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THE ISLAMIC REPUBLIC OF **IRAN** AND THE ICC

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Abstract

*Like many states, **Iran** has an ambivalent position towards the Statute of the International Criminal Court ('Statute'), ranging from enthusiastic support to open scepticism. On account of its experience in the Iraq--Iran war, Iran is interested in exploring the Court's jurisdiction over aggression and war crimes; in addition, it sees the possible adoption of provisions on the crime of aggression as a tool against greater powers' domination. Major issues for Iran are, however, some of the penalties provided for under Iranian criminal law, including capital punishment as well as whipping, stoning and the sectioning of limbs as well as the treatment of minorities and gender. Another problem may be the presence of non-Muslim Judges at the Court, who, it is feared, may not be familiar with and sensitive to Shari'a principles; in addition, under theological principles, Muslims may not be judged by non-Muslim Judges. This question paradoxically constitutes an incentive for Iran to consider ratification of the Statute. So far, Iran has signed but not ratified the Statute. Studies are under way with a view to presenting the Statute to Parliament for ratification. However, problems of conflict between some provisions of the Statute and the principles of Shari'a law may arise if the Statute is ratified.*

1. Introduction

The place that Iran occupies in the international community is often misunderstood. From a religious viewpoint, Iran has the world's largest Shiite community. But it should also be noted that this community constitutes a minority branch of Islam. On the other hand, Iran--*ex aequo* with Turkey--is the world's fifth largest Muslim country. When one notes that none of these six states is an Arab country, it becomes clear why, while a member of the Organisation of the Islamic Conference ('OIC'), Iran, with its predominantly Persian-speaking population, is not a member of the Arab League. Finally, geographically, Iran is a country located in Asia--and not in the inaccurate, approximate and undeterminable area called 'Middle East and North Africa'. [FN1]

When envisaging the relationship between any given state and the Court, it is fundamentally important to understand the institutions as well as the psychology of the mode of government of that state. This applies to the case of the Islamic Republic of Iran ('IRI'), where any attempt either to block or facilitate the ratification of the Statute operates under a particularly complex constitutional and institutional setting. International law is thus not self-sufficient in this context and cannot be studied in total detachment from municipal law. This is particularly the case of international criminal law, as embodied by the ICC Statute, which, beyond creating a treaty-based organization, is one that places the emphasis on the interaction between international and municipal law, in particular by virtue of the principle of complementarity.

To better explain any position that Iran may adopt vis-à-vis the Statute, the article first conducts a brief review of the constitution of the IRI (Part 2), followed by a discussion of Iran's position vis-à-vis the Statute (Part 3), in order to point to the problems that the possible incorporation of the Statute into Iranian national law may raise (Part 4).

2. The Constitution of the IRI [FN2]

Following the collapse of the Imperial Government of Iran during the 1979 revolution, the country called Iran witnessed the emergence of the IRI. Institutionally, this new system of government represents a fundamental change, since it corresponds not only to the end of a 3,000-year-old monarchic system, but also to the birth of a theocratic system deeply rooted in the revolutionary aspirations that brought it into existence.

A. A Theocratic System

In the spring of 1979, after the collapse of the Imperial Government of Iran, a referendum resulted in the abolition of the 1906 monarchic constitution and the approval of the Islamic Republic as a form of government, which in turn led to the adoption of the constitution of the IRI (‘Constitution’). Reflecting the politico-religious vision conceptualized under the leadership of Ayatollah Ruhollah Khomeyni, the Constitution was amended in July 1989. Beyond officially renaming the country--from Iran into the IRI--and stating that the Shiite twelver *Ja'fari* school is the official religion of the country, [FN3] the Constitution makes the system of government of Iran a theocratic one.

Throughout the Preamble of the Constitution (‘Preamble’), multiple references are made to the Islamic *Ommat* (i.e. Nation of Islam) and the Islamic Government. The Preamble states that government is the fulfilment of the political ideals of a nation with a common ideology and religion, with the final aim of moving towards God. In this broader framework, the mission of the Constitution is to create those conditions necessary for the development of human beings in accordance with the values of Islam.

The Preamble also explains that as all legislation shall follow the *Koran* and the traditions of the Prophet, a scrupulous supervision must be exercised by the just *Faqihs* (i.e. persons who have studied the *Shari'a*). [FN4] Hence the necessity of leadership by a *Faqih* who, during the occultation of *Hazrat-e Vali-e Asr* (Shiites' Imam of Time, who disappeared in the ninth century, and is expected to return), shall exercise the leadership of the Islamic *Ommat* in the IRI. [FN5] In sum, Ayatollah Khomeyni's idea, as enshrined in the Constitution, was that the legislative, executive and judicial functions shall be exercised under the *Faqih*'s politico-religious leadership of the Islamic *Ommat*. [FN6]

In this context, according to the Preamble, the executive power must work towards the creation of an Islamic society, by implementing Islamic rules. Likewise, the judiciary is of vital importance for the safeguarding of peoples' rights as well as preventing any deviation within the Islamic *Ommat*.

