



**THE JUDICIAL INDEPENDENCE OF
THE INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL:
POTENTIAL FOR REFORM**

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EXECUTIVE SUMMARY

The importance of judicial independence for the legitimacy and accountability of legal institutions in general, and for the parties appearing before them, cannot be overstated. This report examines whether the International Labour Organization Administrative Tribunal (“ILOAT”) may in fact be considered an independent body. The report begins by examining the competence and judicial process of the ILOAT. Next, it identifies and discusses the content of judicial independence as interpreted by legal scholars, and set out in human rights treaties and soft law sources. The report continues with an assessment of the applicability of customary international law to the ILOAT, and discusses the customary international law status of the right to an independent judiciary. On the basis of that content, and by comparing the ILOAT with other courts and tribunals, the report assesses whether the ILOAT provides a judicial forum that may be considered independent. The report also examines repercussions that may result from a failure to provide adequate access to court; and more specifically, the duty of national courts to set aside the immunity of international organizations.

The report acknowledges that neither human rights treaties nor soft law are binding upon the ILOAT. It also concedes that the practices and statutory provisions of other courts and tribunals are persuasive at best in determining how judicial independence matters should be addressed in practice. Notwithstanding, each of these sources is relevant when seeking to determine whether a court or tribunal provides a fair trial before an independent judiciary, particularly when considering that the right to an independent judiciary can be considered customary international law, binding upon the International Labour Organization and thereby also the ILOAT.

The ILOAT Statute is silent on a number of issues that are relevant in determining whether a tribunal may be considered independent, including: reappointment, security of tenure, conflicts of interest, improper influence, discipline, disqualification, improper influence, and financial independence. In light of this, the report argues that the ILOAT Statute is significantly deficient in providing judicial independence safeguards. Moreover, the lack of transparency as to how the ILOAT deals with these matters in practice gives further cause for concern. The report concludes that the ILOAT should amend its current Statute to include more judicial independence guarantees in order to



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ensure the appearance of compliance as well as actual compliance with international judicial independence standards.



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1. INTRODUCTION

This report was requested by the Staff Union of the European Patent Organisation (“SUEPO”). Through their observance of the International Labour Organization Administrative Tribunal (“ILOAT”), members of the SUEPO have become concerned that the ILOAT does not fully guarantee the right of employees of international organizations to judicial independence. The purpose of the report is to assess whether the ILOAT is bound by and in fact complies with international standards of judicial independence.¹

The concept of judicial independence is becoming ever more important in the context of international courts and tribunals.² With the increase in the number of international courts and tribunals after World War II, the scope and degree of judicial activity at the international level has expanded. One part of this trend is the creation of administrative tribunals, such as the ILOAT, to settle disputes arising within the international organizations between staff members on the one hand, and the employer organization on the other.³

The ILOAT is competent to hear complaints of staff members of and against the International Labour Organization (“ILO”) as well as forty-three other international organizations that have recognized its jurisdiction, including the European Patent Organisation (“EPO”). The ILOAT is the only available forum for the employees of these international organizations for the settlement of employment disputes because its awards are final and not reviewable;⁴ and because international organizations, in principle, have

¹ The report draws from a report written on the same subject by Nicole E. Kuijer and Susan L. Park in 2005 in their capacities as students in the Amsterdam International Law Clinic.

² Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271, 271 (2003); Nathan J. Miller, *Independence in the International Judiciary: General Overview of the Issues: Background Paper for the Meeting of the Study Group of the International Law Association* (Working Draft), (2002), at 2, available at http://www.pict-pcti.org/activities/ILA_study_grp/ILA1.pdf (last visited Feb. 5, 2007).

³ Other administrative tribunals include the Administrative Tribunal of the United Nations; the (World Bank) Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation; the Administrative Tribunal of the International Monetary Fund; the Administrative Tribunal of the Organization of American States; the Administrative Tribunal of the Inter-American Development Bank.

⁴ Statute of the Administrative Tribunal of the International Labour Organization at art. 6 [hereinafter ILOAT Statute], adopted by the International Labour Conference on October 9, 1946, amended by the Conference on June 29, 1949, June 17, 1986, June 19, 1992, and June 16, 1998, available at <http://www.ilo.org/public/english/tribunal/stateng.htm> (last visited April 14, 2007).



immunity from lawsuits filed in domestic jurisdiction.⁵ The ILOAT thus serves as the final arbiter of employment disputes for some 35,000 international civil servants.⁶

The SUEPO's concern regarding the judicial independence of the ILOAT is shared by staff members of other international organizations, academics and legal professionals. Amerasinghe notes that the organizations that "have associated themselves with the ILOAT, obviously have sufficient confidence in the ILOAT resulting from the long experience of that tribunal to entrust to it the settlement of their employment disputes."⁷ Yet, after reviewing the ILOAT at the request of the Staff Union of the International Labour Organisation ("ILO"), a number of scholars found that the Tribunal does not meet the basic requirements of an independent tribunal.⁸ One of these scholars, Dr. Ian Seiderman, notes that the ILOAT "appears to lack certain core attributes of independence" including "[t]he manner in which judges are selected, the conditions of their tenure, [and] the apparent lack of procedures for their discipline or removal"⁹ In addition, the *UN Special*, the magazine of the international staff in Geneva, has dedicated several articles to the functioning of the ILOAT, highlighting several possible

⁵ Edgar Hennis, *Case Practice in International Administrative Law*, 10 LEIDEN J. INT'L. 295, 296 (1997) ("There is no external legal protection afforded to employees outside or beyond the administrative tribunals of the organizations involved. In addition, employees cannot sue the organization before national courts, since the organizations enjoy immunity from the jurisdiction of national courts."). *See also* CHITTHARANJAN FELIX AMERASINGHE, *THE LAW OF THE INTERNATIONAL CIVIL SERVICE (AS APPLIED BY INTERNATIONAL ADMINISTRATIVE TRIBUNALS)* 42, 44 (1988)

[M]ost national legal systems seem to recognize that international organizations are immune from their jurisdiction in regard to employment matters or that employment matters of such organizations are outside their subject-matter jurisdiction [...]. If the courts of the State recognize the immunity from jurisdiction of international organizations in employment-related matters, it means that employees of international organizations would have no judicial forum in that State.

⁶ Geoffrey Robertson Q.C., *Opinion for the Information Meeting on the ILO Administrative Tribunal Reform and Related Matters*, available at <http://www.ilo.org/public/english/staffun/info/iloat/robertson.htm> (last visited Feb. 5, 2007) For a discussion of the immunity of international organizations, *see* AUGUST REINISCH, *INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS* (2000). *See also* *The (Non-) Application of International Law by the ILO Administrative Tribunal: Possible Legal Avenues for Establishing Responsibility*, Report by Amsterdam International Law Clinic, July 2004.

⁷ AMERASINGHE, *supra* note 5, at 48.

⁸ *See* Louise Doswald-Beck, *ILO: The Right to a Fair Hearing Interpretation of International Law* (2002), at <http://www.ilo.org/public/english/staffun/info/iloat/doswald.htm> (last visited Feb. 5, 2007); Robertson, *supra*, note 6; Ian Seiderman, *Does the ILO Administrative Tribunal meet the standards of an independent and impartial judiciary?*, (2002), at <http://www.ilo.org/public/english/staffun/info/iloat/seiderman.htm> (last visited Feb. 5, 2007).

⁹ Seiderman, *supra* note 8.



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independence issues of this Tribunal.¹⁰ Commenting on administrative tribunals in general, Singer notes that “[u]nfortunately, only a few international organizations offer procedures meeting these basic standards necessary to assure adequate protection of human rights.”¹¹ He concludes that “[t]he chief issues of concern [with regard to international administrative tribunals] are the *independence of the tribunals*, the adequacy of their procedures and the timely publication of signed decisions.”¹²

In seeking to determine whether the ILOAT fully guarantees judicial independence, the report examines the competence and judicial procedures of the ILOAT in Section 2. Section 3 serves to illuminate the concept of judicial independence as set forth in scholarship, international human rights treaties, and soft law instruments. Next, Section 4 discusses the applicability of customary international law standards to the ILOAT, and whether the right to an independent judiciary may be said to constitute customary international law. The report then assesses the ILOAT’s adherence to various international standards of judicial independence in Section 5. Thereafter, the report discusses the impact of the European Convention on Human Rights and Fundamental Freedoms on the immunity of international organizations; and more specifically, conditions under which an international organization’s failure to address the rights of its employees may subject it to a constructive waiver of immunity before national courts (Section 6). The report concludes, in Section 7, with recommendations for improving the judicial independence of the ILOAT.

¹⁰ See Edward Patrick, *The best of the bunch flunks*, 614 UN SPECIAL (2003), available at http://www.unspecial.org/uns614/UNS_614_T18.html (last visited Feb. 5, 2007) (Topping the list of defects were (1) the manner in which the ILOAT members (judges) are appointed and renewed (specifically, their short appointment terms and multiple renewals, and (2) the fact that the current Tribunal President has been renewed three times after his initial 3 year appointment. The UN Special concluded that these issues give rise to at least the perception that ILOAT judges might be influenced by the need to keep the defendant Administrations happy in order to win another term).

¹¹ Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT’L L. 53, 163 (1995), quoted in Charles H. Brower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT’L L. 1, 83 (2000).

¹² Singer, *supra* note 11, at 155 (emphasis added). See also the discussion of Singer’s criticism of international administrative tribunals in Brower, *supra* note 11, at 83.



2. INTERNATIONAL LABOUR ORGANIZATION ADMINISTRATIVE TRIBUNAL

The International Labour Organization Administrative Tribunal is the successor to the Administrative Tribunal of the League of Nations; it was founded in 1946 when the League of Nations was dissolved. The purpose of the ILOAT, like other international administrative tribunals, is to provide “legal recourse within public international organizations in respect of conflicts between employees (international civil servants) and the organization itself.”¹³ The Statute of the Administrative Tribunal of the International Labour Organization (“ILOAT Statute”) was adopted in 1946 and amended in 1949, 1986, 1992, and 1998.¹⁴ The Statute as amended in the 1990s increased the number of judges from six to seven.¹⁵ It adopted its current rules in 1993.¹⁶ By July 2006, the ILOAT had decided 2,568 cases.¹⁷

2.1. Competence

The jurisdictional competence of the ILOAT is limited to the settlement of disputes covered by the statutes and governing instruments of the international organizations before it, generally referred to as staff or service regulations.¹⁸ Pursuant to Article II of the ILOAT Statute, the Tribunal is competent to hear claims of non-observance of the terms of appointment of officials of the International Labour Office.¹⁹ In addition, it may settle any dispute concerning the compensation provided in cases of invalidity, injury or disease incurred by an official of the International Labour Organization (“ILO”) in the course of his or her employment and to determine the final amount of compensation;²⁰ complaints of non-observance of the Staff Pensions

¹³ Hennis, *supra* note 5, at 295.

¹⁴ ILOAT Statute, *supra* note 4.

¹⁵ AMERASINGHE, *supra* note 5, at 64.

¹⁶ Rules of the Administrative Tribunal of the International Labour Organization [hereinafter ILOAT Rules], *adopted* Nov. 24, 1993, at <http://www.ilo.org/public/english/tribunal/stateng.htm#Rules> (last visited Feb. 5, 2007). Amerasinghe notes that the original Rules of the ILOAT were adopted in 1947 and amended in 1953, 1957, and 1972. AMERASINGHE, *supra* note 5, at 53.

¹⁷ ILOAT database of judgments, at <http://www.ilo.org/public/english/tribunal/lastsesn.htm> (last visited Feb. 6, 2007).

¹⁸ AMERASINGHE, *supra* note 5, at 201 (discussing the jurisdictional competence of international administrative tribunals).

¹⁹ ILOAT Statute, *supra* note 4, at art. II, para. 1.

²⁰ *Id.* at art. II, para 2.



Regulations or of pension rules applicable to the wife, husband or children of the official;²¹ and disputes arising out of contracts to which the ILO is a party and that provide for the competence of the ILOAT in any case of dispute with regard to their execution.²²

Article II, paragraph 5 of the ILOAT Statute was amended to allow other international organizations to recognize the jurisdiction of the ILOAT, with the approval of the ILO Governing Body.²³ This provision provides that the Tribunal is competent to hear complaints alleging non-observance of the terms of appointment of officials and of provisions of the Staff Regulations of other international organizations. In order to qualify to recognize the jurisdiction of the ILOAT, the international organization must be intergovernmental in character or meet the following criteria: (1) be clearly international in character; (2) enjoy immunity from national law as evidenced by a headquarters agreement; (3) be empowered with functions of a permanent nature; and (4) the organization must guarantee compliance with the tribunals judgments.²⁴

Article II, paragraph 6 provides that standing before the Tribunal is available to both current and former officials of the international organizations consenting to the ILOAT's jurisdiction, and to any other person who can show that s/he is entitled to some right under the terms of appointment of a deceased official or under provisions of the Staff Regulations on which the official could rely.²⁵

2.2. Judicial Process

Applicants may not bring complaints before the ILOAT unless they have exhausted all options under the staff regulations of the international organization at issue. Generally, this means that an employee has sought redress from management or some other internal dispute resolution system at the international organization for which the

²¹ *Id.* at art. II, para 3.

²² *Id.* at art. II, para 4.

²³ *Id.* at art. II, para. 4 (“The Tribunal shall be competent to hear disputes arising out of contracts to which the International Labour Organization is a party.”).

²⁴ *See also* International Labour Organization, Governing Body, Committee on Legal Issues and International Labour Standards, Possible Amendment Regarding the Nature of International Organizations Entitled to Recognize the Competence of the Tribunal, 271st Session, Geneva, March 1998, GB.271/LILS/1, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb271/lils-1.htm> (last visited Feb. 25, 2007).



employee works, and has received a “final decision” with which the employee disagrees or finds inadequate.²⁶ The complaint must be filed within 90 days after the complainant is notified of the negative internal decision affecting him or her.²⁷ Where no internal decision is taken by the administration of the international organization concerned within 60 days, the complainant may have recourse to the ILOAT within 90 days following this failure.

Of the Tribunal’s seven judges, a panel consisting of three judges shall be appointed to all cases coming before the Tribunal. In exceptional circumstances where the president of the Tribunal so determines, the panel may also be composed of five or all seven judges.²⁸

In rendering its decisions, the ILOAT relies on the following sources as it determines necessary: (1) the treaty establishing the ILO or relevant international organization; (2) the agreement with the host State of the organization; (3) the employment contract; (4) the staff rules and regulations; (5) the ILOAT Statute; (6) ILOAT judgments; (7) practice; (8) equity; (9) municipal law; and (10) general principles of law.²⁹

A complainant may plead his or her own case or appoint an agent.³⁰ The Tribunal may, on its own accord, or by the request of either party, take any investigation necessary. These investigatory possibilities include requiring the parties to appear before the Tribunal, the hearing of experts or witnesses, consultation with a competent international authority, and/or expert inquiry.³¹ In addition, Article 5 of the ILOAT Statute states that the Tribunal shall decide in each case whether to hold oral proceedings and if so whether any part of them shall be in public or in camera.³² However, the

²⁵ ILOAT Statute, *supra* note 4, at art. II, para. 6.

