

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 5
(31 May 1995)**

**Cynthia M. Bares, Lauren Bares,
Christopher Bares, and the Estate
of Robert E. Bares**

v.

Asian Development Bank

**E. Lauterpacht, Chairman
F.P. Feliciano, Member
M.D.H. Fernando, Member**

1. This is a tragic case arising out of the homicide of the Bank's Assistant General Counsel, Mr. Robert E. Bares, committed on the premises of the Bank in Manila by a person employed as a security guard there. The action is brought against the Bank by Mrs. Cynthia Bares, widow of the deceased, her two children, and the Estate of the deceased.

2. The proceedings were commenced by an Application filed with the Tribunal on 4 June 1993. The Bank agreed, as it may do under Article II, paragraph 3(a), of the Statute of the Tribunal, that the Application might be submitted directly to the Tribunal.

I. Procedural Matters

A. Applications for production of documents

3. In their Application the Applicants requested the production by the Bank of a number of documents. The Bank objected to their production on the ground that some of them related to the Bank's security arrangements and were in any event irrelevant, and that others were personnel files which should remain confidential and which were also irrelevant. The Bank noted that the Applicants' representatives had been given an executive summary of one document, a copy of the most material section of that same document, as well as a copy of another report, and that the same representatives were also given an opportunity to peruse the entire text of the principal document. As the Applicants maintained their request, the Tribunal ordered that the full texts of the various requested documents should be supplied to it so that it might judge their relevance and decide whether they should be produced to the Applicants. The Bank produced the documents to the Tribunal. The Tribunal considered them, ordered one to be produced to the Applicants and, as regards the rest, concluded that they contained nothing that could advance the Applicants' case and, therefore, decided that they need not be made available to the Applicants.

B. Request for an oral hearing and to call witness

4. The Applicants also requested an oral hearing for the purpose of introducing oral testimony from certain witnesses. The Bank opposed this request. Having considered the Applicants' summary description of the matters to which the evidence to be adduced would relate, the Tribunal concluded that the case might be properly decided on the basis solely of the written pleadings and the written evidence submitted by the parties.

II. The Facts

5. Mr. Bares was killed on 7 January 1992 in the car park of the Bank as he was leaving the Bank to drive home at the end of his day's work. His assailant was Mr. Fernando A. Macalindong, a security guard employed by Protectors Services, Inc. ("PSI"), a security firm with which the Bank had contracted for the provision of security services at the Bank's headquarters.

6. It appears that at the time that Mr. Bares was killed Mr. Macalindong, though not in uniform, had not yet mustered to go off duty, having volunteered to replace the guard at the car park while the latter went to the toilet. Mr. Macalindong was seen walking around carrying a piece of lead pipe. He encountered Mr. Bares, for whom indeed he appears to have been looking. What then ensued is not known except that Mr. Macalindong bludgeoned and stabbed Mr. Bares to death with the lead pipe and a double-edged knife. Mr. Macalindong subsequently claimed that Mr. Bares owed him money but no evidence has been produced - either in the Philippine court in which Mr. Macalindong was tried or in this Tribunal - supportive of Mr. Macalindong's assertion. Mr. Macalindong was tried for murder by a Philippine court and was convicted on 19 May 1993 of the lesser offence of homicide with the mitigating circumstance of voluntary surrender and was sentenced to a six-to-twelve-year prison term.

7. Immediately after the death of Mr. Bares the Bank commissioned a report on the matter from a consultant, Security Risks International, Inc., the purpose of which was to assemble all the information possible concerning the episode. The report was submitted to the Bank on 23 April 1992, that is, before the trial and conviction of Mr. Macalindong. The report specifically considered whether there had been any financial transaction between Mr. Bares and Mr. Macalindong. It found that there was "no evidence of any prior dealings between Messrs. Bares and Macalindong" and, on the specific question of whether there had been a transaction between the two relating to the sale of Mr. Bares's car, concluded that "a categorical answer had eluded the research team."

8. Following the death of Mr. Bares his family received US\$375,400 under a policy of life insurance to the cost of which Mr. Bares had contributed 50%, a further US\$375,400 under an accidental death and dismemberment policy the cost of which was borne entirely by the Bank, as well as US\$34,952 in severance pay, US\$5,000 for a death grant and US\$527.76 in workmen's compensation. The total payment was US\$791,279.76. In addition, Mrs. Bares and her two children became entitled to survivors' benefits under the Bank's retirement plan. On the assumptions of a 6% annual cost of living increase and corresponding adjustment of the pension benefits, and of the survival of Mrs. Bares to the actuarially determined age of 82 and of the two children to age 24, the Bank will, under this head, pay them a further US\$5,449,265. The total of the various benefits may thus, over time, yield US\$6,240,544.76.

