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Georges Abi-Saab,  
Egypt

*Member of the World Trade  
Organization Appellate Body*



Law was not Georges Abi-Saab's first choice of career. But over the last four decades, he has become an eminent figure in the field of international law, both as a professor and as a practitioner. He has also had the opportunity to serve on the bench of three different international courts: the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia, and, most recently, the World Trade Organization Appellate Body. His experience in international justice is thus both deep and broad. But of all the roles that Abi-Saab has played in his field, the one that expresses his essence is that of teacher—a teacher who has from time to time been “borrowed” by the international bench.

#### *Egyptian Beginnings*

Abi-Saab's educational career acts as a window onto his intellectual acuity and enthusiasms. Born into a Christian, French-speaking family in Egypt, his first experiences were in a Jesuit-like institution. He eventually left it for a public school attended by a broader spectrum of the Egyptian population, a transition he now considers as significant in his life.

*That change was very important for me because it gave me the occasion to be with people from other social strata, and other backgrounds—not only social but also cultural and religious.*

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As Abi-Saab approached the end of his secondary school studies, he realized that what attracted him most was philosophy. But his father convinced him that law, in the French tradition, serves as a kind of “public philosophy,” so it would be an appropriate field of study for the young Abi-Saab, who was thinking vaguely of an intellectual career. He thus entered the Faculty of Law at the University in Cairo but continued to attend lectures in philosophy at the Faculty of Arts as well.

Thus began Abi-Saab’s long and remarkably diverse years of higher education. He loved both economics and Islamic law as well as the general theory of law (jurisprudence), topics that were part of his first-year curriculum. In his second year, he was introduced to international law by a young Egyptian professor, Abdullah el-Erian, who had recently completed a doctorate at Columbia University and had a pedagogical approach that was new and fresh to Abi-Saab and his fellow students.

*The professor created a society of international law where, he said, there would be no membership fees. The only dues were to undertake a small research project. That was revolutionary, in 1951. At the time, undergraduate students didn’t go to the library or do research—they just listened to what the professor said, read the book, and took the exam. I chose as a subject for my paper the status of the Universal Declaration of Human Rights, adopted earlier, in December 1948—is it binding or not? So I went to the library and found a book by Hersch Lauterpacht, later a great judge on the ICJ. Then I went to the UN information center in Cairo, where I looked into the documents. Then I made the presentation. The professor was very happy with it and afterwards took me to the faculty room and introduced me to the other professors, saying, “This young boy has done a paper like the ones that graduate students do at Columbia!”*

This auspicious introduction to international law did not, however, result in Abi-Saab’s single-minded pursuit of it afterward. Although he did study public international law for a short while in Paris after graduating from Cairo University, he was soon enticed by a scholarship to the University of Michigan, where he enrolled instead in a doctoral program in economics.

Abi-Saab continued at Michigan for two years, during which time he also attended the international law lectures of Professor William Bishop at the law school, much as he had continued to pursue philosophy while studying law in Cairo. Professor Bishop invited him to attend a weekend colloquium on Middle East law, and he found himself correcting the speakers on points about the region that he felt they had misunderstood and on various aspects of Sharia law. A short while later, he was handed a letter by Professor Bishop. To his surprise, it contained an invitation by

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Professor Milton Katz, of Harvard Law School, who had been impressed by Abi-Saab's contribution to the colloquium discussions, inviting the young Egyptian to join the newly established international legal studies program he was directing at Harvard. This turn of events was to lead Abi-Saab definitively away from economics and toward what was to become his lifelong calling, international law.

By this time, Abi-Saab's peripatetic approach to his studies was firmly established. He moved from Michigan to Harvard, then on to Cambridge with another fellowship, where he did research for his Harvard doctoral thesis in law. From there he moved on to Geneva, where he was granted yet another fellowship to pursue a second doctorate at the Institut Universitaire de Hautes Etudes Internationales (Graduate Institute of International Studies). This last fellowship was part of a program designed for promising scholars from the Third World, a need that was recognized in the immediate postdecolonization period. Future UN Secretary General Kofi Annan was among Abi-Saab's peers in the same program.

