer to your question.

QUESTION: I'm a lawyer from India. In the context of what has been discussed in the last fifteen minutes to half-an-hour, I would like to say that one solution — and which has been perhaps to some extent found in India — is a provision in our Constitution which recognizes international conventions and treaties. Now, once you have that kind of a provision in the written Constitution, it would be the duty of the courts to enforce that. If there is a conflict between the domestic laws and the international conventions, the courts certainly can give effect to an international convention or a treaty.

MR. FERNANDO: Thank you very much.

QUESTION: I want to pick up on a comment made by Legal Counsel Hans Corell on the default by the United States in paying its dues to the United Nations. The default is of an amazing magnitude because, if my recollection is good, it is equivalent roughly to one full year of the ordinary budget of the United Nations. I know they are offering a sixty percent payment subject to conditionality, and God knows whether it will or will not be accepted.

But my question is addressed both to Hans Corell and to Madam Justice Louise Arbour. Can one say, as I suspect, that this is adversely impacting the work of the High Commissioner on Human Rights and of the human rights agencies in Geneva? Can we also say that Madam Justice Louise Arbour's work is also curtailed by the fact that you do not have enough resources, or is the institution or the trust, where countries can selectively decide what they will endorse and what they will not, being used right now to make your life a little bit easier in terms of resources?

MR. CORELL: Thank you very much for asking that question. Of course, when I mentioned it I saw a few smiles in the room. I don't smile because I am not looking so much at the dollars; I am looking at the law. As I said, international law cannot be a smorgasbord, where you pick and choose. It means that you have to abide by the law even in a situation where you may not be particularly pleased with its effects, but still where you have contributed yourself, and in particular if you have contributed to decisions that have been taken unanimously in the Organization.

I think it is fair to say that the default by some Member States in not paying their dues has had a serious impact on the Organization. I would like to say in the same vein, though, that I think that states are definitely in a position to criticize the Organization. I am a relative newcomer; I have been here for three years. I thought I was asked to come here just to participate in reforming the Organization, and I am actively involved in that work now.

But I think that, in a sense, the reform work itself can be hampered if we have to muddle through, as we have done in the past. I think the audience would be surprised to learn how many hours I put in alone, as the manager of a relatively small department of 160 people, because of the fact that the Organization doesn't have sufficient funds, and all the legal consequences that come out of that. At the same time, the very Member State that I mentioned in many senses supports the Organization in a tremendously supportive way. Here I think Justice Arbour might wish to continue.

Exactly what the effects of the non-paid dues are in different branches of the Organization, I don't think that I can comment on that. In the Legal Department, certainly many of my lawyers have suffered. They have worked very hard, long hours, and of course we don't have any overtime.

There are many competent and hard-working members of the staff of the United Nations, and they work very hard in spite of what has been said about them. I think it's one of my duties to stand up for them, as head of a department, and take them in defense. I know that the Secretary-General is very concerned about his staff. I am convinced that if we are given a little time

and can work meticulously and logically to reform the Organization, we can do so.

But we can't reform the Organization unless the Member States support us, because ultimately they are the ones who created the Organization, they are the ones who make the ultimate decisions, they are the ones who hold the purse strings. But once they have decided on the body, then it is a legal obligation to pay up, and I think that's clear to everyone.

MADAM JUSTICE ARBOUR: I am even newer to this organization than Hans Corell, so I can speak possibly with even more naivete about the subject. Contrary to him, I don't view that as a matter of principle, but as a simple matter of money.

These Tribunals are newborn into an organization that is supposed to be in a no-growth period. Well, you can't have institutions that are caught in a system that applies a no-growth policy across-the-board when we, having started an investigative phase, are now entering also a prosecutorial phase.

So I feel very much the consequences, which I assume — I can only assume it because I'm new to this organization — I assume that the enormous pressures downward in financial constraints are fed in part by this enormous shortfall that the United Nations is facing. Having said that, I'll say two more things.