The Constitution also provides that the IRI is based on the belief in principles such as ‘the One God, His exclusive sovereignty and right to legislate and the necessity of submission to His command’: ‘Divine revelation and its fundamental role in expressing the law’; ‘the concept of resurrection’; ‘the return to and path towards God’; ‘the justice of God in the creation and legislation’; and ‘the *Faqih*'s perpetual *Ejtehad*’ (i.e. logical deduction on a legal or theological question) on the basis of the *Koran* and the traditions of the Innocents (i.e. the Prophet, his daughter and the 12 Imams). [FN7]

Essentially, all laws and regulations, including the Constitution itself, must be based on Islamic criteria and principles--a matter to be assessed by the *Showraye Negahban* (i.e. Guardian Council). [FN8]

B. A Sui Generis *System*

The IRI resembles closely a presidential regime, where the President, who must be faithful to the principles of the Islamic Republic and Shiite Islam, is elected from among distinguished religious and political personalities, by direct popular vote, for a four-year mandate, renewable once. [FN9] The President, who is the Head of the Council of Ministers, is assisted not by a Prime Minister and his cabinet, but by various vice-presidents/deputies and ministers. [FN10] He signs international treaties after the approval of the *Majles*. [FN11] As for the IRI's unicameral Legislative Power, it is the representatives, elected by popular vote, who carry it out in the *Majles-e Showraye Eslami*--literally, the Islamic Consultative Assembly (*'Majles'*). [FN12] Finally, there is the Judicial Power, which completes Montesquieu's classical triangle of powers. [FN13]

As stated above, the system only 'resembles closely'--and not entirely--a presidential regime because of the existence of a fourth pillar in the Constitution, namely the Leader or Leadership Council. [FN14]

C. A Theocratic Sui Generis *Judicial Power*

Based on the principles that were explained earlier, the Preamble provides that the judicial system must be based on Islamic justice and administered by only judges with meticulous knowledge of Islamic law.

Here transpires another specificity of the Leadership, i.e. its power to appoint, dismiss and accept the resignation of the Head of the Judicial Power, [FN15] who is not to be confused with the Minister of Justice. Indeed, the latter is appointed by the President--following the *Majles*' vote of confidence--after having been proposed by the Head of the Judicial Power, who is appointed by the Leadership, for a period of five years, [FN16] i.e. for a period longer than that of a single Presidential mandate. In practice, the Minister of Justice and the Head of the Judicial Power exercise different functions. [FN17]

Among the penal functions of the Judicial Power, one can refer to the implementation of Islamic penal provisions, including those that are mentioned in the *Koran*, which is based on God's revelation to His Prophet Mohammed, such as *Hodood*. [FN18] Should the provisions in question not be found in codified law, judges must then have recourse to either authoritative and reliable Islamic sources or *Fatwas* (i.e. legal opinion), or both. [FN19]

In any event, judges shall refrain from implementing government decrees and regulations that are contrary to, inter alia, Islamic rules. [FN20]

3. Iran's Ambivalence vis-à-vis the ICC Statute

Iran had an active presence at various stages of the elaboration of the Statute. At the UN Diplomatic Conference on the Establishment of an International Criminal Court, held in Rome on 15 June--17 July

1998 (‘Rome Conference’), it held the Presidency of the OIC, while it also held the temporary Presidency of the Asian Group, as well as being the coordinator of the Non-Aligned Movement. [FN21]

Like many states, Iran has an ambivalent position vis-à-vis the Statute, ranging from enthusiastic support to open scepticism.