On the verge of turning thirty, Abi-Saab realized that student fellowships would now become scarcer. He did not intend to settle abroad, but he wanted to get some international practical experience before returning home to teach. He considered taking a variety of jobs—with the UN in the Congo and with the International Atomic Energy Agency in Vienna, and he applied for a lectureship in the sociology of international law at the London School of Economics—but none of these positions seemed a perfect fit with his interests or skills, however. As he walked along Lake Geneva one day, contemplating his future, he ran into the director of the Graduate Institute. When asked why he looked so serious, Abi-Saab recounted his dilemma about the various directions in which his life could now turn. The director responded, "How about teaching here for a year while you sort things out?" This "one-year job" turned out to run for thirty-seven years, from 1963 until Abi-Saab's retirement in 2000.

*Practitioner on the Side*

The constant of Abi-Saab's professional life has been teaching, and he considers it his true calling. One often reads reference to the brilliant general course on international law that he gave in The Hague in 1987. After the final lecture, so delighted were his students that they gave Abi-Saab a standing ovation lasting a full fifteen minutes, a first in the history of the academy. He has worked with countless students over the years; the devotion with which many speak of him is a testament to his ability to act as a mentor. One has only to peruse the enormous volume dedicated to his work and ideas, published in 2001, and to which many of

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his former students contributed, to gain a sense of the influence he has had on several generations of legal scholars.<sup>1</sup>

Abi-Saab has not confined his work to the academic world, however. He has made equally significant contributions to the field of international law through his practice as an international lawyer and judge, even if these contributions have served only as a complement to his life's work. His first foray into "applied" law was in 1969, when he conducted a study for the United Nations, titled "The Respect of Human Rights in Armed Conflict." Soon afterward, he prepared another report concerning similar issues in the context of wars of national liberation. In the years to follow, Abi-Saab participated in various diplomatic conferences and scientific meetings on related issues and eventually became recognized as an expert in the field of international humanitarian law. This experience was to prove very important years later when he was elected as a judge to the first bench of the International Criminal Tribunal for the former Yugoslavia.

His initial work in international courts was not, however, as a judge but rather as counsel. Through teaching as a visiting professor in Tunisia in 1974, Abi-Saab became acquainted with the Tunisian legal community. This resulted, in 1978, in his being chosen as counsel to represent Tunisia in its case against Libya before the International Court of Justice.<sup>2</sup> When he made his pleading before the bench, it was his first formal appearance before an international court. Yet he already was acquainted with many of the well-known players in international justice, a cosmopolitan group who constituted an "invisible international bar" that can be retained by states in need of experienced international lawyers.<sup>3</sup> This group included Sir Robert Jennings, Abi-Saab's former Cambridge professor, who was soon to become a member and then president of the ICJ bench and who was also on the Tunisian team. The Tunisians were shocked when opposing counsel representing Libya approached Abi-Saab after his pleading and congratulated him warmly.

*The Tunisians thought that I had really given away the case. They didn't understand. But my first pleading went down very well. The judge ad hoc for Libya, Eduardo Jimenez de Arechaga, a very-well-known Uruguayan jurist and former president of the ICJ, told me at the end of the pleadings, "You know, the judges give an Oscar for oral pleadings; there were three nominees, but you got it!" So that was my first case.*

Abi-Saab did not seek to join the cadre of international lawyers who appeared repeatedly in cases before the ICJ in the late twentieth century. But he did serve as counsel in five or six major cases and then had the opportunity to serve twice as judge ad hoc on the ICJ: the first time in 1983 for Mali in a frontier dispute with Burkina Faso,<sup>4</sup> and the second time in

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1990 for Chad in a territorial dispute with Libya.<sup>5</sup> When asked how appearing before the ICJ bench was different from actually sitting as a judge, Abi-Saab remarks,