²⁶ *Id.* at art. VII, para. 1.

²⁷ *Id.* at art. VII, para 2 (also note that in the case of “a class of officials,” the 90-day period begins after the internal decision is published).

²⁸ *Id.*, at art. III.

²⁹ Hennis, *supra* note 5, at 296.

³⁰ ILOAT Rules, *supra* note 16, at art. 5, para. 1. (This agent may be “a serving or former official of the organization which has recognized the Tribunal’s jurisdiction or the United Nations, or a member of a bar in a member State of one of those organizations, or, with leave from the President, someone who is qualified to deal with issues relating to the international civil services.”).

³¹ *Id.* at art. 11, para 1.

³² ILOAT Statute, *supra* note 4, at art. V.



Tribunal has declined every request for oral proceedings received since 1989.³³ The decisions of the ILOAT are taken by majority vote.³⁴ The Tribunal must state the reasons for its judgments.³⁵

Because there is no provision for the review of decisions taken by the ILOAT, the ILOAT is the last resort for cases falling under its jurisdiction³⁶ with one exception. In cases where the Governing Body of the ILO, the Administrative Board of the Pensions Fund, or the executive body of an international organization submitting to ILOAT's jurisdiction considers that a decision of the Tribunal is impaired by a fundamental fault in the procedure, the question of the validity of the decision by the Tribunal shall be submitted for an advisory opinion to the International Court of Justice ("ICJ").³⁷ The opinion of the ICJ is binding.³⁸ The ILOAT Statute does not grant a complainant-employee the equivalent ability to challenge Tribunal decisions.

Where the ILOAT finds for the complainant-employee, it can order that the challenged decision of the internal process be rescinded or that the obligation relied upon be performed. If this is not possible or advisable, the Tribunal can award compensation to the complainant for his/her injury.³⁹ In addition to expenses arising out of the ILOAT sessions or hearings, the defendant-international organization must also bear any amount of compensation awarded to the complainant.

³³ Letter from Catherine Comtet, Registrar, ILOAT, to Hege E. Veenstra-Kjos, Coordinator AILC, Universiteit van Amsterdam (Dec. 12, 2006) (on file with author) ("We have no statistics concerning oral proceedings which are held once in a blue moon. The last oral hearing took place in 1989 (Judgment 986)"); Graph of hearing statistics 1947-2006, *available at* <https://www.suepo.org/rights/public/Projects/projects.html> (last visited Jan. 15, 2007).

³⁴ ILOAT Statute, *supra* note 4, at art. VI para. 1.

³⁵ *Id.*, at art. VI, para 2.

³⁶ *Id.*, at art. VI, para. 1.

³⁷ *Id.* at art. XII, para. 1. (the ICJ has issued one advisory opinion at the request of an international organization submitting to ILOAT's jurisdiction) *See* Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77 (Oct. 23).

³⁸ ILOAT Statute, *supra* note 4, at art. XII, para. 2.

³⁹ AMERASINGHE, *supra* note 5, at xii-xiii

Remedies in the ILOAT consist in annulment resulting in rescission of the decision with or without additional compensation, annulment with rescission and the alternative of compensation, annulment with specific performance and with or without specific compensation, specific performance without explicit annulment, annulment and remand, remand before the merits are judged, compensation for an invalid decision after annulment but without rescission, compensation without annulment for an invalid decision, remedy in the case of a valid decision,



3. INTRODUCTION TO JUDICIAL INDEPENDENCE

Judicial independence has been described as the ability of a judge to decide a matter free from pressures or inducements.⁴⁰ In short, judges must be independent and impartial as this ensures that judicial decisions are not influenced in an improper or unlawful way.⁴¹ The right to a trial by an independent and impartial judiciary is a key component of the fundamental right to a fair trial,⁴² and the importance of judicial independence for the legitimacy and accountability of legal institutions cannot be overstated.⁴³ The Inter-American Commission on Human Rights phrases it this way: “[t]o enable the judicial branch of government to serve as an effective body for overseeing, guaranteeing, and protecting human rights, it is not enough for it to formally exist; the judiciary must also be independent and impartial.”⁴⁴

It should be noted that both scholars and tribunals have had difficulty distinguishing between the concepts of independence and impartiality. The European Court of Human Rights has had occasion to address the distinction, and has noted that at times the distinction between the two terms is complicated and not always apparent.⁴⁵ In *Holm v. Sweden*, for example, the Court considered whether there was a violation of

compensation offered by the respondent confirmed or establishment of the *quantum* of compensation.

⁴⁰ F.B. William Kelly, *An Independent Judiciary: The Core of the Rule of Law 2*, at http://www.icclr.law.ubc.ca/Publications/Reports/An_Independent_Judiciary.pdf (last visited Feb. 5, 2007).

⁴¹ K. WAGNER, PREADVIEZEN: DE ONAFHANKELIJKHEID VAN DE RECHTER 4 (2001).

⁴² See Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment of the Appeals Chamber [hereinafter *Furundžija* Appeal Judgment], July 21, 2000, para. 177, at <http://www.un.org/icty/furundzija/appeal/judgement/fur-aj000721e.pdf> (“The fundamental right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial.”). See also Statute of the International Criminal Tribunal for the former Yugoslavia, art. 21, para. 2, at <http://www.un.org/icty/legaldoc-e/index.htm> (last visited Feb. 5, 2007).

⁴³ Cf. Commission on Human Rights, *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*, Resolution 2004/33, E/CN.4/RES/2004/33 (April 19, 2004), available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2004-33.doc (last visited March 28, 2007) (“an independent and impartial judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice”).

⁴⁴ Report on the Situation of Human Rights in Venezuela, Inter-Am. C.H.R., OEA/Ser.L/V/II.118, doc. 4 rev. 2. (2003), para. 153, available at <http://www.cidh.org/countryrep/Venezuela2003eng/chapter1.htm> (last visited Feb. 5, 2007).

⁴⁵ F.A.M. Stroink, *De betekenis van de Straatsburgse jurisprudentie inzake de onafhankelijkheid en onpartijdigheid van het Nederlandse recht (The meaning of the Strasbourg jurisprudence regarding judicial independence and impartiality of Dutch law)*, NJCM-Bull.,10 (1999).



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Article 6 of the European Convention on Human Rights and Fundamental Freedoms⁴⁶ which provides individuals with the right to a fair and public hearing before an independent and impartial tribunal.⁴⁷ In this case, five members of the jury in a case out of the District Court of Stockholm, which originally heard the complainant's case, were members of the political party which owned the defendant publishing company.⁴⁸ The European Court of Human Rights stated that it found it "difficult in this case to examine the issues of independence and impartiality separately."⁴⁹ Similarly in another European Court of Human Rights case, *Debled v. Belgium*, the Court stated that it found "it unnecessary in this case to examine the issues of independence and impartiality separately."⁵⁰

Nevertheless, some scholars contend that although the content of the two terms are closely related, there are differences between them.⁵¹ One scholar asserts that independence considers protection against outside pressures, such as the executive, governments, the press, media, public debate, and political parties; while impartiality considers the protection against improper influences and bias, or the appearance of bias, of the judge in favor of one of the parties.⁵² Another scholar makes a similar assertion stating that "[t]he concept of independence relates to the duty of outsiders not to interfere with the judges, while the concept of impartiality is the internal duty of the judiciary not to be influenced by any source."⁵³ While this Report considers impartiality as a subcomponent of judicial independence, it adopts definitions similar to those given by these scholars. Accordingly, impartiality considerations will be analyzed as pertaining

⁴⁶ *Holm v. Sweden*, 279 Eur. Ct. H.R. (ser. A) (1993).

⁴⁷ Convention for the Protection of Human Rights and Fundamental Freedoms [*hereinafter* ECHR], art. 6, para 1, Nov. 4, 1950, ETS No. 005 (entered into force on Sept. 3, 1953), as amended by Protocol No. 11, ETS No. 155 (entered into force on Nov. 1, 1998), 213 U.N.T.S. 222, <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (last visited Feb. 5, 2007).

⁴⁸ *Holm v. Sweden*, *supra* note 46, at para. 12.

⁴⁹ *Id.* at para. 30 (references omitted).

⁵⁰ *Debled v. Belgium*, 292 Eur. Ct. H.R. (ser. A), at para. 36 (1994).

⁵¹ WAGNER, *supra* note 41, at 5. *See also* Luu Tien Dung, United Nations, *Judicial Independence in Transitional Countries*, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, Jan. 2003, at 12, at <http://www.undp.org/oslocentre/docsjuly03/DungTienLuu-v2.pdf> (last visited Apr. 20, 2007).

⁵² *Id.*

⁵³ *Id.*



specifically to judges and their ability to render judgment free from outside pressures. Independence issues will address issues pertaining to the functioning of the judiciary as whole.

3.1. Scholarly Opinion

Scholarship confirms how critical judicial independence is for the credibility, legitimacy, effectiveness, and accountability of both domestic and international courts and tribunals: “The cornerstones of any legal system, and the greatest measure of whether it can provide justice to its citizens, are its judges.”⁵⁴

According to Shetreet, “[i]n order for the court to be able to resolve disputes impartially and to pass judgment which will be accepted by rival parties, particularly when one of them is the government or one of its agencies, the court must be independent and free from any external pressures or influence.”⁵⁵ Essentially, the appearance and actual existence of impartiality and independence must be present or those litigating before it will not consider the decisions of a judiciary legitimate.⁵⁶ Whereas procedural safeguards are important to obtain this goal, it has been pointed out that “procedural safeguards are of no real value . . . if the decision-maker bases his findings on factors other than his assessment of the evidence before him.”⁵⁷

⁵⁴ Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 667 (2001). See also The Burgh House Principles on the Independence of the International Judiciary [hereinafter Burgh House Principles], at http://www.ucl.ac.uk/laws/cict/docs/burgh_280604.pdf (last visited Feb. 10, 2007); Mackenzie & Sands, *supra* note 2, at 271; Miller, *supra* note 2, at 2.

⁵⁵ Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 590, 591 (Shimon Shetreet & Jules Deschênes eds., 1985).

⁵⁶ Jose Juan Toharia, *Evaluating Systems of Justice Through Public Opinion: Why, What, Who, How, and What For?*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik G. Jensen & Thomas C. Heller eds., 2003) (stating that social legitimacy is the capacity of judicial institutions to engender the belief that they deserve obedience and respect and that legitimacy is equivalent to social trust and credibility). See also ASIAN DEVELOPMENT BANK, ASIA FOUNDATION, JUDICIAL INDEPENDENCE OVERVIEW AND COUNTRY-LEVEL SUMMARIES 2 (2003), available at http://www.adb.org/Documents/Events/2003/RETA5987/Final_Overview_Report.pdf (last visited April 14, 2007) (stating that the second element of judicial independence is that decisions are accepted by the parties and the public, and that this second element highlights social legitimacy as an element of judicial independence).

⁵⁷ Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L. J. 455, 476 (1986).



It is clear that the international judiciary should also adhere to the standards of judicial independence in order to be considered legitimate. As noted by Amerasinghe, “[i]f international administrative tribunals are to function efficiently and effectively . . . the independence and impartiality of the judges must be protected.”⁵⁸

3.2. Human Rights Treaties and Jurisprudence

Various human rights treaties, including the International Covenant on Civil and Political Rights (“ICCPR”) of 1966;⁵⁹ the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) of 1950;⁶⁰ the American Convention of Human Rights (“ACHR”) of 1969;⁶¹ recognize the importance of judicial independence standards in guaranteeing basic human rights protections.⁶²

Article 6(1) of the ECHR provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal* established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.⁶³

⁵⁸ AMERASINGHE, *supra* note 5, at 68.

⁵⁹ International Covenant on Civil and Political Rights [hereinafter ICCPR], *opened for signature* Dec. 16, 1966, G.A. Res. 2200 A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Feb. 5, 2007).

⁶⁰ ECHR, *supra* note 47.

⁶¹ American Convention on Human Rights [hereinafter ACHR], O.A.S. Treaty Series No. 36 (1969), 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *available at* <http://www.cidh.org/Basicos/basic3.htm> (last visited Feb. 5, 2007).

⁶² Another human rights instrument recognizing the importance of judicial independence is the African (Banjul) Charter on Human and Peoples’ Rights of 1981 (“African Banjul Charter”). African (Banjul) Charter on Human and Peoples’ Rights [hereinafter African (Banjul) Charter], OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *adopted* June 27, 1981, *entered into force* Oct. 21, 1986, *available at* http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf (last visited Feb. 5, 2007).

⁶³ ECHR, *supra* note 47, at art. 6(1) [emphasis added].



The European Court of Human Rights (“ECtHR”) has pronounced the following criteria for determining the independence of a tribunal including: (1) the manner of appointment of its members; (2) the duration of their term of office; (3) the existence of legal guarantees against outside pressures; and (4) the appearance of independence.⁶⁴ Additionally, the European Commission of Human Rights has referred to the need for the existence of regulations governing the removal of judges or guarantees for their irremovability, laws prohibiting the executive from giving instructions to judges in their adjudicatory role, and the attendance of members of the judiciary in the proceedings.⁶⁵

With regard to impartiality, the ECtHR has created the objective impartiality test, which is used to ascertain whether the judge or the body sitting as a bench⁶⁶ offers “guarantees sufficient to exclude any legitimate doubt” regarding impartiality.⁶⁷ Amongst the aspects assessed are (1) conflicts of interest;⁶⁸ (2) discipline and disqualification;⁶⁹ (3) compatibility of other functions;⁷⁰ and (4) judging the same party in different cases.⁷¹ This test has developed through time⁷² and in the *Hauschildt* judgment of 1989, the Court described some of its crucial features:

Under the objective test, it must be determined whether, quite apart from the judge’s personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the

⁶⁴ *Le Compte, Van Leuven and De Meyere v. Belgium*, App. No. 6878/75; 7238/75, 43 Eur. Ct. H.R. (ser. A) 24, at para. 55 and 57 (1981); *Piersack v. Belgium*, App. No. 8692/79, 53 Eur. Ct. H.R. (ser. A) 13, at para. 27 (1982); *Delcourt v. Belgium*, App. No. 2689/65, 11 Eur. Ct. H.R. (ser. A) 17, at para. 31 (1970). *See also* *Campbell and Fell v. United Kingdom*, App. No. 7819/77; 7878/77, 80 Eur. Ct. H.R. (ser. A) 39, at para. 78 (1984); *Findlay v. United Kingdom*, 1997-I Eur. Ct. H.R. at para 73.

⁶⁵ *Holm v. Sweden*, App. No. 14191/88, 31 Eur. H.R. Rep. at para. 54 (1992) (Commission report).

⁶⁶ *Çiraklar v. Turkey*, App. No. 19601/92, 1998-VII 1998 Eur. Ct. H.R. at para. 38.