A. Support for Jurisdiction over the Crime of Aggression and War Crimes

Both academics and officials of the Iranian Ministry of Foreign Affairs and the Judicial Power have continuously stated their particular interest in the Court's jurisdiction over the crime of aggression as well as war crimes. [FN22] In particular, on 17 June 1998, at the Rome Conference, the Deputy Foreign Minister of the IRI indicated that his delegation favoured the inclusion of the crime of aggression, and the ‘serious violations of the laws and customs applicable in international armed conflicts, and grave breaches of the Geneva Conventions', alongside the crime of genocide. [FN23] Later, in the year 2000, the importance of the inclusion of provisions on war crimes and the crime of aggression was re-emphasized by Ayatollah Yazdi, the Head of the Judicial Power. [FN24]

This omnipresent focus on these two crimes has a psychological background deeply rooted in Iraq's invasion of Iran on 22 September 1980, which, by the time a ceasefire was agreed on 17 July 1988, had resulted in one of the longest and costliest international armed conflicts of the 20th century between two states. In the broader geopolitical context, this was about a very young revolutionary theocracy which perceived the invasion of its international borders as the manifestation of support provided by major powers to the secular government of Iraq in order to fight a theocratic system whose enthusiasm to export its political and religious values was only equalled by its capacity to sustain high-level casualties to fulfil that enthusiasm, or, as it was said during that armed conflict, to ‘drink the beverage of martyrdom’ [FN25]--hence the ‘Imposed War’ in the official terminology of the IRI.

A unique historical feature of that armed conflict--with a death toll ranging from 500.000 to a million and war-handicapped ranging in the millions-- is its unenviable record of the first-time use of the nerve agent Tabun. This weapon and mustard gas were used on a widespread and systematic basis by special Iraqi combat formations against Iranian armed forces, resulting in the fatal contamination of more than 100.000 army personnel, not to mention the civilian casualties. [FN26] Another characteristic of that armed conflict was the use of ballistic missiles which, due to their relative imprecision, were intended often at wreaking havoc in civilian areas by destroying civilian targets. According to Charles Duelfer, the Special Advisor to the Director of Central Intelligence, during the Iran--Iraq war, 516 Soviet Scud warheads were fired by the Iraqis. [FN27]

But Iran also remains actively interested in the jurisdiction of the Court over the crime of aggression which, according to officials from both the Ministry of Foreign Affairs and the Judicial Power, is ‘the most important international crime’. [FN28] This, too, can be traced back to the Iran--Iraq war where the UN Security Council did not respond favourably to the IRI's repeated request to make the finding that Iraq had initiated and was leading a war of aggression. This frustration became even more apparent when the only such finding was made by the Secretary-General--and not by the Security Council--in a report addressed to the Security Council, but more than three years after the end of the eight-year-long armed conflict. [FN29] If one recalled that during those three years, a whole new invasion by Iraq--this time, of Kuwait--had occurred and been repelled, with the very active posture adopted by the Security Council, in particular with regard to the crime of aggression, this frustration of the IRI would become even more perceptible.

Finally, during Saddam Hussein's hearing of preliminary charges before a Judge of the Iraqi Special Tribunal on 1 July 2004, the total absence of any charge regarding crimes committed against Iranians--be it the crime of aggression or war crimes--in the context of the Iran--Iraq war was the epilogue of Iran's failed efforts to have that international armed conflict provided at least some consideration--however diluted--in the realm of international criminal law. [FN30]

Today, Iran views the Statute, in particular the crime of aggression, as a tool against domination by militarily superior powers. [FN31]

Following the same line of thought, one is able to understand why, during the Rome Conference, after indicating that the Court 'should be free from the influence and interference of political organs', the Deputy Foreign Minister of Iran appeared to oppose referrals and possibly deferrals by the Security Council--at least in the context of the crimes of aggression--as well as the Prosecutor's *proprio motu* powers. [FN32] He further indicated that 'the responsibility of the Security Council under the Charter to determine the existence of aggression should in no way undermine the role of the Court in judicial ascertaining of the existence of a crime' and that 'the determination of the crime aggression should thus rest with the International Criminal Court and States should have the right to refer the crime to the Court'. [FN33]

In 1999, the Iranian Representative before the Sixth Committee reiterated the same approach, indicating further that on the substance, the GA Res, 3314 of 14 December 1974 'ought to be a basis for discussion'; later, in 2001, the same representative expressed hopes that the definition of the crime of aggression would be approved during the first review conference in 2009. [FN34]

B. Iran's Concerns about the ICC Statute

Like most states, the IRI supported the concept of complementarity. [FN35] However, some of its academics suggest that if this concept were to be tested in the case of Iran, problems could possibly arise. Accordingly, they argue that there is no correspondence between its judiciary and international standards, without further elaborating on this issue. [FN36]

Another issue is capital punishment, to which Iran attaches great importance. In this regard, the IRI was instrumental in the wording of Article 80 of the Statute on 'non-prejudice to national application of penalties and national laws', in order to ensure that the existence of the capital punishment in the *Shari'a* is not in contradiction with the Statute. [FN37]

Considering all aspects of the ratification of the Statute, academics and officials have been questioning two issues. They include Article 7 of the Statute, on crimes against humanity, and problems that potentially arise from the scarcity of Muslim Judges at the Court.