There is no way, I think, neither in principle nor in reality, that these two Tribunals could be sustained through the trust fund vehicle. As a matter of U.N. policy, as I understand it, the trust funds are not to be used to fund posts. Well, we are a human resource-intensive industry. We don't need a lot of equipment; we just need a lot of people to do the work. So the trust funds are not a solution for the Tribunals.

The last thing I'm going to say is that, not only in the spirit of U.N. reform, but in a professional lifetime of working in the criminal law field, my ambition, apart from ensuring the success of the enterprise of these two Tribunals, would be to turn them into models of a lean, and yet efficient, criminal justice system.

I think that one of the great dangers that we face is in having a sort of Western-style-dominated model of justice in which we are in the process of exporting something that we ourselves cannot afford. There are very few people in this country, in my country, across Europe, who can nowadays afford to defend themselves against a criminal charge unassisted. If that's the

model that we are trying to export, it is my ambition to try internationally to live up to acceptable standards of decency and respect of human rights, but to develop a criminal justice system that should be a model that will make it affordable. But even to do that I need more money than I have.

QUESTION: On the same question, if I may address Mr. Corell, is it really enough just to point a finger at a senior or a very significant member of the United Nations and say "you have made a legal commitment that you shall pay your annual contribution, and you're not paying and thereby breaking your obligations," when we are all aware that the head of state might be willing to pay, but he is unable to pay because the legislature that controls the purse strings, and that is elected every two years or every four years, for some reason changes its mind and disables the head of state from complying with the obligation?

The reason I make this point is this has happened now in a very significant way for the first time. Is there any thought being given to how this kind of a problem might be dealt with in the future? For example, is there any effort towards making this organization much freer financially than it is today? In other words, there are organizations that can develop assets and income of their own so as to be able to protect and sustain their independence. I'm not saying that the United Nations should go into business tomorrow, but I am asking is there any thought being given to this issue?

MR. CORELL: If you were to ask the Permanent Representative of Argentina here until not long ago, he would tell you that there is one issue that the ambassadors here are discussing, how we can deal with this, and we discuss it in the Secretariat. That is the issue.

I recognize the distinction you made, and I think it is a very important distinction. That is why I used the word "tragedy." I think it's tragic for international law that this situation has occurred because we are left with one Member State, which is actually a democratic state under the rule of law, one of the midwives of the Organization, of the United Nations, which is in this situation now.

I recognize the constitutional problem, and maybe the question is in the Constitution of the country. The fact that I made reference to it was simply because I have to be credible. I would

be seen in many countries as a Westerner perhaps pointing fingers at developing countries and going on about human rights. I have to be credible, as Legal Counsel of the Organization, and I have to look at how the law is applied by all Member States.

I am convinced that this particular Member State will come on-board. The Secretary-General is so committed to reforming the Organization, but he should himself judge what proposals he should make to Member States. He should not be given benchmarks by one particular government.

And mind you, if we look at the history books and draw the conclusions, the future is still in the mist. I think it is important that now, when we have a window of opportunity, that also the strong and mighty demonstrate that to apply the law is also in their interest. As Legal Counsel of the Organization, that is my concern.

Somebody talked about pouring in money. I made a reference to the UNCITL, the international trade law organization. I mentioned that in the context of peace and security, and I did that intentionally, because we can't pour money in. I think that's the message also from the Secretary-General, that we must assist states to develop a relative wealth, that they can create their own, shall we say, business community and so forth. Everything is so tied together, I think.

Therefore, I think, we have to see also our efforts to strengthen the trade law as an effort to create the environment in a Member State in such a way that they become part of the international community, that they can do business, that they can compete, and that they can raise the standard of living of Member States.

Sorry I was so long on this, but I think this is so important, the issue you raised. My intention is certainly not really to offend any Member State, far from that. I used the word "tragic" because I think it is tragic. I know that there are so many Americans, and in particular I would like to tell you here there are so many American lawyers. I have seldom met a legal community anywhere which is so devoted to human rights, and so active, and so in the forefront as I have done here. So it is sort of the paradox that I am looking at. That is why I, rather than just criticizing, use the word "tragedy," because I think it is.

MR. FERNANDO: Thank you.