9. Subsequently, Mrs. Bares claimed from the Bank US\$4,220,346 by way of damages in respect of the alleged liability of the Bank for the tort committed against her husband. The amount claimed was said to represent the "lost earnings that would have been earned by Mr. Bares had he not been killed." It did not take into account the payments to which the Applicants are entitled under para. 8 above. The Applicants also sought "moral damages" as well as attorney's fees and costs. The Bank rejected these claims.

III. Reasons

A. The jurisdiction of the Tribunal extends only to claims in contract

10. The Applicants presented their claim as one founded on the law of tort. That, no doubt, might have been a reasonable way to frame the cause of action had the proceedings been

commenced in a national court. However, the Bank, as an international organization, is immune from suit in national courts and, short of a waiver of immunity by the Bank (which the Applicants do not appear to have requested), the Applicants would not have been able to get such a proceeding off the ground.

11. Instead, the case has been brought against the Bank in this Administrative Tribunal. The Tribunal is not akin to one of general jurisdiction within the national sphere. Here the proceedings are controlled entirely by the Statute of the Tribunal as promulgated by the Bank. Whatever is done by or in this Tribunal can be done only in accordance with that Statute. Article II, paragraph 1, of this prescribes that the Tribunal may deal only with an application which "alleges non-observance of the contract of employment or terms of appointment" of a staff member.

12. Thus, proceedings in this forum are limited to claims in contract. When the Bank consented to the initiation of these proceedings before this Tribunal without the need to exhaust other remedies within the Bank, it did not alter the basis on which this Tribunal could proceed. Indeed the Bank could not have done so because the limitation upon the jurisdiction of this Tribunal is laid down in its Statute which is binding upon both the Tribunal and the Bank's administration.

13. The inability of the Bank within the framework of the present Statute to consent to an extension of the scope of the Tribunal's jurisdiction should not be confused with the ability of the Bank, and in this case its willingness, to permit the Applicants to bring their case to the Tribunal without exhausting the Bank's internal remedies. The agreement thus given by the Bank could be, and was, given only in relation to an action falling within the prescribed competence of the Tribunal. No suggestion has ever been made by the Applicants that they regarded the Bank's agreement as extending any further than that.

14. There was, of course, the theoretical possibility that the parties might have agreed to resort to this Tribunal not as the Administrative Tribunal of the Bank subject to its Statute but as a group of individuals who, though happening to be the Members of the Tribunal, have agreed, at the request and with the consent of the parties and, for the purposes of the particular proceedings, to act as a special tribunal or arbitral body outside the scope of the Tribunal's Statute. However, this has not been done. The proceedings have been brought in this Tribunal as the Asian Development Bank Administrative Tribunal and the case can, therefore, only be decided within the framework of this Tribunal's Statute.

15. The Applicants could also have taken the course of suing PSI, the direct employer of Mr. Macalindong, in tort in the courts of the Republic of the Philippines. The plea of immunity would not have been open to PSI. However, the Applicants have not proceeded in this way. In choosing to proceed against the Bank, the Applicants must take the Bank as they find it, a defendant exempt from suit in the local courts and open to proceedings only in this Administrative Tribunal and limited to actions for breach of the contract of employment.

16. Faced with a claim formulated in terms of the principles of the law of tort and thus falling outside the jurisdiction of this Tribunal, the Bank sought to assist the Applicants to put the proceedings on the right track by approaching the matter as if the Applicants had argued that the Bank's conduct amounted to a breach of the contract of employment between Mr. Bares and the Bank. However, the Applicants have been ambivalent in their response to this necessary realignment of the case. Though acknowledging in their Reply that the "claim presented in this Application is based on the contractual duty of the Respondent to provide a safe working environment for its employees", they have nonetheless adhered to the language and concepts

of the law of tort, justifying this by the assertion that "[s]ome of the elements of this claim are linked to tort concepts because a wrongful death resulted from the breach of contract that forms the basis of this claim." Thus, the Applicants have developed lengthy arguments relating to the vicarious liability of the Bank and to the extent of its entitlement to delegate to an outside contractor the task of providing security services at the Bank's headquarters. As concepts strictly forming part of the law of tort, these elements cannot contribute to the establishment in this Tribunal of any liability on the part of the Bank. The Tribunal must, therefore, leave them out of account. But there are other aspects of the Applicants' arguments which relate as much to contractual responsibility as they do to tortious liability. Examples are the procedure by which the Bank chose PSI and the manner in which PSI carried out its duties. To the extent that these arguments can be related to contractual duties of the Bank, the Tribunal has jurisdiction and will give them due consideration.