1. Crimes against Humanity and the Shari'a

Crimes against humanity are generally seen as the category of crimes most explicitly linked to violations of human rights, as such. And it is in the realm of the latter that the IRI has encountered some of its most serious differences with Western democracies. This has been recognized openly by Iranian officials and academics, some of whom attribute it to the difference of interpretation that, in their view, 'necessarily' exists between the international community's interpretation of human rights-related issues and the understanding and interpretation that 'some countries' have their own municipal law. [FN38] Some Iranian officials see a fundamental problem in the fact that there are many diverging views as to the definition of crimes against humanity. [FN39] For example, they refer to the comparison between Islamic penal laws and the provisions contained in the Statute, and the problems of definition that 'are always the consequence of the mono-cultural view of these definitions'. [FN40]

The example they often cite is that of penalties arising out of the application of the *Shari'a*, such as whipping, stoning and the sectioning of limbs which, they recognize, are regarded by international lawyers as torture and sometimes inhumane acts. [FN41] According to the same officials and academics, assimilating these penalties to torture as a crime against humanity becomes even more crucial when one considers the fact that the word 'attack' in the chapeau elements of Article 7 of the Statute encompasses also situations in which there is no armed conflict; and that the use of the terms 'widespread' and 'systematic' is alternative, despite some attempts made during the Rome Conference to present them cumulatively. [FN42] Therefore, both the open definition of the term 'attack' and the alternative character of the words 'widespread' and 'systematic' may, 'in certain conditions, create problems for certain countries', they argue. [FN43]

Another area of concern expressed by the IRI is the question of 'minorities', which has been on the agenda of the UN High Commissioner for Human Rights for years, as acknowledged by academics and officials. [FN44] Depending on the meaning attributed to the term 'minorities', some might argue that aspects of persecution as crime against humanity may arise in certain contexts. In the case of Iran, according to the Senior Adviser of the Bureau of Human Rights of the Ministry of Foreign Affairs, while the concerns expressed by international organizations relate primarily to freedom of religion, they also include ethnic, political, cultural and gender issues. [FN45]

In fact, it is the same Senior Adviser who best summarizes these problems. According to him, since the inception of the IRI, a number of human rights-related situations have been on the agenda of international organizations, in particular the UN General Assembly, the High Commissioner for Human Rights, and the European Parliament. He further suggests that should Iran ratify the Statute and should the 'current situation continue', there is a 'strong likelihood' that they would be 'considered' by the Court, according to the following sub-paragraphs of Article 7(1) of the Statute: (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) gender-related crimes: (h) persecution; and (i) enforced disappearance of persons. [FN46]

In this context, the reasons behind Iran's concerns in relation to crimes against humanity become more clear. Generally, there is concern that the *Shari'a* could be questioned, if an when envisaged in this field.

Likewise, one can also understand Iran's successful positioning on behalf of the OIC, which, according to the Adviser of Ayatollah Yazdi, clarified the fact that the word 'gender' (which also appears as a ground under the crime of persecution) is to be understood as 'male and female and it will have no other meaning', thereby excluding homosexuality as a gender-related ground. [FN47]

2. Judges of the Court and the Shari'a

The scarcity--and *a fortiori* absence--of individuals from Muslim countries among the Judges of the

Court is a concern expressed by the IRI. Some of its academics and officials are of the opinion that this may present two types of problems, both of them having implications for the *Shari'a*. On the one hand, it is feared that non-Muslim Judges may not be familiar with or sensitive to the *Shari'a* principles and that, consequently, justice may not be carried out as it should be. [FN48] On the other hand, there is the theological issue of principle, which is posed in the case where a Muslim is judged by non-Muslim Judges; this, Iranian academics suggest, should be answered by recourse to the opinion of the *Olama*. [FN49]

This dual problem arising from the absence of Muslim Judges is, paradoxically, an additional reason for Iran to both consider the ratification of the Statute and hope that it be joined by more Muslim countries, so that they can also contribute to bring the *Shari'a* legal thinking into an environment composed of the common-law and civil-law systems. However, regarding the qualifications, nomination and election of Judges, while Article 36(8)(a)(i) of the Statute mentions the ‘representation of the principal legal systems of the world’, it does not provide for the religious background of the Judges as a criterion for election. Nevertheless, considering the fact that the overwhelming majority of Muslim countries are in Africa and Asia, it is possible to think that Article 36(8)(a)(ii) on ‘equitable geographic representation’ is the main provision that would contribute to ensure that Judges versed in the *Shari'a* are elected. [FN50]

4. Problems that May Arise in Connection with the Possible Incorporation of the ICC Statute into Iranian Law

With regard to international law and the hierarchy of norms, Iran appears to have a dualist system. As stated earlier, the President signs international treaties after the approval of the *Majles*, while all international conventions and agreements must be approved, i.e. ratified by the *Majles*. [FN51] In other words, the *Majles* intervenes at both ends of the signature and ratification process: it authorizes the President to sign international instruments, following which it still remains for the *Majles* to ratify them.