*I came out of the experience as a judge more respectful of the court than I had been when I saw it from the outside. Because I saw that there is a kind of a collective wisdom that prevails there and that transcends the sum of the wisdom of its individual members. A collective wisdom in spite of the fact that the court sometimes fudges issues or finds flimsy ways to get out of awkward corners. But you understand why they do it. They try to find solutions that satisfy both sides at least minimally. This is what I call “transactional justice.” But it should not be at the expense of the best legal reasoning. The court has to act as an organ of the international legal system and not merely as an arbitral tribunal in the hands of the parties. It has a duty to safeguard the integrity of the system while settling the dispute before it.*

This early judicial experience at the ICJ was to stand Abi-Saab in good stead for his later work on international courts. Perhaps the most challenging judicial work he carried out was during the early days of the ICTY. He had not intended to be an international criminal court judge and had not even known that he was nominated until another nominee asked Abi-Saab to put in a good word for him with the UN Secretary General at the time, Boutros Boutros-Ghali, a fellow Egyptian and friend of Abi-Saab's, as well as a friend of the Egyptian ambassador's to the UN. When he did so, the response of the latter was, “Why are you helping a competitor? Don't you know that the Egyptian government is thinking of you for the same position?”

Abi-Saab's immediate reaction was that he was not qualified for such a position, as he had no experience in criminal law. But the ICTY bench was to include experts in international humanitarian as well as criminal law; Abi-Saab had a wealth of experience in the former. After his election to the bench in 1993, his primary task was to sit on the Rules of Evidence and Procedure Committee. Abi-Saab explains:

*I worked very hard because I was coordinating the main work, that of the Rules Committee. And the rules are one of the tribunal's greatest achievements because it is the first detailed code of international criminal procedure. First, we had to combine elements of the adversarial [common law] and inquisitorial [civil law] systems.<sup>6</sup> Secondly, we had to adapt them to the international level. And, thirdly, we had to integrate into the rules the entire UN codex of human rights. So, it was not an easy job.*

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Abi-Saab did not remain long on the ICTY bench. After two years, he returned to teaching full time in Geneva, where he had never left off his supervision of student theses. He is pleased to have participated as an appeals judge in what he considers one of the ICTY's most, if not *the* most, significant decisions, that of the interlocutory appeal on jurisdiction in the *Tadić* case of October 2, 1995.<sup>7</sup> This case made history, as it was the first to be dealt with by the ICTY, giving place to the first interlocutory judgment and to the first appeal. Tadić's attorney tried all possible objections to the tribunal's jurisdiction, questioning the very legality of the establishment of the tribunal by the Security Council under the UN charter, as well as the applicability of war crimes in the armed conflict in question. These pleas raised issues that went to the very core of international humanitarian law and the constitutional law of the UN. Abi-Saab comments on the Appeals Chamber judgment,

*This judgment authoritatively decided two fundamental, though—until then—highly controversial questions. The first related to judicial control over the legality of Security Council acts, a highly sensitive matter, particularly in the wake of the ICJ evasive attitude on that issue in the Lockerbie case. The Trial Chamber considered the matter to be beyond its jurisdiction, and that, in any case, it was a nonjusticiable political question.*

*The Appeals Chamber reversed it on both these grounds, asserting its power to examine the question of the constitutionality of the establishment of the tribunal—which is a legal matter, though with political ramifications—not as a principal cause of action, but as an incidental preliminary question whose prior determination is necessary for the establishment by the court of the existence and ambit of its principal jurisdiction over international crimes. The larger significance of this affirmation, that Security Council action is not above the law or beyond judicial review, needed no demonstration. The other jurisdictional plea of the accused was that the alleged crimes took place in the context of an internal conflict, and that war crimes, according to international law, can only take place in the context of an international armed conflict.*