⁶⁷ *Piersack v. Belgium*, *supra* note 64, at para. 30 (1982). *See also* *Findlay v. United Kingdom*, *supra* note 64, at para 73; *Demicoli v. Malta*, App. No. 13057/87, 210 Eur. Ct. H.R. (ser. A), at para 40 (1991); *Thorgeir Thorgeirson v. Iceland*, App. No. 13778/88, 239 Eur. Ct. H.R. (ser. A) (1992).

⁶⁸ *See e.g.* *Pescador Valero v. Spain*, App. No. 62435/00, 2003-VII Eur. Ct. H.R.; *Gillow v. United Kingdom*, App. No. 9063/80, 109 Eur. Ct. H.R. (ser. A). Cases are discussed in section 5.4.1.

⁶⁹ *See e.g.* *H. v. Belgium*, App. No. 8950/80, 127B Eur. Ct. H.R. (ser. A) para. 53 (1987); *Hauschildt v. Denmark*, App. No. 10486/83, 154 Eur. Ct. H.R. (ser. A), para. 48 (1989). Cases are discussed in section 5.5.1.

⁷⁰ *Piersack v. Belgium*, *supra* note 64, at para. 30 (1982) (presenting the concept of both the objective and subjective impartiality test for the first time).

⁷¹ *Id.*

⁷² *Delcourt v. Belgium*, *supra* note 64, at para. 31 (1970); *Piersack v. Belgium*, *supra* note 64, at para. 30 (1982); *Campbell and Fell v. United Kingdom*, *supra* note 64, at para. 78 (1984); *De Cubber v. Belgium*, App. No. 9186/80, 86 Eur. Ct. H.R. (ser. A) 16 (1984).



public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. . . . This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. . . . What is decisive is whether this fear can be held objectively justified.⁷³

The ECtHR has also developed a subjective impartiality test. The basis of this test is the personal conviction or interest of a particular judge in a given case.⁷⁴ In order to satisfy this test, the claimant must show that the judge, in fact, had personal bias against him or her. This may be difficult to do because there is a presumption of impartiality.⁷⁵ Whenever structural defaults give cause to fear impartiality, the objective test is applied. Accordingly, and because of its fact-specific nature, the subjective impartiality test will not be discussed.

Article 8(1) of the American Convention on Human Rights states that:

“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”⁷⁶

The Inter-American Court of Human Rights (“IACHR”) was established as an autonomous judicial institution for the purpose of interpreting and applying, *inter alia*, the ACHR.⁷⁷ Also the Inter-American Commission on Human Rights (“IACoHR”) provides insight in the meaning of Article 8 ACHR. In *Garcia v. Peru*, the Commission

⁷³ Hauschildt v. Denmark, *supra* note 69, at para. 48. The Court has applied the objective impartiality test in the same way in its subsequent judgments. *See, e.g.*, Belukha v. Ukraine, App. No. 33949/02 (2006), available at <http://www.echr.coe.int/ECHR/> (last visited Feb. 5, 2007) (follow “case law” hyperlink; then follow “HUDOC” hyperlink; then enter “belukha” in “case title”; then follow “search” hyperlink); Schwarzenberger v. Germany, App. No. 75737/01 (2006); Pabla Ky v. Finland, App. No. 47221/99, 2004-V Eur. Ct. H.R.; Wettstein v. Switzerland, App. No. 33958/96, 2000-XII Eur. Ct. H.R.; Gregory v. United Kingdom, App. No. 22299/93, 1997-I Eur. Ct. H.R.; Langborger v. Sweden, App. No. 11179/84, 155 Eur. Ct. H.R. (ser. A).

⁷⁴ Demicoli v. Malta, *supra* note 67, at para 40 (1991) (adding “or interest”).

⁷⁵ Le Compte, Van Leuven and De Meyere v. Belgium, *supra* note 64; Albert and Le Compte v. Belgium (1983) 5 EHRR 533; Debled v. Belgium, *supra* note 50.

⁷⁶ ACHR, *supra* note 61, at art. 8(1) [emphasis added].

⁷⁷ *See Inter-American Court of Human Rights*, available at <http://www.corteidh.or.cr/index.cfm?CFID=146963&CFTOKEN=15986519> (last visited Feb. 28, 2007).



identified criteria similar to that of the ECtHR for determining judicial independence including (1) the manner of election or appointment; (2) the duration of the judicial term; and (3) the existence of guarantees against external pressures.⁷⁸ Impartiality in the context of Article 8 ACHR requires the judge to offer sufficient guarantees to remove any doubt as to his or her impartiality in the case.⁷⁹

Finally, Article 14(1) of the ICCPR provides that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.⁸⁰

The Human Rights Committee (“HRC”) was established to monitor the implementation of the ICCPR and the Protocols to the Covenant in the territory of States Parties.⁸¹ The General Comments of the HRC, and the Concluding Observations the HRC produces with regard to the practice and policies of States Parties give some indication as to the content of judicial independence standards under the ICCPR.⁸² Furthermore, the Committee’s views and recommendations on individual complaints pursuant to the First Optional Protocol of the ICCPR provide interpretative guidance with respect to various

⁷⁸ *Garcia v. Peru*, Case 11.006, Inter-Am. C.H.R., Report No. 1/95, OEA/Ser.L/V.88, doc. 9 rev. 1 (1995) (explicitly referring to the ECtHR).

⁷⁹ *Martí de Mejía v. Peru*, Case 10.970, Inter-Am. C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7, rev. 28 (1996).

⁸⁰ ICCPR, *supra* note 59, at art. 14(1).

⁸¹ Introduction to the Human Rights Committee, *available at* <http://www.unhcr.ch/html/menu2/6/a/introhrc.htm> (last visited Feb. 5, 2007).

⁸² Office of the High Commissioner for Human Rights, *Human Rights, Civil and Political Rights, the Human Rights Committee, Fact Sheet No. 15* (Rev. 1) 13-16 *available at* <http://www.ohchr.org/english/about/publications/docs/fs15.pdf> (last visited April 14, 2007). *See also* ICCPR, *supra* note 59, at arts. 40 para. 4 and 42 para. 6.



provisions of the ICCPR.⁸³ While States usually follow the recommendations of the Committee, *legally speaking*, its views are not binding on State Parties. However, in view of the general principle *pacta sunt servanda* (“pacts must be respected”), the argument has been made that the ratification of the Protocol by State Parties entails an obligation by those States to follow the HRC’s views.⁸⁴ In 1994, the HRC appointed a Special Rapporteur on the Independence of Judges and Lawyers.⁸⁵ The Special Rapporteur sends allegation letters and urgent appeals to concerned governments; conducts country visits upon the invitation of governments; and concludes annual reports.⁸⁶

In its General Comment 13, the Human Rights Committee’s identified the following criteria to be of importance for independence: (1) the manner in which judges are appointed; (2) the qualifications for appointment; (3) terms of office; (4) the condition governing promotion, transfer and cessation of their functions; and (5) the actual independence of the judiciary from the executive branch and the legislative.⁸⁷

3.3. Soft Law Instruments

Due to the recent proliferation of international courts and tribunals, contemporary efforts have focused on developing concrete international standards for the independence of the international judiciary.⁸⁸ Currently, these international standards still take the form of soft law. Although soft law instruments are not legally binding upon States or international organizations, many scholars emphasize their importance noting that “[i]n addition to their political impact, which is often significant, they sometimes confirm rules

⁸³ Office of the High Commissioner for Human Rights, Overview of Procedure, *available at* <http://www.unhcr.ch/html/menu2/8/over.htm>, (last visited March 1, 2007).

⁸⁴ C. TOMUSCHAT, HUMAN RIGHTS – BETWEEN IDEALISM AND REALISM 182-183 (Oxford University Press 2003).

⁸⁵ Office of the United Nations High Commissioner for Human Rights, *Special Rapporteur on the Independence of Judges and Lawyers: Introduction*, *available at* <http://www.ohchr.org/english/issues/judiciary/index.htm> (last visited March 26, 2007).

⁸⁶ *Id.*

⁸⁷ U.N. High Commissioner of Human Rights, *General Comment 13, Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, para. 3, *available at* <http://www.ohchr.org/english/bodies/hrc/comments.htm> (last visited Feb. 5, 2007) (follow “Article 14 (Administration of Justice)” hyperlink) (Twenty-first session, 1984).

⁸⁸ Mackenzie & Sands, *supra* note 2, at 271.



that are already compulsory principles of customary law.”⁸⁹ Moreover, it is generally accepted that these instruments provide indications of *communis opinio* – or “the generally accepted view” – regarding independence, and they may therefore be of significant value for the interpretation of the notion of independence.

Two key examples of the efforts to develop such standards in the international judicial independence field are the *Universal Declaration on the Independence of Justice* adopted in Montreal in 1983 (“*Montreal Declaration*”)⁹⁰ and the 2004 *Burgh House Principles on the Independence of the International Judiciary* (“*Burgh House Principles*”).⁹¹ Another important soft law instrument focused specifically on judicial independence in national courts is the 1985 *Basic Principles on the Independence of the Judiciary* (“*Basic Principles*”).⁹²

The *Montreal Declaration* was adopted unanimously at the First World Conference on the Independence of Justice held in Montreal in June 1983. It was attended by representatives of about twenty international organizations.⁹³ The purpose of the Conference was to draft a declaration on the independence of justice that would set out a “universally applicable theory of the independence of justice.”⁹⁴ The *Declaration*

⁸⁹ LOUISE DOSWALD-BECK & ROBERT KOLB, JUDICIAL PROCESS AND HUMAN RIGHTS: UNITED NATIONS, EUROPEAN, AMERICAN AND AFRICAN SYSTEMS: TEXTS AND SUMMARIES OF INTERNATIONAL CASE-LAW 35 (2004).

⁹⁰ Universal Declaration on the Independence of Justice [hereinafter *Montreal Declaration*], adopted at the final plenary session of the First World Conference on the Independence of Justice, Montreal, June 10, 1983, reprinted in SHETREET & DESCHÊNES, *supra* note 55.

⁹¹ Burgh House Principles *supra* note 54; Mackenzie & Sands, *supra* note 2, at 271; Miller, *supra* note 2, at 2. See also International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration*, Approved on 22 May 2004 by the Council of the International Bar Association, available at <http://www.ibanet.org/images/downloads/guidelines%20text.pdf> (last visited Feb. 26, 2007).

⁹² Basic Principles on the Independence of the Judiciary [hereinafter *Basic Principles*], U.N. Congress on the Prevention of Crime and the Treatment of Offenders, 7th Sess., at 59, U.N. Doc. A/CONF.121/22/Rev.1 (1985), U.N. General Assembly Resolution 40/32, 29 Nov. 1985, and U.N. General Assembly Resolution 40/146, 13 Dec. 1985, at http://www.unhcr.ch/html/menu3/b/h_comp50.htm (last visited Feb. 5, 2007).

⁹³ Shimon Shetreet, *The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration*, in SHETREET & DESCHÊNES, *supra* note 55, at 395 (The international organizations included, *inter alia*, the International Commission of Jurists, the International Court of Justice, the European Court of Human Rights, Amnesty International, and global and regional international lawyers organizations).

⁹⁴ Jules Deschênes, *The Montreal Declaration on the Independence of Justice – an Introduction*, in SHETREET & DESCHÊNES, 445, *supra* note 55, at 446.



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provides that both the ethical standards for national judges⁹⁵ and the principles of judicial independence contained in human rights instruments shall apply to international judges.⁹⁶

The *Burgh House Principles* were formulated and adopted in 2004 by the International Law Association's (ILA)⁹⁷ Study Group on the Practice and Procedure of International Courts and Tribunals in the context of the Project on International Courts and Tribunals.⁹⁸ The *Principles* apply primarily to standing international courts and tribunals and to full-time judges.⁹⁹ However, they are also applicable – as appropriate – to judges *ad hoc*, judges *ad litem* and part-time judges, to international arbitral proceedings, and to other exercises of international judicial power.¹⁰⁰ The *Principles* note “the special challenges facing the international judiciary in view of the non-national context in which they operate”¹⁰¹ and “[r]ecognis[e] the need for guidelines of general application to contribute to the independence and impartiality of the international judiciary.”¹⁰² Various principles on judicial independence, including those identified in the *Montreal Declaration*, the *Basic Principles*, and practices and statutes of various international courts were relied upon in the drafting of the *Burgh House Principles*.¹⁰³

The *Basic Principles* were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and were later endorsed by General Assembly resolutions.¹⁰⁴ Though these principles were drafted for use by national judges, as promulgated by the United Nations they provide valuable guidelines

⁹⁵ Montreal Declaration, *supra* note 90, at art. 1.06.

⁹⁶ Montreal Declaration, *supra* note 90, at art. 1.07.

⁹⁷ See, e.g., International Law Association, *History of the ILA*, available at http://www.ila-hq.org/html/layout_about.htm (last visited Feb. 5, 2007) (The International Law Association was founded in Brussels in 1873. Its objectives, under its Constitution, are “the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law.” The ILA has consultative status, as an international non-governmental organization, with a number of the United Nations specialized agencies. Amongst its 3700 members it counts lawyers in private practice, academia, government and the judiciary, to non-lawyer experts from commercial, industrial and financial spheres, and representatives of bodies such as shipping and arbitration organizations and chambers of commerce).

⁹⁸ International Law Association, Study Group on the Practice and Procedure of International Courts and Tribunals, *Independence of the International Judiciary*, available at http://www.ucl.ac.uk/laws/cict/docs/burgh_280604.pdf (last visited March 14, 2007).

⁹⁹ Burgh House Principles, *supra* note 54, at Preamble.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Miller, *supra* note 2.

¹⁰⁴ Basic Principles on the Independence of the Judiciary, *supra* note 92, at art. 17.



for universal notions of independence, reflecting principles of independence across a substantial part of the world.¹⁰⁵

Notwithstanding the non-binding nature of soft law instruments, this report contends that the following seven considerations put forward by these instruments should be acknowledged and applied by all tribunals because in identifying criteria for maintaining (the appearance of) independence, these instruments taken together with the jurisprudence of human rights bodies give additional substance and meaning to the more general provisions set out in human rights treaties.

First, the instruments contain several provisions relating to the appointment process, recalling the need to follow provisions set forth in law;¹⁰⁶ and for the process to be transparent.¹⁰⁷ The selection of judges should be based on identified minimum qualification requirements.¹⁰⁸ Discrimination in the nomination process is prohibited, except on the basis of nationality.¹⁰⁹ Furthermore, there should be an equitable geographical and gender representation.¹¹⁰ When subsequent influence is possible, appointment upon recommendation by the executive is prohibited;¹¹¹ and the promotion of judges should be based on objective grounds.¹¹²

Second, the *Basic Principles* require the term of office of judges to be adequately secured by law,¹¹³ and the *Burgh House Principles* require judges to be appointed for a

¹⁰⁵ Other important soft law instruments are the Universal Charter of the Judge, unanimously approved by the Central Council of the International Association of Judges on November 17, 1999, *available at* http://www.justiceintheworld.org/info/ucj_e.htm (last visited March 28, 2007); Beijing Statement of Principles of the Independence of the Judiciary in the Law Asia Region, as amended at Manila, 28 August 1997, *available at* http://www.lawasia.asn.au/uploads/images/Beijing_Statement.pdf (last visited March 28, 2007); the Cairo Declaration on Judicial Independence, adopted at the Second Arab Justice Conference: Supporting and Promoting the Independence of Judiciary, Cairo, February 21-24, 2003, *available at* http://www.ifes.org/files/rule-of-law/Egypt/Egypt_declaration-english.pdf (last visited March 28, 2007); and the Bangalore Principles of Judicial Conduct, adopted by a roundtable meeting of Chief Justices from the Asia and African Regions in The Hague in 2002, *available at* www.ajs.org/ethics/pdfs/Bangalore_principles.pdf (last visited March 28, 2007).