In the case of the Statute, the first stage has been implemented so far. Indeed, together with Israel and the United States of America, the IRI was the last state to sign the Statute on the 31 December 2000 deadline set forth in Article 125(1) of the Statute.

However, matters do not necessarily end at this stage, since the Guardian Council can still intervene for the purpose of ensuring conformity with Islamic laws and the Constitution. In this regard, it is noteworthy that it is the majority of the six *Faqihs* alone who will determine the compatibility of the laws passed by the *Majles* with Islamic principles and rules. It is the majority of all 12 members of the Guardian Council which determines the compatibility of the same laws with the Constitution. [FN52] Finally, any time the Guardian Council finds that a proposed bill of the *Majles* contradicts the *Shari'a* or the Constitution, and the *Majles* is unable to meet the expectations of the Guardian Council, the *Majma'e Tashkhis-e Maslehat-e Nezam* (i.e. the Exigency Council), whose members are appointed by the Leadership, shall meet, at the request of the Leadership. [FN53] These mechanisms may be better understood when one recalls the religious spirit of the Constitution in general, and the particular place that the *Shari'a* occupies in the penal vision of the IRI.

From a non-religious viewpoint, it is noteworthy that the Iranian Representative before the Sixth Committee indicated in 1999 that progress of work on the definition of the crimes of aggression ‘would encourage the ratification of the Statute’. [FN54] It remains to be seen to what extent the incorporation of the definition of this crime into the Statute will play a role in Iran's ratifying the Statute.

Finally, in the summer of 2002, Iran informed the Security Council that ‘studies were underway [in Iran] with a view to presenting [the Statute] to the Parliament for ratification’. [FN55]

Overall, the creation of the ICC has generated spirited debate among the academics and officials of the IRI who have openly manifested their interests in this topic. Perhaps it is the speech given in the year 2000 by Ayatollah Yazdi, that encapsulates best the IRI's ambivalence vis-à-vis the Statute. He very clearly indicated his interest in the establishment of the Court, which, according to him, constitutes a ‘turning point’ in history. [FN56] Emphasizing that Iran in particular and Islam in general possess the ‘finest legal sources', and that its assertions are based on divine ‘revelation’ and therefore ‘unmistakable’, Ayatollah Yazdi added that while not all provisions of the Statute are necessarily ‘correct’, it was nonetheless important to discuss them so that those who think that ‘joining’ the Statute is harmful could view the relevant problems in a broader frame and look into the future. [FN57]

Endnotes:

[FNa1]. Diplôme d'études approfondies de Droit International, Robert Schuman University, Strasbourg; Legal Adviser, Presidency, International Criminal Court (ICC); formerly Associate Legal Officer for the *Milos evi* case, Trial Chamber III, International Criminal Tribunal for the Former Yugoslavia. The views expressed in this article are those of the author in his personal capacity and not necessarily those of the ICC or of the United Nations. The author wishes to express his gratitude to Safinaz Jadali for her assistance; hiradabtahi@yahoo.ca.

[FN1]. For example, while, in its listing of the States Parties to the Statute, the Coalition for the ICC utilizes the UN General Assembly Groupings, it also provides another list, which is based on the previous list, but which it has ‘slightly modified’, by placing together some Western Asian and North African countries in the ‘North Africa/Middle East’ grouping on the one hand, and by placing the rest of Asian countries in ‘Asia/Pacific Islands'. As a result, two of Iran's close neighbours, Afghanistan and Tajikistan, with which Iran shares the same language (Persian) and have a common historical heritage, end up in the Asia/Pacific Islands group, while Iran is grouped with countries such as Morocco and Algeria, which are located in the north-west of Africa; this is as logical as keeping, for example. Austria and Switzerland in the Western European and Other States group, while placing, say, Germany and Belgium in the Latin-American and Caribbean States group; see
http:// www.iccnow.org/countryinfo/RATIFICATIONSbyRegion.pdf (visited 15 April 2005).