*The prosecutor, followed by the trial chamber, considered that the Security Council had classified the armed conflicts in the former Yugoslavia as international in character and that they were bound by this legal characterization. The Appeals Chamber considered that as a court of law, it had to undertake its own legal characterization, and after an exhaustive examination of customary international law, it came to the conclusion that it is already established under general international law that serious violations*

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*of international humanitarian law committed in noninternational armed conflict are punishable as war crimes. This means that the classification of the armed conflict as international or noninternational is immaterial for that purpose, thus opening a very big wedge in the legal wall separating these two types of armed conflicts.*

*On both these issues, the judgment, by its thorough and tight legal reasoning, made a contribution to the clarification of the law on fundamental, but highly sensitive issues, which makes it one of the major judicial decisions of recent times.*

*An Advocate for the Periphery*

After his retirement in 2000, Abi-Saab remained in Geneva, the city where he has spent most of his professional life. He was elected member of the World Trade Organization Appellate Body (AB) that same year and was reappointed for a second four-year term in 2004. The AB is charged with hearing appeals against judgments, or “reports,” as the WTO calls them, in disputes brought by WTO members and already decided by a panel of the organization’s Dispute Settlement Body.

The WTO is an interesting vantage point from which to consider one of Abi-Saab’s long-standing concerns, that of allowing the voices of the developing world to be heard in international law. Abi-Saab is widely recognized as an advocate of the position that inequalities between “core” countries and those on the “periphery”—to use the terminology of Wallerstein’s world-system theory<sup>8</sup>—should be narrowed. And he is well aware that international law has historically privileged the former and disadvantaged the latter. After all, this body of law derives largely from European public law, which had perhaps its most powerful expression at the Berlin Congress of 1885, where the “civilized” powers of Europe summarily carved up Africa, each taking the territories it wanted to exploit. The two ICJ cases on which Abi-Saab served as judge ad hoc were, in fact, a product of this same Berlin conference; they concerned disputes over territorial lines randomly drawn by European powers during the colonial era.<sup>9</sup> In response to the question of how developing countries can become players in the sphere of international law, Abi-Saab responds,

*Well, they already participate in a way. The International Criminal Court is a good example—sometimes the big boys don’t always get the final say. We had great hopes, my generation, about the Third World progressing, creating elites that can participate effectively in the construction of a universal world order. My experience is that if you have good people who know the subject, any country can exert*

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*some influence. And, after all, these are negotiations; they are not fights. So, if you can make a good argument, a good case for your position, some of the others may not end up signing the treaty, as with the ICC, but you can still get what you want. India has very good and stubborn negotiators. They usually leave their mark. The problem with the Third World is that it has lost a lot of time and a lot of clout. People are disillusioned. But the world is moving on. I mean, I don't lose hope when I see that China and India are moving ahead. They are getting their place in the sun, and they constitute a very large part of what used to be called the Third World, or the non-Western world.*

Despite his concern for the plight of the Third World, and in particular the African continent, Abi-Saab is not an apologist for certain patterns that have emerged there, nor does he accept the exaggerated claims of cultural relativism. But while he supports the notion that non-Western countries should help shape the direction of the “international community” by subscribing to its universal values, he also believes that local identities need to remain strong. Abi-Saab has this to say about the balance that needs to be sought between international criminal justice processes and more local processes that respond to conflicts on the African continent:

*The territorial judge is the natural judge. Because he is closer to the dramatis personae, to the evidence, to the environment, and to the social perception of the legal standards that are supposed to have been violated. So, obviously, he has the best capability to judge. But the question is whether he is able and willing to do so.*

This is the question that will be answered by the International Criminal Court, an institution that has been able to draw upon the experiences of the ICTY and the very rules that Abi-Saab and the other shapers of contemporary international criminal justice formulated with little or no guidance from earlier experience.

#### *A Tale of Three Courts*

As an academic, Abi-Saab has found himself somewhat frustrated by his work at the Appellate Body. He feels that the role of the judge at both the ICTY and the ICJ gives greater scope for interpretation and for the development of international law. This was particularly the case at the ICTY in its early days.