17. The Applicants have also introduced extensive arguments based upon authorities relating to the responsibility of States in public international law for the wrongful acts of officials causing injury to aliens. The Bank has, understandably, responded to the case as presented by the Applicants in all its detail - even to the extent of answering the non-contractual elements in the Applicants' case. But the Tribunal cannot pursue these arguments. The Tribunal is not authorized to assess the international responsibility, tortious or otherwise, of an international organization on the plane of public international law, especially at the instance not of another person of comparable international standing, but rather upon the initiative of an aggrieved individual. The function of this Tribunal is much more limited.

B. The nature and extent of the contractual liability of the Bank

18. This Tribunal has to determine whether the death of Mr. Bares at the hands of a security guard operating on the Bank's own premises involves a breach of contract on the part of the Bank. The Tribunal must, therefore, identify the relevant contractual terms.

19. Looking at this case in terms of contract and contract alone, the Tribunal must consider whether there was some failure on the part of the Bank to fulfill an obligation expressly or impliedly laid down in the contract of employment properly interpreted and applied. The Applicants have understandably laid heavy emphasis upon the fact that the death of Mr. Bares was the result of deliberate homicidal conduct by a security guard employed on the Bank's premises to protect the staff of the Bank against, amongst other things, precisely the kind of attack that was made upon Mr. Bares. But the facts that the attack was deliberate, that it was made by one of the Bank's guards and that it happened on the Bank's premises do not by themselves make the Bank liable unless it can be shown that the contract between the Bank and the staff member has been broken and that that breach was the cause of the death of Mr. Bares.

20. There is no express provision of the terms of employment as derived from Mr. Bares' letter of appointment or from the other elements in the internal law of the Bank that the Bank must ensure the safety of its staff members. Any relevant term must, therefore, be an implied one.

C. The Bank's implied duty to exercise reasonable care

21. In considering the extent of the duty of an employer the Tribunal has been quite unable to find any support for the view that an employer is absolutely liable in contract to a staff member for injury suffered by the staff member whilst on the employer's premises or otherwise performing the duties of an employee. The position is, rather, that, as a matter of the general

principles of the law of employment, the Bank owes to all members of its staff a contractual duty to exercise reasonable care to ensure their safety whilst on the Bank's premises. This is the same as saying that the Bank must not be negligent in constructing, equipping or maintaining its premises, or in making provision for the personal protection of its staff members on those premises against reasonably foreseeable risks.

22. An authoritative statement reflecting this general principle is to be found within the jurisprudence of international administrative tribunals in the decision of the Administrative Tribunal of the International Labour Organization in *In re Grasshoff* (Nos. 1 and 2), Judgment No. 402 (1980). The Tribunal there stated:

"1. It is a fundamental principle of every contract of employment that the employer will not require the employee to work in a place which he knows or ought to know to be unsafe. Staff Regulation 1.2, which provides that all staff members are subject to assignment by the Director-General to any of the activities or offices of the Organization, is to be read subject to this principle. If there is doubt about the safety of a place of work, it is the duty of the employer to make the necessary inquiries and to arrive at a reasonable and careful judgment, and the employee is entitled to rely upon his judgment. It is unnecessary in this case to consider whether and in what circumstances an employee may refuse to accept an order to work in an unsafe place. It is sufficient to say that, if he accepts the order, as *prima facie* he is bound to do, and the employer has failed to exercise due skill and care in arriving at his judgment, the employee is, subject to any contrary provision in the contract, entitled to be indemnified in full against the consequences of the misjudgment.

2. This principle is to be applied with due regard to the nature of the employment. In some employments there are unavoidable risks. A doctor may have to risk infection and a soldier or a policeman to risk bombs. The question in each case is whether the risk is abnormal having regard to the nature of the employment. In a case such as the present a reasonable test (though this is only one possible criterion) might be to consider whether an insurance company could, because of the civil war in East Pakistan (as Bangladesh then was), properly demand an additional premium for cover against the risk of injury in Dacca."