[FN2]. Note on translations from Persian into English: the author has noted that, at times, the various translations of the Constitution of the Islamic Republic of Iran from Persian into English differed under both a secular and religious approaches. Therefore, the religious terms used in the Constitution appear as such--not translated--in this paper, accompanied by the author's own explanations. For a comparative approach, see the following useful translations: http://www.iranologyfo.com/low-e01.htm; http:// www.oefre.unibe.ch/law/icl/ir00000_html (visited 15 April 2005) and
http:// www.salamiran.org/IranInfo/State/Constitution/ (visited 15 April 2005). Furthermore, the author refers to a number of articles that can be found in a book which exists only in Persian; therefore, quotations from this book are the author's own translation.

[FN3]. Article 12 of the Constitution. It should also be noted that Art. 13 of the Constitution provides that Zoroastrian, Jewish and Christian Iranians shall be the only recognized minorities of the country, while

Art. 64 of the Constitution provides that of the 270 deputies of the Islamic Consultative Assembly, the Zoroastrians and Jews shall have one representative each, Assyrian and Chaldean Christians collectively shall have one representative, and the Armenian Christians of the south and the north shall each have one representative.

[FN4]. Primarily legal, the *Shari'a* constitutes in fact a whole, encompassing the religious, political, social, domestic and private life. Traditionally, it is made of two sets of regulations: worship/rituals and legal/political.

[FN5]. Article 5 of the Constitution.

[FN6]. The exact wording in the Constitution is *Velayat-e Faqih*, *Velayat-e Amr va Emamat-e Ommat*; see Art. 57 of the Constitution.

[FN7]. Article 2 of the Constitution.

[FN8]. Articles 4, 72, 91 and 94 of the Constitution. Of interest to this study is the composition of the Guardian Council: of its 12 members, six *Faqihs* are selected by the Leadership, while the other six members are jurists who are elected by the *Majles*, after having been nominated, from among Muslim jurists, by the Head of the Judicial Power (Art. 91 of the Constitution).

[FN9]. Chapter IX of the Constitution (Arts 113-151) addresses the Executive Power, Arts 113-115.

[FN10]. Articles 134 and 124 of the Constitution.

[FN11]. Article 125 of the Constitution.

[FN12]. Chapter VI of the Constitution (Arts 62-99) addresses the Legislative Power.

[FN13]. Chapter XI of the Constitution (Arts 156-174) addresses the Judicial Power.

[FN14]. Chapter VIII of the Constitution (Arts 107-112) addresses the Leader or Leadership Council. Elected by the *Majles-e Khobregan* (i.e. Assembly of Experts), the Leader is a person whose most essential qualification is in *feqh* (i.e. science of the *Shari'a*) and politics, followed by other requirements, such as justice and piety necessary for the leadership of the Islamic *Ommat* (Art. 109 of the Constitution). Apart from its religious qualification, what makes the Leadership special is its position and powers. Indeed, not only the President is the highest official only after the Leadership, but he is also responsible for implementing the Constitution and acting as the Head of the Executive Power, except in matters directly concerned with the Leadership (Arts 60 and 113 of the Constitution). Thus, the Leadership is responsible for, inter alia, delineating the general policies of the IRI, assuming supreme command of Armed Forces, or declaring war and peace (Art. 110 of the Constitution).

[FN15]. Article 110 of the Constitution.

[FN16]. Articles 160 and 157 of the Constitution.

[FN17]. The former is responsible for matters concerning the relationship between the Judicial Power and the Legislative and Executive powers, while he may also be delegated financial, administrative and human resources-related functions (excluding Judges): Art. 160 of the Constitution. As for the Head of the Judicial Power, he is a *Mojtahed* (i.e. doctor and expert in theology, who is qualified to solve legal or theological questions), responsible for establishing the structure of the judiciary, drafting judicial bills appropriate for the Islamic Republic, and the Judges' employment-related functions, such as appointment and dismissal (Art. 158 of the Constitution).

[FN18]. Article 156 of the Constitution. *Hodood* means ‘borders'; consequently, whoever crosses them is subject to the ‘Had’ (i.e. penalty), which the *Shari'a* determines in function of each crime.

[FN19]. Article 167 of the Constitution.

[FN20]. Article 170 of the Constitution. Both press and political offences can be prosecuted, the latter being determined by law, in accordance with Islamic criteria and principles.

[FN21]. See J. Zarif, *Speech*, in Es-haag Alehabib, *Divan-e Keyfari-e Beynolmelali va Jomhoori-e Eslami-e Iran* (Teheran: Institute for Political and International Studies, Ministry of Foreign Affairs, 2000, available only in Persian) (‘Zarif’), 17.