¹⁰⁶ Montreal Declaration, *supra* note 90, at art. 1.11 (if possible governments should not hold the power of nomination and nomination should not be dependent on nationality).

¹⁰⁷ Burgh House Principles, *supra* note 54, at art. 2.3.

¹⁰⁸ Montreal Declaration, *supra* note 90, at art. 1.12 (only jurists of recognized standing); Basic Principles on the Independence of the Judiciary, *supra* note 92, at art. 10; Burgh House Principles, *supra* note 54, at art. 2.1.

¹⁰⁹ Basic Principles on the Independence of the Judiciary, *supra* note 92, at art. 10.

¹¹⁰ Burgh House Principles, *supra* note 54, at 2.2.

¹¹¹ Montreal Declaration, *supra* note 90, at art. 1.13.

¹¹² Basic Principles on the Independence of the Judiciary, *supra* note 92, at art. 13.

¹¹³ *Id.*, at art. 11.



minimum term to enable them to exercise their judicial functions in an independent manner.¹¹⁴

Third, with respect to security of tenure, the *Basic Principles* and the *Burgh House Principles* provide that judges shall have security of tenure until the expiry of their term of office.¹¹⁵ Both instruments acknowledge that judges can be removed on specified grounds where specific procedures are followed.¹¹⁶

Fourth, the *Burgh House Principles* contain several rules prohibiting and guarding against the existence of conflicts of interest.¹¹⁷ The *Basic Principles* require the judiciary to decide matters before them impartially;¹¹⁸ and the Montreal Declaration notes the duty of judges to avoid influence.¹¹⁹

Fifth, there should be established grounds for and independent review of discipline, suspension and removal;¹²⁰ there should be appropriate procedures for complaints against judges.¹²¹

Sixth, regarding improper influence, the instruments emphasize the importance of the freedom from restrictions, improper influence, inducements, pressures, threats or interferences from any quarter.¹²² Moreover, governments have a duty to respect and observe independence.¹²³

Seven, in order to protect the judiciary from outside influence, the court should have adequate resources.¹²⁴ In addition, judges must enjoy adequate terms of compensation and pension.¹²⁵

Section 5 of this Report will elaborate on these seven judicial independence standards as addressed in the jurisprudence of human rights tribunals, by the statutes and

¹¹⁴ Burgh House Principles, *supra* note 54, at art. 3.2.

¹¹⁵ Basic Principles, *supra* note 92, at art 12; Burgh House Principles, *supra* note 54, at art 3.1.

¹¹⁶ Basic Principles, *supra* note 92, at art. 17. *See also* art. 18; Burgh House Principles, *supra* note 54, at art. 3.1.

¹¹⁷ Burgh House Principles, *supra* note 54, at arts. 8-13, 15-16.

¹¹⁸ Basic Principles, *supra* note 92, at art. 2.

¹¹⁹ Montreal Declaration, *supra* note 90, at arts. 1.03 and 1.05.

¹²⁰ Basic Principles, *supra* note 92, at arts. 18, 19, 20; Burgh House Principles, *supra* note 54, at art. 3.1; *id.*, at art. 16; Montreal Declaration, *supra* note 90, at art. 1.18..

¹²¹ Basic Principles, *supra* note 92, at art. 17; Burgh House Principles, *supra* note 54, at art.17; *id.*, at art. 8.1; Montreal Declaration, *supra* note 90.

¹²² Basic Principles, *supra* note 92, at arts. 2, 4; Burgh House Principles, *supra* note 54, at art. 1.

¹²³ Basic Principles, *supra* note 92, at art. 1.

¹²⁴ Burgh House Principles, *supra* note 54, at art. 6; Basic Principles, *supra* note 92, at art. 7.



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establishing treaties of international courts and tribunals, and give additional information as to how soft law instruments address these principles.

Thus far we have established the importance of and identified factors determining the judicial independence for courts and tribunals. The next section of this report discusses the applicability of customary international law to international organizations, and the customary international law character of the right to an independent and impartial judiciary.

¹²⁵ Montreal Declaration, *supra* note 90, at art. 1.14; Burgh House Principles, *supra* note 54, at art. 4; Basic Principles, *supra* note 92, at art. 11.



4. CUSTOMARY INTERNATIONAL LAW

4.1. The Applicability of Customary International Law to the International Labour Organization Administrative Tribunal

In order to pronounce upon any failure by the ILOAT to meet judicial independence standards, it must first be established whether it is legally bound to do so. In general, international organizations are not parties to human rights treaties such as the ECHR, the ICCPR, and the ACHR. However, treaties are not the only source of law in which the right to an independent tribunal is protected, as some human rights obligations have achieved the status of customary international law.

It is generally accepted that international organizations that possess international legal personality are subject to international law.¹²⁶ International legal personality may be established by an express provision in the treaty or constituent instrument of the international organization.¹²⁷ In the absence of such a provision, international legal personality may be derived from the purposes and functions of the organization, as well as its practice.¹²⁸

The ILOAT may not be said to have a separate international legal personality apart from the ILO. By the virtue of an analogy with the law on state responsibility, it is commonly accepted that individual organs of an international organization enjoy legal personality derived from the legal personality of the international organization. Consequently, international law binding on the organization is *ipso facto* binding on all its organs.¹²⁹ The Constitution of the ILO explicitly provides for the Organization's legal personality, stating that: "The International Labour Organization shall possess full juridical personality and in particular the capacity (a) to contract; (b) to acquire and

¹²⁶ M.N. SHAW, *INTERNATIONAL LAW* 191 (1997); REINISCH, *supra*, note 6, at 53; A. CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 59 (2006); Draft Articles on Responsibility of International Organizations, art. 2, ILC, Fifty-fifth session (2003) *available at* <http://untreaty.un.org/ilc/reports/2003/2003report.htm> (last visited Jan. 15, 2007) ("the term 'international organization' refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality").

¹²⁷ CHITTHARANJAN FELIX AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* 82 (1996); HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 822 (3d ed. 1995); REINISCH, *supra* note 6, at 54-9.

¹²⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (April 11), Advisory Opinion, para.185 (supporting the existence of presumptive personality).

¹²⁹ JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 55 (2002).



dispose of immovable and movable property; (c) to institute legal proceedings.”¹³⁰ Accordingly, the ILO, including the ILOAT as an organ thereof, has rights and, more importantly for the purposes of this report, duties under international law.

Customary law as a source of international law is important in terms of ensuring accountability of non-state actors, including international organizations.¹³¹ As a direct result of their international legal personality, it is now recognized that international organizations are bound by general international law including any human rights norms that have risen to the level of custom.¹³² As stated by the ICJ in its Advisory Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*: “International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law.”¹³³ More forcefully, Arsanjani asserts: It would be “fantastic” to assume that international organizations “are authorized to violate the principles they were established to serve” and it would “be perverse, even destructive, to postulate a community expectation that [international organizations] need not conform to the principles of public order.”¹³⁴

An important consequence of possessing international legal personality is that it renders an international organization “responsible or liable for the non-fulfillment of its

¹³⁰ International Labour Organization Constitution, Chapter IV, Article 39, *available at* <http://www.ilo.org/public/english/about/iloconst.htm#a39> (last visited Feb. 5, 2007).

¹³¹ CLAPHAM, *supra* note 126, at 80.

¹³² A. Reinisch, *Securing the Accountability of International Organizations*, 7-2 GLOBAL GOVERNANCE 131 (2001). *See also* Final Report of the International Law Association Committee on Accountability of International Organizations (2004) [hereinafter Final ILA Report], p. 22, *available at* http://www.ila-hq.org/html/layout_committee.htm (last visited Jan. 25, 2007): “[International organizations] should comply with basic human rights obligations.”

¹³³ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 I.C.J. 73, 89-90, para. 90. *Cf.* International Law Commission, *Commentary on the Jus Cogens Provision of Article 53 Vienna Convention on the Law of Treaties Between States and International organizations*, 2(2) YEARBOOK OF INTERNATIONAL LAW COMMISSION 56 (1982) (“International organizations are created by treaties concluded between States [...] despite a personality which is in some aspects different from that of States parties to such treaties, they are nonetheless the creation of those States. And it can not be maintained that States can avoid compliance with peremptory norms by creating organizations”); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, opened for signature 21 March 1986, art. 31-32, 25 I.L.M. 543 (a treaty rule may become binding on a third party if it becomes a customary rule of international law); AMERASINGHE, *supra* note 5, at 240-47; SCHERMERS & BLOKKER, *supra* note 127, at 822-25 (citing customary international law, the constitution of an international organization, and general principles of international law as sources of law for international organizations).



obligations”¹³⁵ In the *Chorzow Factory* case, the Permanent Court of International Justice held that it is a principle of international law that “the breach of an engagement involves an obligation to make reparation in an adequate form”.¹³⁶ Although the principle was held to apply to States, it is reasonable to extend it to international organizations.¹³⁷ The imposing of obligations on organizations without the corollary sanction of responsibility in case of breach leaves the notion of obligations hollow and meaningless. Such responsibility is explicitly endorsed by the ILA Committee on Accountability of International Organizations: “No situation should arise where an [international organization] would not be accountable to some authority for an act that might be deemed illegal. The principle that [international organizations] may be held internationally responsible for their acts is nowadays part of customary international law.”¹³⁸

Importantly, the ILA Committee states that the international responsibility of an international organization remains regardless of whether the act or omission in question is considered lawful by the organization’s internal legal order.¹³⁹ Thus, the ILO(AT) may not invoke as a defense the lack in the ILOAT Statute of provisions regarding judicial independence. The need for accountability also appears to constitute the starting point of the International Law Commission in its work on providing a framework for the responsibility of international organizations.¹⁴⁰ Thus, even though a more detailed explanation of the scope of the responsibility of international organizations for violations

¹³⁴ Mahnoush H. Arsanjani, *Claims Against International Organizations: Quis Custodiet Ipsos Custodies*, 7 YALE J. WORLD PUB. ORD. 131, 133–34 (1981).

¹³⁵ See Reparations for Injuries Suffered in the Service of the United Nations, *supra* note 128.

¹³⁶ Case Concerning the Factory at Chorzow, PCIJ 21 November 1927, Series A, Judgment No. 8, para 21.

¹³⁷ KLABBERS, *supra* note 129, at 307. Cf. Eisuke Suzuki and Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICHIGAN JOURNAL OF INTERNATIONAL LAW 177, 179 (2005) (“It is now clear that the legal personality of international organizations entails a responsibility for their conduct.”).

¹³⁸ Final ILA Report, *supra* note 132, at p. 26, available at http://www.ila-hq.org/html/layout_committee.htm (last visited Jan 25, 2007) (reference omitted). See also *id.*, at 27: “Every internationally wrongful act of an [international organization] entails the international responsibility of that [international organization].”.

¹³⁹ Final ILA Report, *supra* note 132, at p. 26, available at http://www.ila-hq.org/html/layout_committee.htm (last visited Jan. 25, 2007) (reference omitted). See also *id.*, at 27: “The characterization of an act of an [international organization] as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by the [international organization’s] internal legal order.”

¹⁴⁰ International Law Commission, Draft Articles on Responsibility of International Organizations, at art. 1(1), Fifty-fifth session 2003, available at <http://untreaty.un.org/ilc/reports/2003/2003report.htm> (last



of international law has yet to be delineated,¹⁴¹ it is nevertheless accepted that such responsibility exists.

4.2. The Customary International Law Character of the Right to an Independent and Impartial Judiciary

Customary international law or “the law of nations” is generally created by State practice and *opinio juris*, the latter being the belief that such practice is legally binding.¹⁴² Such a standard makes the actual content of customary international law difficult to ascertain¹⁴³ and accordingly difficult to apply. Still, it is recognized that where a treaty is almost universally accepted, it is possible to conclude that certain norms contained in that treaty have evolved into customary international law.¹⁴⁴ It can safely be asserted that human rights instruments have generated norms of customary international law.¹⁴⁵

visited Jan. 15, 2007): “The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.”

¹⁴¹ Cf. Report of the Working Group on Responsibility of International Organizations, UN GAOR, 54th Session, para. 9, UN Doc.A/CN.4/L.622 (2002), *available at* <http://www.un.org/law/ilc/sessions/53/54sess.htm> (last visited Jan 15, 2007) (international organizations “vary so much that with regard to responsibility it may be unreasonable to look for general rules applying for all international organizations”).

¹⁴² See e.g., M. BYERS, CUSTOM, POWER AND THE POWER OF RULES 129-146 (1999); North Sea Continental Shelf 1969 I.C.J. 3 (Feb. 20); Paramilitary activities in and against Nicaragua (merits) [1986] ICJ Rep 1; 45 Am. Jur. 2d International Law § 1; Restatement (Third) of Foreign Relations Law § 102(2) (1987); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6-10 (6 Ed. 2003). See also OPPENHEIM’S INTERNATIONAL LAW 1, 25-6 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1996) (“Custom is the oldest and the original source of international law as well as of law in general,” the substance of which “is to be found in the practice of states.”) (The practice of States, in turn, “embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic dispatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere.”).

¹⁴³ LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 29 (1995) (all of these characteristics give the body of customary international law a “soft, indeterminate character,” that is subject to creative interpretation).

¹⁴⁴ See, e.g., Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985, pp. 29-30, para. 27) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.”)

¹⁴⁵ See T. Buergenthal, *The World Bank and Human Rights*, in THE WORLD BANK, INTERNATIONAL FINANCIAL INSTITUTIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW 96 (E. Brown Weiss, A. Rigo Suerda and L. Boisson de Chazournes eds., 1999); CLAPHAM, *supra* note 126, at 100 (“the two Covenants and the Universal Declaration - which over time can be said to have acquired normative status either as a customary international law or as an authoritative interpretation of the Charter - constitute what has become as the International Bill of Rights.”); TOMUSCHAT, *supra* note 84 (“the wide scale acceptance of the Declaration and the Covenants constitutes “a framework which might even be said to have become binding on non-signatory States, in any event as far as substantive content is concerned.”); M. Cogen, *Human Rights, Prohibition of Political Activities and the Lending Policies of World Bank and International*



Nonetheless, it cannot be assumed that *all* human rights norms have acquired a customary status.¹⁴⁶

The fact that the right to a fair trial is enunciated in many legal instruments and is widely recognized in domestic legal systems has led scholars to conclude that the right to a fair trial is now customary international law.¹⁴⁷ Doswald-Beck argues that the international community has created a customary international law requirement of independent judiciaries in its quest to secure the protection of basic human rights. In so arguing, she points to the similarity in the text of the various treaties as well as the similarities in the jurisprudence of the treaties' supervisory bodies.¹⁴⁸ Accordingly, she contends that it is possible to acknowledge these standards as customary international law.¹⁴⁹ With respect to judicial independence in particular, Brower concludes: “[g]iven the diversity of municipal due process standards, one may identify only two commonly accepted requirements of procedural justice at the international level: impartiality of the tribunal and equal treatment of parties.”¹⁵⁰

It should also be mentioned that based on the fact that most, if not all, national legal systems recognize the importance of judicial independence, it may also be said to constitute a general principle of international law.¹⁵¹

Monetary Fund, in THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW 387 (Chowdhury, Denters and de Waart eds., 1988) (“The Universal Declaration and the Covenants represent minimal standards of conduct for all people and all nations. Intergovernmental organizations are inter-state institutions and they too are bound by the generally accepted standards of the world community.”); T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 34 (1989); International Law Commission, Report on State Responsibility, Third Report, UN Doc. A/CN.4/507, para 96, *available at* http://untreaty.un.org/ilc/guide/9_6.htm (last visited Jan 15, 2007) (“one can infer that the core cases of obligations *erga omnes* are those non-derogable obligations of a general character which arise directly under general international law or under generally accepted multilateral treaties (e.g. in the field of human rights)”).