23. The Tribunal recognizes that this quotation does not state in exact terms the proposition in support of which the Tribunal cites it. It is clearly authority for the proposition that an organization is not absolutely liable for injury suffered by a staff member in its service. But it necessarily follows from this that an organization is likewise not absolutely liable for injury suffered by a staff member on its premises. Rather, in both situations the obligation of the organization is only to take reasonable care.

24. The Applicants have argued in general terms that the organization has an "obligation to protect its staff" (citing A. Plantey, *The International Civil Service: Law and Management*, para. 1283, at 371 (1981) and the statement of the International Court of Justice in its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports 1949, p. 174, at p. 183). The Tribunal has no reason to question the existence of a general obligation of this nature. But that is not the same thing as saying that that obligation is absolute, so as to make the organization the insurer of the staff member even if no failure of reasonable care can be attributed to the organization itself. Indeed, the Applicants appear to accept this limitation upon the Bank's responsibility, for much of their case is aimed at establishing that the Bank has in fact been negligent.

25. True, the Bank has arranged, and in large part paid for, policies of insurance to provide compensation for its staff in the event that they suffer harm while in the Bank's service. However, this is not done in discharge of any legal liability of the Bank itself to act as insurer of its staff, but only as the action of a concerned employer anxious to make sure that its staff are protected in all circumstances, irrespective of whether any fault can be attributed to the Bank, to any third party, or even to the staff member himself. The Bank's duty is only to exercise reasonable care in every aspect of its activity that impinges or may impinge upon the safety, health and security of its staff.

26. This duty rests upon the Bank as a legal person. However, the Bank is an artificial legal person, not a natural one. It can act only through those whom it employs, whether as servants, agents or independent contractors. In selecting such persons to perform the functions with which it is charged, the Bank must of course use reasonable care to choose those who are fully capable of performing the functions for which they are employed or retained. It must, moreover, ensure that all who perform these functions themselves exercise reasonable care in doing so. Nevertheless, the Bank, having used reasonable care in the selection of its servants, agents or contractors, cannot afterwards say that it has thereby discharged the whole of its duty and is no longer obliged to see that those persons in their turn exercise reasonable care towards its staff. In short, though the Bank is free to hire a contractor to provide a service within the Bank that it might otherwise itself perform directly through its own employees, the Bank must exercise reasonable care in the selection of the contractor and then maintain a sufficiently close supervision over the latter to ensure that the latter itself uses reasonable care. The employment of a contractor does not reduce the level of care to which the staff member is entitled under the contract of employment.

27. The central points in this case are, therefore, whether the Bank has failed to exercise reasonable care; and, if so, whether such failure was the cause of the death of Mr. Bares. To these questions the Tribunal now turns.

D. Has the Bank failed to exercise reasonable care?

28. The Applicants have attempted to show that the Bank has failed to discharge its duty of care in a variety of ways.

29. The Tribunal will first consider the Applicants' contention that the Bank's selection of the contractor, Protectors Services Inc., involved a failure to exercise due care in relation to the protection of Mr. Bares. The fact that the Bank chose to discharge its duty of care in the provision of security through the employment of a local security company does not by itself support a suggestion of dereliction of duty. If the Bank had so chosen it could also have contracted out such services as cleaning, catering, maintenance of equipment, etc., provided always that recourse to such outside assistance did not adversely affect the maintenance by the Bank of the standard of reasonable care owed to its staff.

30. The same is true of the provision of security services. So long as reasonable care was used in the choice of a security company and reasonable supervision was continuously exercised to see that suitable standards were maintained by that company, no relevant fault can be attributed to the Bank. It is unnecessary for the Tribunal to follow the parties into their discussion of whether or not the Bank was obliged under Philippine law to hire the services of a security company. The only question in relation to this point is whether the Bank exercised due care in the selection of the company.

31. The Tribunal notes that the selection of PSI was not arbitrary or casual. The Bank was evidently concerned to make a careful choice of a security company, as is shown by the fact that the Bank had over the previous six years employed two other companies. In thus changing security companies the Bank was clearly aiming to maintain a reasonable standard of security or even to enhance it.

32. As to the selection process, tenders were invited from several companies. These were carefully considered in the Bank by reference to a number of factors such as the experience of the company, the numbers of personnel it proposed to allocate to the task, the equipment it intended to use, the wages that it proposed to pay its employees and its overall charges to the Bank. The Tribunal can find no evidence of any lack of care on the part of the Bank in choosing PSI.