[FN22]. See, e.g. Statement by Dr Saeid Mirzaei Yengejeh, Representative of the Islamic Republic of Iran before the Sixth Committee on Agenda Item 153 Establishment of an International Criminal Court, New York, 22 October 1998; Statement by Dr Saeid Mirzaei Yengejeh, Representative of the Islamic Republic of Iran before the Sixth Committee on Agenda Item 153 Establishment of an International Criminal Court, New York, 20 October 1999 (‘Yengejeh Statement of 20 October 1999’); Statement by HE Mr Seyed Mohammad Hadi Nejad Hosseinian, Ambassador and Permanent Representative of the Islamic Republic of Iran to the United Nations Before the fifty fourth session of the General Assembly on Agenda Item: 154 United Nations Decade of International Law, New York, 17 November 1999 (‘Nejad Hosseinian’); Statement by Dr Saeid Mirzaei Yengejeh, Representative of the Islamic Republic of Iran before the Sixth Committee on Agenda Item 164 Establishment of the International Criminal Court, New York, 12 November 2001 (‘Yengejeh Statement of 12 November 2001’), available online at: http://www.iccnow.org/countryinfo/northafricamiddleeast/iran.html (visited 25 April 2005).

[FN23]. Statement by HEM Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran, 17 June 1998, available online at: http:// www.un.org/icc/speeches/617ira.htm (visited 25 April 2005) (‘Zarif Satement’).

[FN24]. See Ayatollah Mohammad Yazdi, ‘Speech’, in Es-haag Alehabib, *Divan-e Keyfari-e Beynolmelali va Jomhoori-e Eslami-e Iran* (Teheran: Institute for Political and International Studies, Ministry of Foreign Affairs, 2000, available only in Persian) (‘Yazdi’), 13.

[FN25]. Concerning the IRI's perception of the pro-Saddam Hussein position of the Security Council with regard to both the crime of aggression and war crimes during the Iran--Iraq war, see Zarif, *supra* note 21, 18-19.

[FN26]. Between 1984 and 1988, nine reports from specialists dispatched by the Secretary-General to investigate allegations concerning the use of chemical weapons were issued, all of them confirming such allegations. During the same period, the Security Council issued a number of resolutions deploring the use of such weapons.

[FN27]. Perhaps what summarizes most appropriately the above is the following finding of Charles Duelfer: ‘Senior Iraqis have said that it was their firm conviction that the use of ballistic missiles and chemical munitions saved them in the war against Iran. Missiles allowed them to hit Iranian cities and chemical munitions (101,000 used) countered the Iranian “human wave” attacks', Comprehensive Report of the Special Advisor to the DCI on Iraq's WMD, 30 September 2004, Volume II of III, 81-91, available online at: http:// www.cia.gov/cia/reports/iraq_wmd_2004/ (visited 25 April 2005).

[FN28]. See Zarif, *supra* note 21, 19; and Seyyed Ahmad Mir Hejazi, *‘Ghavanin-e Jazayi-e Jomhoori-e Eslami va Asasname Divan-e Keyfari-e Beynolmelali’*, in Es-haag Alehabib, *Divan-e Keyfari-e Beynolmelali va Jomhoori-e Eslami-e Iran* (Teheran: Institute for Political and International Studies, Ministry of Foreign Affairs, 2000, available only in Persian) (‘Mir Hejazi’), 340.

[FN29]. *Further Report of the Secretary-General on the Implementation of Security Council Resolution 598* (1987), S/23273, 9 December 1991.

[FN30]. Even if these charges were to be brought later during the trial, the fact that they were not brought up during the preliminary hearing has, in and of itself, symbolic value. Iran's deep frustration acquires an even more blatant dimension when one recalls that among the seven charges read out to Saddam Hussein, at least one related to events directly linked to the Iran-- Iraq war. Indeed, the charge of using mustard gas and the nerve agent Tabun against Iraqi Kurds in *Halabja* in 1988 is in fact about an act that occurred during the Iran--Iraq war, where Iraq's Kurdish combatants were accused by Baghdad of providing material and intelligence support to the troops of the IRI in that Kurdish region of Iraq. But *Halabja* itself occurred at a time where the *Anfal* campaign began to unfold in 1988, the last year of the Iran--Iraq war. This campaign, which consisted of the displacement of over 100,000 Iraqi Kurds through massive use of chemical weapons by Iraq, was itself another of the seven charges brought against Saddam Hussein. (It is also important to mention the charges regarding the repression of the Iraqi Shiite Arabs, who were continuously called upon by Ayatollah Khomeyni to overthrow Iraq's Ba'thist secular Republic.) In a broader context, chronologically, the chemical weapons used against Iraqi Kurds had been already tested successfully against the Iranians from 1984 to 1988. Notwithstanding this, no mention was made of the Iranian victims of that armed conflict's chemical conflagration.