¹⁴⁶ CLAPHAM, *supra* note 126, at 86. *See also* O. SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 340 (Hague Academy International Law, 1982) (“Only some rights recognised in the Declaration and other human rights texts have a strong claim to the status of customary law”).

¹⁴⁷ *See* H. Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 287 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 345 (1995-96). *Cf.* D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 182 (1999).

¹⁴⁸ DOSWALD-BECK & KOLB, *supra* note 89.

¹⁴⁹ *Id.*

¹⁵⁰ Brower, *supra* note 11, at 87 (footnote omitted).

¹⁵¹ *See* Final Report by the Special Rapporteur L. M. Singhvi, *The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*, UN Doc. E/CN.4/Sub.2/1985/18 (judicial independence and impartiality form part of the “general principles of law recognised by civilised nations” in terms of Art. 38(1)(c) of the



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On the basis of the foregoing, it is reasonable to conclude that the ILOAT, as an organ of an international organization, must abide by standards required of an independent judiciary pursuant to customary international law and general principles of international law.

While the exact content of customary international law and general principles of law are difficult if not impossible to distill with precision, it is arguable that based on the criteria set forth in human rights instruments such as the ECHR, the ICCPR, and the IACHR, and as interpreted by its monitoring bodies; as well as the soft law instruments discussed above, that any assessment of the independence of a tribunal should take into account the following considerations: (1) appointment; (2) term of office and reappointment; (3) security of tenure; (4) conflicts of interest; (5) discipline and disqualification; (6) improper influence; and (7) financial independence.

Statute of the International Court of Justice). Cf. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS OR TRIBUNALS 279-289 (1953) (on the general principle of law *nemo debet esse iudex in propria sua causa* (no one can be judge in his/her own cause)); *id.*, at 282 (“It is, therefore, perhaps not without reason that Justice is always presented as being blindfolded.”); Rome Statute of the International Criminal Court [hereinafter Rome Statute], art. 21(1)(c), available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (last visited Feb. 7, 2007).



5. ASSESSMENT OF THE JUDICIAL INDEPENDENCE OF THE INTERNATIONAL LABOUR ORGANIZATION ADMINISTRATIVE TRIBUNAL BASED ON STANDARDS DERIVED FROM INTERNATIONAL LAW

This section of the report examines judicial independence principles pursuant to the seven considerations just set forth. We will first identify the content of these principles in accordance with relevant jurisprudence of the European Court of Human Rights,¹⁵² the Human Rights Committee, and the Inter-American Court and Commission of Human Rights, and as set out in soft law instrument such as the *Burgh House Principles* and the *Montreal Declaration*. The ILOAT will then be assessed according to those principles, and by comparing its Statute and known practices to those of other courts and administrative tribunals including the World Bank Administrative Tribunal (“WBAT”), the United Nations Administrative Tribunal (“UNAT”), the International Court of Justice (“ICJ”), the European Court of Justice (“ECJ”), the European Court of Human Rights, and the Inter-American Court of Human Rights.¹⁵³

5.1. Appointment

Existing international standards make clear that the selection and appointment of judges play an important role in safeguarding judicial independence and ensuring the selection of the most competent individuals.¹⁵⁴ The importance of the appointment process in assessing the independence of the judiciary is distinctly put in an Expert Report on Judicial Appointments to the European Court of Human Rights:

The issue of how judges are appointed is important in two respects. First, the independence and impartiality of the judiciary is directly linked to appointment procedures. Since the legitimacy and credibility of any judicial institution depends upon public confidence in its

¹⁵² In order to determine the exact content of the judicial independence standards of the ECHR, we will examine the case law of the European Court of Human rights with some reference to Commission reports where applicable. However, we acknowledge that while the Commission’s opinions can be relevant in interpreting the concept of independence under the Convention, the Court has not confirmed all of the Commission’s opinions.

¹⁵³ While not discussed in this Report, another administrative tribunal of interest is the European Union Civil Service Tribunal. The rules governing its functioning are contained in the Annex to the ECJ Statute, *infra* note 195.

¹⁵⁴ Andrea Coomber, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, 5 E.H.R.L.R. 486 (2003).



independence, it is imperative that appointment procedures for judicial office conform to--and are seen to conform to--international standards on judicial independence. . . . Secondly, without the effective implementation of ‘objective and transparent criteria based on proper professional qualification’, there is the very real possibility that the judges selected will not have the requisite skills and abilities to discharge their mandate. Declining standards will ultimately have a negative effect on the standing of the Court¹⁵⁵

Based on the following survey of human rights jurisprudence and soft law instruments, as well as the statutes of other courts and tribunals, the ILOAT’s appointment process and provisions have a number of potential problems and gaps.

5.1.1. Human Rights Jurisprudence

The European Court of Human Rights has had occasion to assess the independence of judicial bodies on the basis of the process of appointment. Several cases indicate that appointment by the executive is not necessarily in breach of the European Convention on Human Rights.¹⁵⁶ However, where this is the case, it appears that the Court requires additional safeguards.¹⁵⁷ The Court’s decisions specify that these safeguards may include considerations such as term of office, security of tenure, and the requirement that the executive avoid giving instructions to the judges in their juridical capacities.¹⁵⁸ Another safeguard that the Court has taken into account is the involvement of an independent body¹⁵⁹ or the tribunal itself¹⁶⁰ in the appointment procedure. In the

¹⁵⁵ Interights, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* 6 (2003), available at <http://www.interights.org/doc/English%20Report.pdf> (last visited March 27, 2007) (the group of experts comprised: Professor Dr Jutta Limbach, former President of the Federal Constitutional Court of Germany; Professor Dr Pedro Cruz Villalón, former President of the Constitutional Court of Spain; Mr Roger Errera, former member of the Conseil d'Etat and of the Conseil supérieure de la magistrature in France; the Rt Hon. Lord Lester of Herne Hill QC, President of INTERIGHTS; Professor Dr Tamara Morschtschakowa, former Vice President (now Consultant) of the Constitutional High Court of the Russian Federation; the Rt Hon. Lord Justice Sedley, judge in the English Court of Appeal; and Professor Dr Andrzej Zoll, former President of the Constitutional High Court of Poland).

¹⁵⁶ See, e.g., *Ringeisen v. Austria*, App. No. 2614/65, 13 Eur. Ct. H.R. (ser. A), para. 95 (1971); *Campbell and Fell v. United Kingdom*, *supra* note 64, at para. 79 (1984); *Sramek v. Austria*, App. No. 8790/79, 84 Eur. Ct. H.R. (ser. A), para 38.

¹⁵⁷ MARTIN KUIJER, *THE BLINDFOLD OF LADY JUSTICE* 218 (2004).

¹⁵⁸ *Id.*

¹⁵⁹ *Lithgow a.o. v. United Kingdom*, App. No. 9006/80;9262/81;9263/81;9265/81;9266/81;9313/81;9405/81, 102 Eur. Ct. H.R. (ser. A) para. 202 (1986).

¹⁶⁰ KUIJER, *supra* note 157 (referring to the ECtHR case of *Kleuver v. Norway*, App. No. 45837/99, declared inadmissible).



Lauko case, the combination of appointment by the executive and the “lack of any guarantees against outside pressures and any appearance of independence” led the Court to conclude that the bodies in question could not be considered to be independent of the executive.¹⁶¹ The Court considers appointment by election compatible with the Convention.¹⁶²

The Human Rights Committee has recognized that rules of appointment can affect the independence of the judiciary especially if judges are appointed by the executive. For instance, with regard to Slovakia where judges were appointed by the executive, the Committee recommended the adoption of measures guaranteeing independence, protecting the judges from political influence by regulations of appointment, remuneration, tenure, dismissal, and discipline.¹⁶³ Thus, it is presumable that while the Committee has not interpreted the standards of Article 14 ICCPR as a prohibition of appointment of judges by the executive, in such a case it would strongly encourage that other safeguards be implemented in order to insure the independent operation of the tribunal in question.

According to the Human Rights Committee, judges should be selected primarily on the grounds of their legal qualifications; further, discrimination should be avoided, giving specific regard to the selection of women and minorities for judgeship positions.¹⁶⁴ In a case involving Sudan, the Committee found that its judges had not been selected on the basis of objective appointment criteria and moreover, the judiciary lacked women and minorities. The Committee urged Sudan to take measures to rectify these inconsistencies in order to comply with its obligations pursuant to the ICCPR.¹⁶⁵

Also the Inter-American Court of Human Rights has recognized that appointment by the executive can affect independence.¹⁶⁶

In sum, the jurisprudence confirms that while appointment by the executive is not in itself cause to question the independence of a tribunal, such a circumstance should be

¹⁶¹ *Lauko v. Slovakia*, App. No. 26138/95, 1998-VI Eur. Ct. H.R. para. 64.

¹⁶² *H. v. Belgium*, *supra* note 69, at para. 51 (in that case, the members of the Council of the *Ordre des avocats* were elected by their peers).

¹⁶³ U.N. HRC *Concluding Observations on Slovakia*, U.N. Doc CCPR/C/79/Add. 50 (1995).

¹⁶⁴ U.N. HRC, *Concluding Observations on Sudan*, para. 21, U.N. Doc. CCPR/C/79/Add. 85 (1997).

¹⁶⁵ *Id.*

¹⁶⁶ *Castillo Petruzzi et al. v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52 at 29 (May 30, 1999) (discussed in section 5.5).



counter-balanced with guarantees that insure the independence of the tribunal at hand. Additionally, there is precedent supporting the need for representation of women and minorities in the judiciary.

5.1.2. *Soft Law*

The *Montreal Declaration* does not require appointment qualifications other than that the judge be a jurist of recognized standing.¹⁶⁷ The *Burgh House Principles* require candidates for judicial appointment to be of integrity and ability with appropriate training or qualifications in law.¹⁶⁸ The *Basic Principles* require that judges be persons of high moral character and conscientiousness who possess the appropriate professional qualifications, competence, and experience required for the court concerned.¹⁶⁹

In addition to considering the qualities of judges during the appointment process, the procedure of the nomination should also adhere to certain standards. In particular, there should be safeguards against appointments for improper motives.¹⁷⁰ The *Montreal Declaration* establishes that international judges should be appointed following provisions set forth in law,¹⁷¹ while the *Burgh House Principles* provide that procedures for the nomination, election and appointment of judges should be transparent and provide information about the procedures.¹⁷² Furthermore, the candidates should be made public. The same rules apply to possible re-elections.¹⁷³ The *Basic Principles* prohibit discrimination in the selection, except for certain nationality requirements, as most international courts require their judges to be nationals of the member states.¹⁷⁴ The *Burgh House Principles* provide the positive obligation to ensure equitable representation of different regions and legal systems of the world, as well as of female and male

¹⁶⁷ Montreal Declaration, *supra* note 90, at art. 1.12.

¹⁶⁸ Burgh House Principles, *supra* note 54, at art. 2.1.

¹⁶⁹ Basic Principles, *supra* note 92, at art. 10. Cf. Universal Charter of the Judge, *supra* note 105, at art. 9:

The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, that include substantial judicial representation.

¹⁷⁰ Burgh House Principles, *supra* note 54, at art. 2.3; Basic Principles, *supra* note 92, at art. 10.

¹⁷¹ Montreal Declaration, *supra* note 90, at art. 1.11

¹⁷² Burgh House Principles, *supra* note 54, at arts. 2.3, 2.4.

¹⁷³ *Id.* at arts 2.3, 2.4, 2.5.



judges.¹⁷⁵ Appointment by the executive is generally acceptable, however the *Montreal Declaration* advises against it, on prohibits it when subsequent influence is possible.¹⁷⁶

5.1.3. *The Practice of Other Courts and Tribunals*

The statutes and rules of most international courts and tribunals contain at least general provisions listing the qualifications necessary for appointment.¹⁷⁷ These criteria include: (1) a nationality requirement; (2) moral integrity; (3) professional qualifications and experience; and (4) gender requirements.

The statutes or establishing documents of the WBAT,¹⁷⁸ the ECtHR,¹⁷⁹ the ECJ,¹⁸⁰ and the IACHR¹⁸¹ all contain nationality provisions requiring judges to be of the nationality of the member states while prohibiting the appointment of more than one judge of the same nationality. While neither the ICJ Statute nor the UNAT Statute require judges to be of the nationality of a Member State, these Statutes acknowledge the importance of the independence requirement by prohibiting the appointment of more than one judge of the same nationality.¹⁸² Conversely, Article 31 of the ICJ Statute permits

¹⁷⁴ Basic Principles, *supra* note 92, at art. 10. Note that the *Montreal Declaration* advises against appointment being dependent on nationality. *Montreal Declaration*, *supra* note 90, at art. 1.11.

¹⁷⁵ Burgh House Principles, *supra* note 54, at art. 2.2.

¹⁷⁶ *Montreal Declaration*, *supra* note 90, at art. 1.11 and 1.13.

¹⁷⁷ Mackenzie & Sands, *supra* note 2, at 277 (“the statutes and rules of international courts and tribunals tend to include general provisions as to qualifications for judicial appointment.”).

¹⁷⁸ Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation [hereinafter WBAT Statute], art. IV, para. 1, *at*

<http://wbln0018.worldbank.org/crn/wbt/wbtwebsite.nsf> (follow “Statute and Rules” hyperlink; then follow “Statute” hyperlink)(last visited Feb. 7, 2007).

¹⁷⁹ ECHR *supra* note 47, at art. 20 (requiring the Court to consist of the same number of judges as the number of the Member States) (Although the provision does not explicitly require judges to be of the nationality of the Member States nor that there be no two judges of the same nationality, it has the same effect.).

¹⁸⁰ Treaty Establishing the European Community, art. 221, Nov. 10, 1997, 1997 O.J. (C340) 3 [hereinafter EC Treaty].