33. The Applicants have next suggested that the Bank should have retained in the contract with PSI a right itself to appraise the personnel selected by PSI for Bank guard duty and should have imposed on PSI a duty to bring to the attention of the Bank any infractions by security personnel of the rules laid down for their conduct. While it is no doubt possible to suggest that the Bank could have been even more exacting in these respects, the Tribunal is unable to find in the contract between the Bank and PSI any defects that amounted to a failure to exercise reasonable care.

34. Nor is the Tribunal able to find in any of the more general allegations of inadequate supervision by the Bank of the provision of security by PSI anything which can reasonably be identified as demonstrating relevant lack of care on the part of the Bank.

35. The central and most important criticism by the Applicants of the conduct of the Bank relates specifically to the selection and supervision by PSI of Mr. Macalindong, the guard who was convicted of the homicide of Mr. Bares. In particular, it is said that Mr. Macalindong was not of an intellectual or psychological calibre suitable for retention as a security guard, that his security guard licence had expired some weeks before the event and that he had not obtained a new one, and that he was known to have committed a number of infractions of the rules governing the conduct of guards in that he regularly sought loans from other Bank employees, acquired supplies for resale, gambled and slept frequently in the drivers' quarters. One of these infractions was brought to the attention of the Bank's security officer in December 1991, but he decided not to impose any punishment.

36. The Tribunal will consider presently whether Mr. Macalindong's behaviour on 7 January 1992 was treated with such lack of care by the Bank as to amount to negligence. But on reviewing the matters indicated above relating to Mr. Macalindong's characteristics and behaviour during the period of his employment prior to that day, the Tribunal can find no evidence of negligence on the part of the Bank. The picture which appears from Mr. Macalindong's psychological tests (which were carried out in accordance with Philippine Government requirements) does not suggest that in capability or reliability he fell below an acceptable standard. Many regarded him as an agreeable, though occasionally persistent, individual. But there is nothing in the record to suggest that he had in him, or ever exhibited, an aggressive or violent strain that could lead him to kill someone. The Security Risks Report stated that "[w]hat may have made him capable of the violence he exhibited is still not completely understood." In the light of this conclusion, reached after a close investigation shortly after the event and with that particular episode in mind, it cannot be said that the Bank, in carrying out no more than general periodic reviews, was remiss. Nor is there any substance in

the complaint that Mr. Macalindong's security guard licence had not been renewed. In fact, PSI had applied for a new licence in good time but it had not yet been issued. There is no reason to believe that, in the normal course of events, it would not have been forthcoming.

37. The Applicants have also invoked a statement in the report by Security Risks that the Bank should have insisted that its guard force "must be held to a higher standard than others" and that it should not have tolerated approaches to staff members by security guards to sell cars, purchase goods or make loans. The Applicants rely, in particular, upon the following sentence in that report: "True, they [acts of the kind just listed] seem like small indiscretions, but the consequences can be tragic as we have seen." The Tribunal recognizes that in this respect there may be grounds for criticising the degree of tolerance shown by the Bank. To such implications as this may have, the Tribunal will return later (paragraphs 42 and following).

38. The Tribunal has carefully reviewed the narratives that have been compiled of Mr. Macalindong's behaviour on the day of Mr. Bares' death in order to assess whether any aspect of his overt conduct could have led a reasonably observant and responsible member of the security staff to anticipate that Mr. Macalindong was about to commit a crime of deadly violence. In so doing, the Tribunal bears in mind that much of the evidence is unavoidably hearsay. But even taking it at its face value, the Tribunal can find no indication that anyone could have foreseen on that day that Mr. Macalindong intended to kill Mr. Bares.

39. The Applicants have argued that the fact that Mr. Macalindong was seen carrying a piece of lead pipe around, which he described as being as good as a nightstick, was evidence of a breach of regulations which should have been observed by responsible Bank or security staff. The Tribunal cannot accept this argument. Even though this conduct may technically have been a breach of regulations, no one could reasonably regard this by itself as suspicious behaviour, especially on the part of someone with no record of, or known propensity towards, violence.

40. The Tribunal notes in this connection the view expressed in the Security Risks report:

"In evaluating the [security] coverage [at the time of the incident], it would appear more than reasonable and balanced; most of the employees should be gone by that point in the work day and the facility should be in the process of gearing down. The reader must keep in mind that the security function is primarily to maintain order and safeguard the assets, normally from external threats, and is not conditioned to expect that one of the 'protectors' will become a risk factor." (Emphasis supplied).