[FN31]. This is reflected in the 1999 statement of the Permanent Representative of the IRI before the Fifty Fourth Session of the General Assembly, indicating that ‘it is crystal clear that in a well-organized world system based on the rule of law, decentralized reaction to possible cases of violation of norms and principles of international law cannot be permissible .... Obviously, the very nature of unilateral measures of a punitive character, which has unfortunately been on the rise in recent years, is detrimental to the cause of promotion of and respect for the principles of international law’, Nejad Hosseinian, *supra* note 22. See also Seyyed Sadegh Kharrazi, ‘Speech’, in Es-haag Alehabib, *Divan-e Keyfari-e Beynolmelali va Jomhoori-e Eslami-e Iran* (Teheran: Institute for Political and International Studies, Ministry of Foreign Affairs, 2000, available only in Persian), 4.

[FN32]. Zarif Statement, *supra* note 23.

[FN33]. *Ibid*.

[FN34]. Yengejeh Statement of 20 October 1999, *supra* note 22 and Yengejeh Statement of 12 November 2001, *supra* note 22.

[FN35]. Although the wording of its Deputy Foreign Minister on ‘situations where domestic trial procedures are ineffective or unavailable’ did not include the word ‘unwilling’; Zarif Statement, *supra* note 23.

[FN36]. Es-haag Alehabib, ‘*Divan-e Keyfari-e Beynolmelali dar yek negah: zarooratha va negaraniha*’, in *Es-haag Alehabib, Divan-e Keyfari-e Beynolmelali va Jomhoori-e Eslami-e Iran* (Teheran: Institute for Political and International Studies, Ministry of Foreign Affairs, 2000, available only in Persian) (‘Alehabib’), 358.

[FN37]. Mir Hejazi, *supra* note 28, 342.

[FN38]. Alehabib, *supra* note 28, 360-361.

[FN39]. Zarif, *supra* note 21, 19.

[FN40]. *Ibid*.

[FN41]. Alehabib, *supra* note 36, 362; and Mostafa A'layi, ‘*Divan-e Keyfari-e Beynolmelali, Hoghough-e Bashar va Barrasi-e Mas'aleye Elhagh*’, in Es-haag Alehabib, *Divan-e Keyfari-e Beynolmelali va Jomhoori-e Eslami-e Iran* (Teheran: Institute for Political and International Studies, Ministry of Foreign Affairs, 2000, available only in Persian) (‘A'layi’), 403.

[FN42]. Alehabib, *supra* note 36, 362.

[FN43]. *Ibid*.

[FN44]. *Ibid.*; and A'layi, *supra* note 41, 405.

[FN45]. A'layi, *supra* note 41, at 399 and 408.

[FN46]. *Ibid.*, 408-409.

[FN47]. Hejazi, *supra* note 28, 339.

[FN48]. Alehabib, *supra* note 36, 358.

[FN49]. *Ibid.*, 359.

[FN50]. In this regard, it is noteworthy that, of the 97 States Parties to the Statute in December 2004, 17 were members of the OIC, with the following geographic representations: one from the Eastern European States group-- Albania; one from the Latin-American and Caribbean States group--Guyana; three from the Asian Sates group--Afghanistan, Hashemite Kingdom of Jordan, Tajikistan; and 12 from the African States group--Benin, Burkina-Faso, Djibouti, Gabon, Gambia, Guinea, Mali, Federal Republic of Nigeria, Senegal, Sierra Leone and Uganda. Finally, one could also add Bosnia and Herzegovina and the Central African Republic, which have an observer status in the OIC. In addition, in these 17 countries, Muslims constituted the minority of the population in four States (Benin, Gabon, Guyana and Uganda); half of the population in two States (Burkina-Faso and Nigeria); and the majority of the population in the other 11 States. For more information, see http://www.oic-oci.org/ (visited 25 April 2005).

[FN51]. Articles 125 and 77 of the Constitution.

[FN52]. Article 94 of the Constitution.

[FN53]. Article 112 of the Constitution.

[FN54]. Yengejeh Statement of 20 October 1999, *supra* note 22.

[FN55]. Statement by HE Mr Mohammad H. Fadaifard, Ambassador and Chargé d'Affaires of the Permanent Mission of the Islamic Republic of Iran before the Security Council on the Situation in Bosnia and Herzegovina on 10 July 2002, available online at: http:// www.iccnow.org/countryinfo/northafricamiddleeast/iran.html (visited 25 April 2005).

[FN56]. See Yazdi, *supra* note 24, 11.

[FN57]. *Ibid.*, 12-13.

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