¹⁸¹ Statute of the Inter-American Court of Human Rights, art. 4, Oct. 1979, [hereinafter IACHR Statute], available at <http://www.corteidh.or.cr/estatuto.cfm> (last visited Feb. 5, 2007) (Adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz Bolivia, October 1979 (Resolution No.448))

¹⁸² Statute of the United Nations Administrative Tribunal as *adopted* by the General Assembly by resolution 351 A (IV) on 24 November 1949 and *amended* by Resolution 782 B (VIII) on 9 December 1953, by Resolution 957 (X) on 8 November 1955, by Resolution 50/54 on 11 December 1995, by Resolution 52/166 on 15 December 1997 and by Resolution 55/159 on 12 December 2000, art. 3 para. 1, available at <http://www.un.org/staff/panelofcounsel/pocimages/atstat.pdf>, [hereinafter UNAT Statute] (last visited Feb. 7, 2007); Statute of the International Court of Justice [hereinafter ICJ Statute], art. 3, available at <http://www.icj-cij.org/icjwww/basicdocuments/basicicic/basicicicstatute.htm>. (last visited Feb. 7, 2007).



judges of the nationality of the parties to the case to preside over a case and in the absence of such a judge, the party may choose its own judge.¹⁸³ Similar possibilities exist for the ECtHR¹⁸⁴ and the IACHR.¹⁸⁵ There is an argument that the presence of a judge who is a national of the State party to the case, and moreover the possibility for such a State to choose its own judge is likely to threaten independence.¹⁸⁶ With regard to the two human rights courts, however, the possibility for a State party to choose its own judge is counterbalanced by the fact that their statutes provide for a disqualification procedure for the purpose of removing judges for reasons of lack of independence and impartiality.¹⁸⁷

Another criterion of appointment is moral integrity. Romano suggests that “[d]espite the vagueness of the expression, ‘moral integrity’ is undoubtedly the first and minimum requirement for judicial office, either internationally or nationally.”¹⁸⁸ While a requirement of moral integrity – considering its intangible nature – may not necessarily influence the appointment process, a stipulation in a tribunal’s statute may serve as an additional guarantee to those coming before the tribunal and as a statutory reminder to its judges. The WBAT Statute demands “high moral character” of its judges.¹⁸⁹ The Statutes

¹⁸³ ICJ Statute, *supra* note 182, at art. 31.

¹⁸⁴ Rules of the European Court of Human Rights [hereinafter ECtHR Rules], Rule 29, para. 1 sub a, available at <http://www.echr.coe.int/ECHR/> (last visited Feb. 5, 2007) (follow “Basic Texts” hyperlink; then follow “Rules of Court” hyperlink).

¹⁸⁵ IACHR Statute, *supra* note 181, at art. 10.

¹⁸⁶ As member States of international organizations are not a party to cases before the international administrative tribunals, the statutes of these tribunals hold no possibilities for parties to the case to appoint a judge based on his/her nationality. Nor do the statutes contain provisions allowing international organizations party to a case to choose a judge.

¹⁸⁷ ECtHR Rules, *supra* note 184, at Rule 28 para. 4; and IACHR Statute, *supra* note 181, at arts. 10, 19. See also CHENG, *supra* note 151, at 280-289; *id.*, at 288-289:

It would thus appear that the presence of national judges does not conflict with the principle *nemo iudex debet esse in propria sua causa*. [...] This does not mean, however, that the institution of national judges is an ideal implementation of the principle that no one should be judge in his own cause. As the examples have shown, the misconception that national judges represent their own State, however unfounded, may easily arise. Moreover, the link of nationality between the judge and one of the parties affords too convenient a ground for insinuations of partiality, however rare and improper. As the Report of the Advisory Committee for the establishment of the Permanent Court aptly said: - “Justice, however, must not only be just but appear so. A judge must not only be impartial, but there must be no possibility of suspecting his impartiality.” (references omitted).

¹⁸⁸ Cesare P.R. Romano, *The Judges and Prosecutors of Internationalized Criminal Courts and Tribunals*, in *INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA* 235, 246 (Cesare P.R. Romano et al., eds., 2004).

¹⁸⁹ WBAT statute, *supra* note 178, at art. 1.



of the ICJ¹⁹⁰, the ECtHR¹⁹¹ and the IACHR¹⁹² all require candidates for judgeships to be of high moral character. The UNAT Statute does not contain a provision requiring judges appointed to the tribunals to be of moral character.

The third appointment consideration is professional qualifications or the experience of the judges. The statutes of international courts and tribunals generally require that their judges be qualified for a high or the highest judicial office in their countries of nationality. Some statutes further require that they be experts in the particular area of law practiced by the court or tribunal. Since 2001, the WBAT Statute includes a requirement that its members “possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence in relevant fields such as employment relations, international civil service and international organization administration.”¹⁹³ The ICJ,¹⁹⁴ ECJ,¹⁹⁵ ECtHR, and IACHR¹⁹⁶ contain similar provisions.¹⁹⁷ The UNAT Statute states that judges must have “requisite qualifications and experience, including . . . legal qualifications and experience.”¹⁹⁸

The fourth consideration under the appointment umbrella is gender. Few courts specifically address equitable gender representation in their statutes.¹⁹⁹ The European

¹⁹⁰ ICJ Statute, *supra* note 183, at art. 2, para. 1.

¹⁹¹ ECHR, *supra* note 47, at art. 21, para. 1.

¹⁹² IACHR Statute, *supra* note 181, at art. 4.

¹⁹³ WBAT Statute, *supra* note 178, at art. IV, para. 1:

The Tribunal shall be composed of seven members, all of whom shall be nationals of Member States of the Bank, but no two of whom shall be nationals of the same State. The members of the Tribunal shall be persons of high moral character and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence in relevant fields such as employment relations, international civil service and international organization administration. Current and former staff of the Bank Group shall not be eligible to serve as members of the Tribunal and members may not be employed by the Bank Group following their service on the Tribunal.

¹⁹⁴ ICJ Statute, *supra* note 183, at art. 2.

¹⁹⁵ Statute of the Court of Justice, art. 223, *available at* <http://curia.eu.int/en/instit/txtdocfr/txtsenvigieur/statut.pdf>, [hereinafter ECJ Statute] (last visited Feb. 7, 2007).

¹⁹⁶ EC Treaty, *supra* note 180, at art. 21, para. 1.

¹⁹⁷ WBAT Statute, *supra* note 178, at art. 4, para. 1.

¹⁹⁸ UNAT Statute, *supra* note 182, at art. 3, para. 1.

¹⁹⁹ *See, generally*, the discussion on equitable gender representation in Romano, *supra* note 188, at 248-249. *See, for example*, Rome Statute of the International Criminal Court, *available at* <http://www.un.org/law/icc/statute/romefra.htm>, at art. 36, para. 8, sub a and b (iii) (last visited March 14, 2007) (requiring States parties to consider, when selecting judges, the need for a “fair representation of female and male judges” and for “the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”); Protocol to the African Charter on



Court of Human Rights does address this aspect in its Rules, which require that the composition for the sections of the Court be “gender balanced.”²⁰⁰

The appointment procedure for members of the WBAT states that the Executive Directors shall appoint the members of the Tribunal based upon a list to be devised by the President of the Bank.²⁰¹ Members of the UNAT are appointed by the General Assembly.²⁰² ECJ judges are appointed by common accord of the governments of the Member States.²⁰³ ICJ judges are elected by the General Assembly and the Security Council based upon a list of persons nominated by the national groups in the Permanent Court of Arbitration.²⁰⁴ Member States of the ECHR choose three candidates to propose to the Parliamentary Assembly that will elect one to be a judge for the ECtHR.²⁰⁵ Judges of the IACHR are elected by the General Assembly of the Organization of American States (“OAS”) from a list of maximum three candidates proposed by Member States of the ACHR.²⁰⁶

5.1.4. Assessment of the International Labour Organization Administrative Tribunal

The ILOAT Statute addresses nationality. Article III states that the Tribunal shall be composed of seven judges who must be of different nationalities.²⁰⁷ Based on long-standing practice, judges of the ILOAT “must be representative of different systems of law [and] [a]n overall balance at the linguistic and geographic level must also be

Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, art. 12, para. 2 and art. 14, para. 3 *available at* http://www.achpr.org/english/_info/court_en.html (last visited Feb. 5, 2007) (requiring States parties to give “[d]ue consideration [...] to adequate gender representation in nomination process.”) (“[I]n the election of the judges, the Assembly shall ensure that there is adequate gender representation.”).

²⁰⁰ ECtHR Rules, *supra* note 184, at Rule 25, para. 2.

²⁰¹ WBAT statute, *supra* note 178, at art. IV, para. 2.

²⁰² UNAT Statute, *supra* note 182, at art. 3.

²⁰³ EC Treaty, *supra* note 180, at art. 223.

²⁰⁴ ICJ Statute, *supra* note 183, at art. 4 para. 1.

²⁰⁵ ECHR, *supra* note 47, at art 22, para. 1.

²⁰⁶ IACHR Statute, *supra* note 181, at art. 7 (stating that, when a State party chooses to nominate three judges, one must be a national from another State).

²⁰⁷ ILOAT Statute, *supra* note 4, at art. III.

1. The Tribunal shall consist of seven judges who shall be of different nationalities.
2. The judges shall be appointed for a period of three years by the Conference of the International Labour Organization.
3. A meeting of the Tribunal shall be composed of three judges or, in exceptional circumstances, five, to be designated by the President, or all seven.



ensured.”²⁰⁸ Currently, the Tribunal’s seven members are nationals of France, Senegal, Australia, Argentina, Switzerland, Italy, and Canada.²⁰⁹

The ILOAT Statute lacks meaningful requirements for the minimum professional qualifications of its judges.²¹⁰ In a letter sent to University of Amsterdam, however, the ILOAT states that candidates for judgeships must have experience as judges of a high national jurisdiction or equivalent status at the international level.²¹¹ In practice, the members of the ILOAT are legal professionals.²¹² Currently, the judges appointed to the ILOAT have served as judges in domestic high courts and/or other international administrative tribunals.²¹³ Nevertheless, the silence on judicial qualifications in the ILOAT Statute could make the appointment of judges without sufficient qualifications or lacking necessary qualities possible as the practice referred to is not legally binding.

The ILOAT Statute does not contain a provision addressing the need to take gender into account when appointing judges to the court. However, it is arguable that such considerations could be beneficial to ensuring actual and apparent impartiality of the Tribunal, especially in cases involving sexual discrimination, harassment, assault, and other cases where (female) victims have been discouraged from filing complaints. Gender equity would also guard against potential judicial bias against female complainants and

²⁰⁸ Letter from Registrar Comtet, *supra* note 33.

²⁰⁹ *Infra* note 213.

²¹⁰ ILOAT Statute, *supra* note 4, at art. III, para. 1. *See also* AMERASINGHE, *supra* note 5, at 66 (noting that, unlike other international administrative tribunals and courts, the Statutes of the ILOAT, the United Nations Administrative Tribunal, and the League of Nations Administrative Tribunal are all “silent on the professional qualifications of judges [...].”).

²¹¹ Letter from Registrar Comtet, *supra* note 33.

²¹² AMERASINGHE, *supra* note 5, at 67 (“The ILOAT has generally had judges who were well known in the legal world.”). *See also*, Brower, *supra* note 11, at 82 (“While the ILOAT Statute does not require the appointment of eminent jurists, the ILOAT has developed a long tradition of service by distinguished judges and lawyers.”) (footnote omitted).

²¹³ The current composition of the ILOAT is *available at* <http://www.ilo.org/public/english/tribunal/judges.htm> (last visited Jan. 19, 2007) (The President of the ILOAT is Michel Gentot (France), a former president of the Conseil d’Etat Litigation Section, former President of the Commission nationale de l’informatique et des libertés (France’s data protection and freedom of information committee), and a judge of the Administrative Tribunal of the International Monetary Fund. The Vice-President is Seydou Ba (Senegal), former senior president of the Cour de cassation and president of the Court of Justice and Arbitration of the Organisation for the Harmonisation of Commercial Law in Africa (OHADA). The other members are Mary Genevieve Gaudron (Australia), former justice of the High Court of Australia; Augusto Gordillo (Argentina), former president of the Administrative Tribunal of the Inter-American Development Bank, judge of the Administrative Tribunal of the International Monetary Fund, and judge of the Administrative Tribunal of the Organization of American States; Claude Rouiller (Switzerland), former president of the Federal Tribunal of Switzerland;



female attorneys representing complainants before the ILOAT.²¹⁴ Currently, two of the ILOAT's seven judges are women.²¹⁵

The ILOAT Statute does not contain a provision requiring judges appointed to the tribunal to be of moral character.

The ILOAT Statute provides that its judges are to be appointed by the ILO Conference., which is the ILO's executive branch.²¹⁶ According to a letter received from the Registrar, it is the "long-standing practice" of the ILOAT with regard to appointment that the ILO Director-General first consults with the ILO Governing Body and then selects candidates on the following criteria: (1) experience in a court of high national jurisdiction or equivalent status at the international level; (2) nationality; and (3) balance in linguistic ability.²¹⁷ The Director-General then recommends to the Governing Body the names of persons that the International Labour Conference should invite to be judges in order to fill vacant posts in the Tribunal.²¹⁸ Neither the ILOAT Statute nor other publicly available documents provide additional guarantees to protect the independence of the Tribunal. This apparent lack of guarantees ensuring independence from the executive gives cause for concern. The potential infringement on judicial independence is more acute in light of the fact that ILOAT judges as well as the judges of other international administrative tribunals are appointed by authorities that may also be the defendant in a dispute before the tribunal. This is true especially considering the fact that ILOAT judges are eligible for unlimited re-appointment and the term of office is a short three years.²¹⁹

Giuseppe Barbagallo (Italy), former president of Chamber in the Council of State; and Dolores M. Hansen (Canada), former judge of the Federal Court).

²¹⁴ See, e.g., Shapiro, *supra* note 54, at 682-84 (discussing efforts in the United States to eliminate gender and racial bias in the judicial system).

²¹⁵ *Supra* note 213.

²¹⁶ ILOAT Statute, *supra* note 4, at art. III, para 2.

²¹⁷ Letter from Registrar Comtet, *supra* note 33.

²¹⁸ *Id. Cf.* Wolfgang Münch et al. (Joint Inspection Unit, United Nations), *Administration of Justice: Harmonization of the Statutes of the United Nations Administrative Tribunal and the International Labour Organization Administrative Tribunal*, Section 1, para. 4, Geneva 2004, JIU/REP/2004/3, available at http://www.unjiu.org/data/reports/2004/en2004_3.pdf (last visited Feb. 26, 2007)

The International Labour Conference appoints ILOAT judges, after nomination by the Director-General of ILO and following consultations with the Officers of the Governing Body (representing all the tripartite constituents of the Organization, namely Governments, Employers and Workers); these nominations are subsequently endorsed by the ILO Governing Body, for submission to the ILO Conference, where they are approved.

²¹⁹ Term of office will be discussed in section 5.2 of this report.