41. The Applicants have also contended that the general operation of the Bank's security system did not comply with the proper discharge of a duty of reasonable care. They have alleged that security factors had not been sufficiently taken into account in the design of the Bank's new building; that the functioning of security devices was unsatisfactory; that the Bank had for a long time not appointed a head of security; that the rules for the management of the Bank's security services were inadequate; that lines of responsibility were not adequately laid down; that guards were not properly trained; that personal guards were provided only for the three most senior officials of the Bank; that there was a failure within the Bank to gather security-related intelligence; and that the security guards had not received training in first aid. Without passing judgment on the correctness of these allegations, the Tribunal recognizes that in these respects it is arguable that the Bank's practices could have been improved and that therefore the required standard of diligence may not have been met.

E. Was the death of Mr. Bares due to any failure by the Bank to exercise reasonable care?

42. The Tribunal has found in respect of most of the allegations made by the Applicants that the Bank did not fail to exercise reasonable care. However, there may be a case for saying that the Bank should have been more diligent in respect of some matters (see paragraphs 37, 39 and 41 above). The Tribunal must therefore consider whether such possible failures, individually or cumulatively, could have been the cause of the death of Mr. Bares or could have contributed to it in sufficient degree to make the Bank liable in this regard. There must be a causal link between the alleged breach and the harm suffered. To use language common in this field, the loss must be such as would arise naturally from the breach, that is, in accordance with the usual course of things, or as would have been within the reasonable contemplation of the parties as a not unlikely result of that breach.

43. In this connection, the Tribunal cannot accept the conclusion reached by the security expert commissioned by the Applicants to report on the matter. He states, after referring to the alleged defects in the Bank's security system generally, that

"[t]he failure of the Asian Development Bank to meet the standard of care expected of an international financial organization in Manila was a direct causative factor in leading to the killing of Mr. Bares."

The test of whether the defects (if defects they were) in the Bank's security system were "a direct causative factor in leading to the killing of Mr. Bares" is whether this tragic episode could have been avoided if the defects had not existed. The answer is self-evidently No. None of the steps which the expert had in mind for remedying the defects that he identified could have prevented the death of Mr. Bares.

44. It is a regrettable fact - as has been shown by a number of well-known episodes -that even the most elaborate security precautions can be penetrated by a determined assailant. The attribution of responsibility in respect of such deaths has generally been on the basis of a failure adequately to deal with a known risk or category of risks to a specific individual. The risk to Mr. Bares was not of this kind.

45. In reaching the conclusion that it has not been established that the death of Mr. Bares was proximately caused by any failure on the part of the Bank to take due care, the Tribunal considers it appropriate to emphasize the following points.

46. The liability of the Bank has had to be assessed exclusively in terms of the contractual relationship between Mr. Bares and the Bank. If the jurisdiction of the Tribunal had extended to obligations in tort then consideration would obviously have been given to the question of vicarious liability.

47. In so far as assistance must be sought from general principles in the resolution of the problems raised by this case the Tribunal has had to exclude analogies derived from the law of tort as well as from the public international law of State responsibility. The Tribunal has, therefore, found no relevance in the Applicants' extended arguments based upon various national rules applicable to "tortious death" cases. Similarly, the Tribunal has not considered as relevant the materials produced by the Respondent referring to the practices of various governments in adopting special legislation to govern their own liability for the death of officials in the course of service. Likewise, the Tribunal has not considered it appropriate to follow the

Applicants into an examination of the international law authorities bearing upon the liability of States in the law of State responsibility for the conduct of their "agents" so described in non-contractual terms.

Decision

Although amendments made to the Statute of the Tribunal on 22 December 1994 (effective 1 January 1995) increased the number of Members of the Tribunal to five and also permit the Tribunal to adjudicate in panels of three, the Board of Directors of the Bank have not yet appointed the additional Members of the Tribunal foreseen in those amendments. The Tribunal has, therefore, decided that the present case should be considered and determined by reference to the Statute of the Tribunal as it stood prior to the adoption of the above mentioned amendments.:

For these reasons the Tribunal unanimously decides to dismiss the Application in its entirety.

Rider

The extraordinary circumstances of the death of Mr. Bares have inevitably added greatly to the dreadful distress and sense of loss felt by his family. The present decision leaves the family in the same financial position as if Mr. Bares had died otherwise than by the hand of one of the Bank's own security guards deliberately acting in breach of his duties within the very premises of the Bank. Notwithstanding the fact that no amount of money can diminish the sorrow of the family, the situation may be one in which the Bank will wish to consider the payment ex gratia to the family of Mr. Bares of a sum that may serve to demonstrate the Bank's sensitivity to the effect upon the family of the especially disturbing circumstances of the crime.