*In order to be consistent with the law, with the principle of legality, we had to apply general international law as it existed at the time of*

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*the commission of the crimes, not merely an ex post facto definition of crimes given to us in the statute. Anyway, these definitions were not necessarily completely right. So we had to interpret boldly general international law and the statute to make them coincide. The idea was that we were creating something new, pioneering international criminal justice when everybody thought it had withered away after Nuremberg.*

*Of course, the ICJ was much more. . . . I wouldn't say cautious, but more restrained. Still, there was ample room for interpretation, rationalization, and elaboration of legal reasoning.*

*Here at the Appellate Body, the judicial policy of interpretation is strict constructionism, insisting heavily that we must remain very close to the text, even the words, of the agreements, and not add to or diminish from the rights and obligations of the contracting parties, not fill any gaps, et cetera. In a small article I wrote about the AB's method of interpretation, I said that it reminds me of the definition of "sedentary species" in the law of the sea, those species that are immobile on or under the seabed, or, if they move, they are in constant contact with the seabed—the lobster walk, if you like. The AB's approach to interpreting the text, or rather the words of the agreements, is a little bit like that!*

*You can see that there is a great difference among those three fora. But they have something in common: on whichever you sit, you are exercising the same function, the judicial function. The judicial function has its own requirements, and it is the same everywhere. However, it is like living in different houses. The rules of architecture are the same, but you feel the environment is very different. That is the judicial policy that varies from organ to organ. But judicial policy has to remain within the parameters of the judicial function.*

The wide experience in international law that Abi-Saab has had both on and off the bench provides him with a unique perspective on the differing characters of various international courts, the way they work and feel and operate. He does not hesitate to name his favorite:

*The International Court of Justice is where I feel most at home. Why? Because, first, it is an animal I have studied throughout my life. My first published book, in French, was about the procedure of the International Court. I know thoroughly the people inside and the people around it, and they deal with subjects I have been teaching and practicing.*

*The Yugoslavia tribunal was a new creation. I managed to get along very well with the colleagues who were internationalists. But*

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*the criminal law judges and lawyers were a little bit alien to me. However, as it was a new thing and we were the founding fathers, I didn't feel estranged because we were all doing pioneering work and everyone was doing what he could.*

*Here at the Appellate Body, I came into an area that I hadn't really explored in depth before. I had worked on international economic law, but from a very different perspective—on the new international economic order, on the right to development, et cetera—subjects that had a progressive dimension. While the WTO, like its predecessor, the GATT, was perceived as a rich man's club, rather conservative and neoliberal. And the type of law that developed within it is a very specialized type of detailed, not to say tortured, law that I had not been following very closely. Moreover, because of the restrictive judicial policy, there is not much room for legal reasoning and theorizing.*

*But as I said, the essence is the judicial function. We act in the AB on that basis. Moreover, I meet and work with some interesting people who are different from my familiar international law fauna. There is usually one, sometimes two, international lawyers on the AB. But there is no general conviction that we should open up to general international law or inject a Third World sensibility into our interpretation. Things have developed a little bit, and I feel they are moving in the right direction, but from a certain starting block that you cannot change. If you act as a judge, you cannot tamper with rules. You have to interpret them within the permissible margin for interpretation. But as the AB has this restrictive judicial policy, it reduces even further that margin. Still, however narrow the margin we are left with, it can be used for pushing things in the right direction.*

*So I feel I am doing a good job. But I am not swimming in my own waters.*

Georges Abi-Saab has not followed the usual paths leading to the international bench. Unlike some other international judges who have definitively left academia, the diplomatic service, or a domestic judicial position to serve on an international court, Abi-Saab has never been enticed by the song of that siren. He has preferred to remain, above all, a professor and mentor; “these other experiences have simply irrigated the main channel, which is teaching.”