Jurisprudence and soft law instruments stress the importance of safeguards in the appointment process, and emphasize proper motives and transparency of the appointment. Although it appears in practice that the ILO takes a number of important factors into account when determining which individuals should be appointed to judgeships, such standards are inexplicably absent in its Statute and other public information does not point to the existence of any minimum standards. Arguably, this absence could allow for unchecked deviation from the standard practice of the Tribunal. While information was obtainable after a request was made to the ILOAT directly, it is still arguable that silence in the Statute negatively affects the transparency and insurance of safeguards regarding the appointment process. Thus, it would be beneficial to the preservation of independence with regard to appointment if such criteria were incorporated in the ILOAT Statute.

5.2. Term of Office and Reappointment

Term of office and reappointment are generally associated with the independence of judiciaries because short terms of offices in combination with the opportunity for reappointment may arguably influence judges to rule in the interest of the relevant appointing body in order to increase the chance of reappointment. The negative repercussions are immediately evident in the context of administrative tribunals where the appointing body may be a defendant before the tribunal. For that reason, scholars have argued that these terms of office must be increased to longer periods in order to avoid inappropriate influence.²²⁰ As noted by Singer, “[t]heoretically, each administrative tribunal is completely independent, in its decision making, of the organization’s political, executive and administrative organs. However, the organization’s political organs appoint the members of each tribunal for limited terms. Plainly, any judge who offends the organization may not be reappointed.”²²¹ As a solution to the potential problem created by reappointment, he suggests that “judges

²²⁰ J.F. Bruinsma, *Egbert Meyjer gaat naar Straatsburg* [Egbert Meyjer goes to Strasbourg], 7 NJCM-BULLETIN, (2004); C.F. Amerasinghe, *Judging with and Legal Advising in International Organizations*, 2 CHI. J. OF INT’L LAW 283, 293 (2001). See also Dung, *supra* note 51, at 12; AMERASINGHE, *supra* note 5, at 70-71.

²²¹ Singer, *supra* note 11, at 155 (footnote omitted).



should be appointed either for a long tenure period or for a single limited term with no possibility of reappointment.”²²² Amerasinghe also considers that limiting reappointment “to one additional term may work to some extent in favour of independence and impartiality, at least during the second term.”²²³ Brower, however, argues that there is the possibility that a limitation may not affect judicial independence because judges appear to be “chosen from senior professionals who may not be particularly interested in reappointment, as they do not depend on their judgeships for a living.”²²⁴

As will be demonstrated, the length of tenures and reappointment procedures for ILOAT judges are not conducive to independence of the Tribunal from the ILO.

5.2.1. *Human Rights Jurisprudence*

In the *Siglfirdingur Ehf* case, the European Court of Human Rights stated that a short term of office cannot by itself be dispositive in determining the independence of judges.²²⁵ In several cases, the Court has expressed that appointment for life is not required to establish an independent judiciary.²²⁶ In the *Campbell and Fell* case, it determined a term of three years to be acceptable because of the circumstance that the members were unpaid.²²⁷ However, in several subsequent cases the Court regarded a three-year term of office, without safeguards as seen in the *Campbell and Fell* case, to be in accordance with the Convention.²²⁸ Still, in a judgment regarding a military tribunal,²²⁹ the Court did consider a term of office of four years combined with the possibility of renewal to be a questionable factor in establishing independence.

²²² Singer, *supra* note 11, at 155 (footnote omitted).

²²³ AMERASINGHE, *supra* note 5, at 70-71.

²²⁴ *Id.* at 70-71.

²²⁵ KUIJER, *supra* note 157, at 232 (referring to the ECtHR case of *Siglfirdingur Ehf v. Iceland* (appl. No. 34142/96) The judgment was struck out of the list on May 30, 2000 because of settlement).

²²⁶ *Ringeisen v. Austria*, *supra* note 156, at para. 95; *Le Compte, Van Leuven and De Meyere v. Belgium*, *supra* note 64, at para. 57 (1981); *Campbell and Fell v. United Kingdom*, *supra* note 64, at para. 80 (1984).

²²⁷ *Campbell and Fell v. United Kingdom*, *supra* note 64, at para. 80 (1984).

²²⁸ *Sramek v. Austria*, *supra* note 156, at para 38; *Ettl a.o. v. Austria*, App. No. 9273/81, 117 Eur. Ct. H.R. (ser. A) para. 41; *Belilos v. Switzerland*, App. No. 10328/83, 132 Eur. Ct. H.R. (ser. A) para. 66.

²²⁹ *Çiraklar v. Turkey*, *supra* note 66, at para. 39.



5.2.2. *Soft Law*

In addition to the *Burgh House Principles* that require a minimum term of office that enables judges to exercise their judicial functions in an independent manner,²³⁰ the *Basic Principles* require the term of office of judges to be adequately secured by law.²³¹ The soft law documents do not further address the issue of term of office and reappointment.

5.2.3. *The Practice of Other Courts and Tribunals*

The issues of terms of office and reappointment of judges at international courts and tribunals are in general incorporated in the specific statutes and rules for every court or tribunal, but the content of the provisions vary. For most international administrative tribunals, the statutory term of office is relatively short; and reappointment is possible. Members of the UNAT are appointed for a period of four years and can be reappointed once.²³² The amended Statute of the WBAT was adjusted seemingly to account for possible threats to independence as the updated Statute provides for a term of office of five years with possible reappointment for one additional term of five years.²³³ The old version of the Statute provided that the term of office was three years with the possibility of reappointment for an unlimited number of terms.²³⁴

The ICJ Statute provides for a term of office of nine years with the possibility of re-election.²³⁵ The judges of the ECJ,²³⁶ the ECtHR²³⁷ and the IACHR²³⁸ are appointed for a period of six years. Judges at the ECJ and ECtHR can be reappointed without limits while the judges of the IACHR can be re-elected only once.²³⁹

²³⁰ *Burgh House Principles*, *supra* note 54, at art. 3.2.

²³¹ *Basic Principles*, *supra* note 92, at art. 11.

²³² UNAT Statute, *supra* note 182, at art. 3, para. 2.

²³³ WBAT Statute, *supra* note 178, at art. IV, para. 3.

²³⁴ AMERASINGHE, *supra* note 5, at 70.

²³⁵ ICJ Statute, *supra* note 183, at art. 13 para. 1.

²³⁶ EC Treaty, *supra* note 180, at art. 223.

²³⁷ ECHR, *supra* note 47, at art. 23, para. 1.

²³⁸ IACHR Statute, *supra* note 181, at art. 5.

²³⁹ *Id.*



5.2.4. *Assessment of the International Labour Organization Administrative Tribunal*

The judges at the ILOAT are appointed for a relatively short period of three years.²⁴⁰ Reappointment is not addressed in the Statute and this silence, in theory, permits judges to be re-appointed an unlimited number of times.²⁴¹ The short term of office of the ILOAT's judges and the possibility that they may be indefinitely reappointed give rise to concern regarding the appearance of independence as well as the actual existence of independence between the Tribunal and the ILO.

5.3. Security of Tenure

Security of tenure, including freedom from arbitrary or retaliatory removal, is crucial because it enables judges “to act independently in deciding cases referred to them.”²⁴² It would give rise to a contradictory and inconsistent position if the appointing body had the power to remove the judges at will or without cause, as appointments are generally made by the organ of the international organization over which the tribunal normally has jurisdiction.²⁴³ Such a situation could result in the removal of a judge simply because s/he failed to return a decision favorable to the organization concerned.²⁴⁴ Amerasinghe suggests that the lack of express provisions in a statute regarding removal of judges before the end of their term implies “that judges may not be removed for any reason at all before their terms expire . . . such a position being necessary in order to preserve the independence and impartiality of the judges.”²⁴⁵ He notes that independence is “an essential attribute of the judicial function . . . and an application of the functional principle of interpretation would result in such purpose being achieved by not implying a power to remove judges at will.”²⁴⁶ Still, express provisions are needed because the implication made by Amerasinghe does not guarantee that the appointing body interprets a lack of provisions regarding removal of judges in the same way. As one scholar notes,

²⁴⁰ ILOAT Statute, *supra* note 4, at art. III, para. 2.

²⁴¹ AMERASINGHE, *supra* note 5, at 70.

²⁴² *Id.*, at 69-70.

²⁴³ *Id.*, at 69-70.

²⁴⁴ *Id.*, at 69-70.

²⁴⁵ *Id.*, at 70.

²⁴⁶ *Id.*, at 70.



“discretion in these matters hardly accords with independence.”²⁴⁷ There is no provision in the ILOAT Statute prohibiting arbitrary removal of judges or the removal of judges before the expiration of their term.

5.3.1. *Human Rights Jurisprudence*

In the *Campbell and Fell* case, the European Court of Human Rights stated that “[t]he irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 para. 1.”²⁴⁸ In another case, the Court held that the existence of the power to remove a judge is sufficient to constitute a lack of independence regardless of whether this power is utilized.²⁴⁹ However, in the *Campbell and Fell* case, the ECtHR held that notwithstanding the absence of a specific irremovability clause, where Court practice guaranteed the tenure of its judges, that court could not be said to lack independence. Accordingly, in and of itself, the absence of a clause recognizing irremovability is not sufficient to establish a lack of independence.

Tenure is also an aspect of impartiality that is highly valued by the Human Rights Committee as a prerequisite for judicial independence.²⁵⁰ The Committee has made reference to security of tenure in a number of Concluding Observations. For example, the HRC determined that the situation in Algeria where the law allowed judges serving for less than ten years to be removed at will gave rise to concerns.²⁵¹ Similarly, the power of the President of Zambia to remove judges without judicial oversight was found to be problematic.²⁵² With regard to an individual complaint, the arbitrary dismissal of a judge

²⁴⁷ Romano, *supra* note 188, at 265 (discussing silence of the constitutive instruments of the Special Court for Sierra Leone “as to the question of the sanctioning and removal of judges who have violated their mandate. Supposedly, international judges will have their mandate terminated by the United Nations, and Sierra Leonean ones by the government.”).

²⁴⁸ *Campbell and Fell v. United Kingdom*, *supra* note 64, at para. 80 (1984).

²⁴⁹ *Bryan v. United Kingdom*, App. No. 19178/9, 335-A 1 Eur. Ct. H.R. (ser. A) para. 38.

²⁵⁰ SARAH JOSEPH, JENNY SCHULTZ, & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (CASES, MATERIALS AND COMMENTARY)* 405 (2nd ed. 2004).

²⁵¹ U.N. HRC, *Concluding Observations on Algeria*, U.N. Doc. CCPR/C/79/Add. 95 para. 14 (1998).

²⁵² U.N. HRC, *Concluding Observations on Zambia*, U.N. Doc. CCPR/C/79/Add. 62 para. 16 (1996).



by the executive, several years before the expiry of his term, led the HRC to establish a violation of Article 14 ICCPR.²⁵³

5.3.2. *Soft Law*

The *Montreal Declaration* does not address security of tenure. However, the *Basic Principles* and the *Burgh House Principles* provide that judges shall have security of tenure until the expiry of their term of office.²⁵⁴ Both instruments acknowledge that judges can be removed on specified grounds where specific procedures are followed.²⁵⁵

5.3.3. *The Practice of Other Courts and Tribunals*

Some statutes of international courts and tribunals contain provisions to guard against arbitrary or retaliatory removal. They generally provide for removal only by other judges serving on the tribunal and not by the executive body of the organization. Furthermore, removal must be for cause and not at will. For example, the ECJ Statute provides that judges can only be removed “if, in the unanimous opinion of the Judges and Advocates General of the Court [excluding the judge in question], he no longer fulfils the requisite conditions or meets the obligations arising from his office.”²⁵⁶ The ICJ Statute

²⁵³ U.N. HRC, *Pastukhov v. Belarus*, para. 7.3, U.N. Doc CCPR/C/78/D/814/1998, Communication number 814/1998 (Sep. 17, 2003).

²⁵⁴ *Basic Principles*, *supra* note 92, at art 12; *Burgh House Principles*, *supra* note 54, at art 3.1.

²⁵⁵ *Basic Principles*, *supra* note 92, at art. 17 (A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.). *See also* art. 18 (Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.); *Burgh House Principles*, *supra* note 54, at art. 3.1 (Judges shall have security of tenure in relation to their term of office. They may only be removed from office upon specified grounds and in accordance with appropriate and prior specified procedures.). *Cf.* *Universal Charter of the Judge*, *supra* note 105, at art. 8:

A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.

A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered.

Any change to the judicial obligatory retirement age must not have retroactive effect.

²⁵⁶ ECJ Statute, *supra* note 195, at art. 6, para. 1:

A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates General of the Court, he no longer fulfils the requisite conditions or meets the obligations



contains a similar provision²⁵⁷ as do the Rules of the ECtHR; however, an ECtHR judge can be dismissed by a two-thirds majority, unanimity is not required.²⁵⁸ The Statute of the IACHR provides that the Court decides whether a judge is incapable of performing his or her functions.²⁵⁹ Because other judges decide upon dismissal, it is likely that judges need not fear retaliation or dismissal for politically unpopular judgments which are legally sound but rule against the organization.²⁶⁰ Members of the UNAT enjoy similar protection against arbitrary removal, as their Statute also requires the other members to be of unanimous opinion on the issue.²⁶¹ With regard to WBAT members, there are no provisions guarding against arbitrary or retaliatory removal.

5.3.4. *Assessment of the International Labour Organization Administrative Tribunal*

On the basis of the foregoing case law of the ECtHR and the HRC, the ILOAT would seem to meet the standards for security of tenure of both human rights treaties. Nevertheless, the ILOAT would do so by default, as its Statute does not address this issue. Also, relative to the statutes of international courts and administrative tribunals discussed above, the ILOAT Statute seemingly falls short of providing adequate assurance to complainant and safeguards to its judges with regard to security of tenure. Arguably, in order to maintain the appearance of independence, an explicit provision in the ILOAT Statute prohibiting arbitrary removal of judges could provide safeguards to independence that are currently absent.

arising from his office. The Judge concerned shall not take part in any such deliberations.

²⁵⁷ ICJ Statute, *supra* note 183, at art. 18, para. 1.

²⁵⁸ ECtHR Rules, *supra* note 184, at Rule 7.

²⁵⁹ IACHR Statute, *supra* note 181, at art. 21, para. 2.

²⁶⁰ J. Clifford Wallace, *Judges Forum No. 2: An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. ANN. SURV. AM. L. 241, 242 (2001):

Judicial independence is most important in those cases where courts are called upon to resolve disputes between individuals and the state or between different branches of government. Judicial independence, at its basis, means that judges are free to rule against the government, should the law so dictate, without fear of reprisal. The threat of reprisal may also arise in nearly any case if political figures are corruptible to the extent that they will attempt to intervene on behalf of powerful members of their constituencies. Thus, the independence of the judiciary from political pressures is an essential aspect of justice at any level.

²⁶¹ UNAT Statute, *supra* note 182, at art. 5.



5.4. Conflict of Interest

Conflicts of interest have clear potential for interfering with the independence of a judiciary. It is therefore essential that the possibility exists for parties before a court or tribunal to challenge the existence of such conflicts. A challenge on the grounds that a judge is biased or appears biased could arise from a conflict of interests resulting from a judge's prior relationship with a party or involvement with an issue before the court. A conflict could also arise if a judge has served as counsel before the same tribunal on which s/he sits; has acted as an advisor to a party; has served as a diplomat on issues that are eventually addressed by the court; or has expressed views on particular legal issues that become relevant in a case before the court.²⁶² The ILOAT Statute does not address the issue of conflict of interest.

5.4.1. Human Rights Jurisprudence

Conflicts of interest are dealt with by the European Court of Human Rights under the objective impartiality test.²⁶³ *Pescador Valero* concerned a judge that ruled on a case in which the university where he was employed was one of the parties. He had regular and close professional relations with that university and received a substantial income from it. Here, the Court found that there was cause for legitimate concerns regarding the judge's impartiality.²⁶⁴ In view of this case, the ECtHR might conclude lack of impartiality in case a judge has an employment relationship with one of the parties to a case. Similarly, in other cases where the Court has determined a close link or similar interests between a judge and a party before that judge, such judges were regarded as partial.²⁶⁵

In the *Gillow case*, the Applicant argued that the same judges of the Royal Court were involved in two cases against the same party.²⁶⁶ Mr. and Mrs. Gillow had been refused an occupation license for their house and consequently were not allowed to live there anymore. While Mrs. Gillow appealed, Mr. Gillow was prosecuted for illegally

²⁶² Mackenzie & Sands, *supra* note 2, at 280.

²⁶³ The objective impartiality test is discussed in section 3.2 *supra*.

²⁶⁴ *Pescador Valero v. Spain*, *supra* note 68, at para. 27.

²⁶⁵ *Id.* See also *Le Compte, Van Leuven and De Meyere v. Belgium*, *supra* note 64, at para. 58 (1981); *Holm v. Sweden*, *supra* note 46, at paras. 32-33.



living in the house. While the ECtHR recognized the “factual nexus” of the cases, it found that the cases involved different people and different questions. The mere fact that the Royal Court sat on both cases with the same composition, except for one judge, was not sufficient for legitimate doubt.

With regard to judges being involved in different cases against the same person, the European Commission of Human Rights held that while involvement of the same judge in various stages of the same proceedings might jeopardize impartiality, involvement in other proceedings against the same person is different.²⁶⁷ It seems to be unlikely that involvement of the same judges in different cases against the same person will cause a breach of Article 6(1) ECHR. However considering the *Gillow* judgment, if both the party to the cases and the questions at issue were the same, a lack of impartiality might be established.

The Human Rights Committee has also dealt with conflicts of interest in the context of impartiality. In the case of *Karttunen v. Finland*, the Committee clarified that judges are not to promote the interests of one party over another. In a case where a conflict of interest arises, the HRC has specified that a court has an obligation to examine grounds for disqualification *ex officio*.²⁶⁸ However, the Committee does not seem to interpret Article 14 ICCPR as demanding the creation of criteria for disqualification where they are not in existence.

5.4.2. Soft Law

The *Burgh House Principles* contain an extensive set of rules prohibiting judges from presiding over cases or parties to whom they have past links.²⁶⁹ Further, an issue

²⁶⁶ *Gillow v. United Kingdom*, *supra* note 68, at paras. 72-73.

²⁶⁷ *Schmid v. Austria*, App. No. 11831/85, 54 Eur. Comm’n H.R. Dec. & Rep. 144 (1987) (Commission report).

²⁶⁸ U.N. HRC, *Karttunen v. Finland*, 13 U.N. Doc CCPR/C/46/D/387/1989, Communication number 387/1989 (Nov. 5, 1992).

²⁶⁹ *Burgh House Principles*, *supra* note 54, at art. 9:

9.1 Judges shall not serve in a case in which they have previously served as agent, counsel, adviser, advocate or in any other capacity for one of the parties, or as a member of national or international court or other dispute settlement body which has considered the subject matter of the dispute.

9.2 Judges shall not serve in a case with the subject matter of which they have had any other form or association that may affect or may reasonably be considered to affect their independence or impartiality.



that prevents a judge from serving in a case²⁷⁰ is interest in the outcome of the case, whether it is an interest of the judge him-/herself or an interest of a person or entity closely related to the judge.²⁷¹ The *Burgh House Principles* require judges to disclose the existence of aforementioned situations to the court and if appropriate to the parties.²⁷² With regard to disclosure, appropriate procedures shall be established by the court.²⁷³ Moreover procedures open to judges, the court, and parties to the case shall be established in order to prevent a judge from sitting in a case for any issue of conflict of interest mentioned in the *Burgh House Principles*.²⁷⁴ The *Basic Principles* require the judiciary to decide matters before them impartially,²⁷⁵ and the *Montreal Declaration* sets out the duty of judges to avoid influence.²⁷⁶

5.4.3. *The Practice of Other Courts and Tribunals*

In order to prevent potential conflicts of interests, especially those involving past links to a party, some administrative tribunals limit the professional activities of its judges. The WBAT prohibits current and former staff of the World Bank, the International Development Association, and the International Finance Corporation from serving as members of the Tribunal. Furthermore, WBAT members cannot be employed

²⁷⁰ *Id.*, at art. 10:

Judges shall not sit in any case involving a party: for whom they have served as agent, counsel, adviser, or advocate within the previous three years or such other period as the court may establish within its rules: or with which they have had any other significant professional or personal link within the previous three years or such other period as the court may establish within its rules.

²⁷¹ *Id.*, at art. 11.1:

Judges shall not sit in any case in the outcome of which they hold any material personal, professional or financial interest.

Judges shall not sit in any case in the outcome of which other persons or entities closely related to them hold a material personal, professional or financial interest.

²⁷² *Id.* at art 15.1 (“Judges shall disclose to the court and, as appropriate, to the parties to the proceedings any circumstances which come to their notice at any time by virtue of which any of Principles 9 to 13 apply.”).

²⁷³ *Id.*, at art. 15.2 (“Each court shall establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may appear to affect their independence or impartiality in relation to any particular case.”)

²⁷⁴ *Id.*, at art. 16.

²⁷⁵ *Basic Principles*, *supra* note 92, at art. 2.

²⁷⁶ *Montreal Declaration*, *supra* note 90, at arts. 1.03 and 1.05.



by any of those three organizations after serving on the Tribunal.²⁷⁷ The UNAT Statute does not address this issue.

Provisions concerning prior involvement of a judge with a party or an issue before the court are included in most of the statutes of international courts. Article 17 of the ICJ Statute states: “No member may participate in the decision of any case in which he has previously taken part as an agent, counsel or advocate for one of the parties, or as a member of a national or international court, or of a commission of an enquiry, or in any other capacity.”²⁷⁸ The Statutes of the ECJ and the IACHR²⁷⁹ contain similar prohibitions and further impose the duty to disclose if a judge feels s/he should not participate in the settlement of a case.²⁸⁰ The Statute of the European Court of Human Rights requires judges to withdraw if they feel there is a conflict.²⁸¹ The Statutes of both the UNAT and the WBAT remain silent on the question of prior involvement.

Extra-judicial activities may also create conflicts of interest because such activities may give rise to the appearance of bias in judicial proceedings; and they may simply compete for the time of judges and thus interfere with the work of the court or tribunal.”²⁸² Several statutes of international courts and tribunals contain detailed provisions on the management of current and prior outside activities in order to secure judicial independence.²⁸³ Article 16(1) of the ICJ Statute provides, “No member of the Court may exercise any political or administrative function, or engage in any other

²⁷⁷ WBAT Statute, *supra* note 178, at art. IV, para. 1 (“Current and former staff of the Bank Group shall not be eligible to serve as members of the Tribunal and members may not be employed by the Bank Group following their service on the Tribunal.”). *See also* AMERASINGHE, *supra* note 5, at 68.

²⁷⁸ ICJ Statute, *supra* note 183, at art. 17, para. 2.

²⁷⁹ ECJ Statute, *supra* note 195, at art. 18, para. 1 (“No Judge or Advocate General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.”); and IACHR Statute, *supra* note 181, at art. 19, para. 1.

²⁸⁰ *Id.*, at art. 18, para. 2 (“If, for some special reason, any Judge or Advocate General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate General should not sit or make submissions in a particular case, he shall notify him accordingly.”); IACHR Statute, *supra* note 181, at art. 19, para. 2.

²⁸¹ ECtHR Rules, *supra* note 184, at Rule 28, para. 2:

A judge may not take part in the consideration of any case in which he or she has a personal interest or has previously acted either as the Agent, advocate or adviser of a party or of a person having an interest in the case, or as a member of a tribunal or commission of inquiry, or in any other capacity.

²⁸² Mackenzie & Sands, *supra* note 2, at 282.

²⁸³ *Id.*, at 282.



occupation of a professional nature.²⁸⁴ Judges of the ECtHR cannot engage in certain activities if the function in question is incompatible with their independence or impartiality.²⁸⁵ In order to ensure adherence to this rule, all activities are to be declared to the President of the Court.²⁸⁶ Similarly, the Statute of the IACHR explicitly declares positions in the executive branch of government to be incompatible.²⁸⁷ Furthermore, these judges are not to hold positions as officials of international organizations or any other position that might affect their independence or impartiality.²⁸⁸ In order to ensure adherence to this rule, all activities are to be declared to the President of the Court.²⁸⁹ The Court decides in case of doubt as to the incompatibility.²⁹⁰

5.4.4. *Assessment of the International Labour Organization Administrative Tribunal*

The ILOAT Statute contains no provision prohibiting participation or requiring disclosure in cases where a judge has had previous experience with a party or issue before the Tribunal. It does not address extra-judicial activities, thus seemingly leaving participation or recusal to the discretion of individual judges.

There is no procedure, according to the ILOAT Statute, requiring judges to disclose conflicts of interest. Nor is there a procedure available to parties to prevent a judge from presiding over a case where there exists a conflict of interest. Moreover, applicants do not know which judges will sit on their case until the judgment is rendered²⁹¹ and therefore it would be impossible for applicants to raise a conflict of interest concern because final and binding judgment would already be given. Further, the

²⁸⁴ ICJ Statute, *supra* note 183, at art. 16, para. 1.

²⁸⁵ ECtHR Rules, *supra* note 184, at Rule 4.

²⁸⁶ *Id.*

²⁸⁷ IACHR Statute, *supra* note 181, at art. 18, para. 1a:

Members or high-ranking officials of the executive branch of government, except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not Chiefs of Missions to the OAS or to any of its member states.

²⁸⁸ *Id.*, at art. 18, para. 1 b and c.

²⁸⁹ *Id.*

²⁹⁰ *Id.*, at art. 18, para. 2.

²⁹¹ In procedures before the ILOAT, the Complaint, Reply, Rejoinder and Co-rejoinder are to be sent to the registrar, not the specific judges handling a case. It is also the registrar who responds and forwards copies of the respective document to the other party. *See* <http://www.ilo.org/public/english/tribunal/advice.htm>. Furthermore, in light of the fact that oral hearings are seldom if ever granted, litigants do not have this option available to them for determining which judges are presiding over their case. *See* Letter from Registrar Comtet, *supra* note 33.



ILO website expressly states that “[n]either [the ILOAT] Statute nor Rules provide for the review of judgments [and judgments] are ‘final and without appeal.’”²⁹² Accordingly, even if applicants are made aware of a conflict of interest after judgment is rendered, they have no recourse because ILOAT judgments are not subject to judicial review.

In sum, the ILOAT Statute does not meet the standards discussed above concerning conflicts of interest.

5.5. Discipline and Disqualification

The credibility of the judiciary depends upon proper procedures for judicial accountability. Proper procedures must be in place to remove a judge who has committed misconduct or breached or failed to maintain his or her duty as a judge. At the same time, these procedures must not serve as a mechanism to arbitrarily remove a judge for political or other reasons unrelated to the performance of his or her judicial duties. The ILOAT Statute does not contain a provision addressing discipline and disqualification of judges.

5.5.1. Human Rights Jurisprudence

Under the objective test, the European Court of Human Rights takes into account the existence of rules governing disqualification and removal of judges, as well as the possibility to challenge members of the court in question.²⁹³ In the case of *H. v. Belgium*, the lack of a right of challenge and the non-existence of internal rules of procedure caused the Court to conclude that the procedural safeguards were “unduly limited,” and the Applicant had reason to fear that he would be dealt with arbitrarily.²⁹⁴ Moreover the objective test determines that “any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.”²⁹⁵

The ECtHR has held that the Convention imposes an obligation on every national court to check whether it is “an impartial tribunal” within the meaning of Article 6 ECHR

²⁹² ILOAT, *Proceedings Before the Tribunal*, available at <http://www.ilo.org/public/english/tribunal/advice.htm> (last visited Feb. 14, 2007). Cf. ILOAT Statute, *supra* note 4, at art. 6;

²⁹³ KUIJER, *supra* note 157, at 307.

²⁹⁴ *H. v. Belgium*, *supra* note 69, at para. 53.

²⁹⁵ *Hauschildt v. Denmark*, *supra* note 69, at para. 48.



in cases where impartiality is disputed on a ground that does not immediately appear to be manifestly devoid of merit.²⁹⁶ The application of this rule does not necessarily require a court to remove a judge because an accusation of impartiality has been made; however, it does require a court to investigate the matter.

The Court has established rules concerning actions to be taken in case of allegations of partiality of jurors. These rules are also relevant to judges, as the Court has repeatedly stated that the principles established in its jurisprudence apply to jurors as well as to professional and lay judges alike.²⁹⁷ In the *Remli* case, a third person had certified in writing that she heard one of the jurors state that he was racist.²⁹⁸ The Applicant was of North-African origin. Mr. Remli's lawyer filed a statement regarding the allegation to the Rhone Assize Court and requested it to make formal note of it. The Rhone Assize Court dismissed the application without any investigation. The Court held that this failure to make the necessary check was a breach of Article 6(1) ECHR.²⁹⁹ The Court has noted that in some circumstances discharging the jury is required by Article 6(1) ECHR. That the allegations were "clear and precise," the complainant and the accused jurors were identifiable, and the applicant's counsel had insisted that dismissing the jury was the only remedy were decisive aspects of the Court's conclusion that the fear for partiality was objectively justified.³⁰⁰

In the case of *Gregory v. United Kingdom*, a vague and imprecise allegation of partiality was made by an unidentified person.³⁰¹ However, the allegation was not devoid of substance and reaction was required. The trial judge sought the views of the parties to the case, and thereafter directed a "firmly worded redirection" to the jury. The ECtHR held that this reaction was sufficient to "dispel any objectively held fears or misgivings

²⁹⁶ *Remli v. France*, App. No. 16839/90, 1996-II Eur. Ct. H.R. para. 48.

²⁹⁷ *Holm v. Sweden*, *supra* note 46, at para. 30; *Remli v. France*, *supra* note 296, at para. 46.

²⁹⁸ *Remli v. France*, *supra* note 296, at para. 11.

²⁹⁹ *Id.*, at para. 48.

³⁰⁰ *Sander v. United Kingdom*, App. No. 34129/96, 2000-V Eur. Ct. H.R. para. 33

[A]lthough discharging the jury may not always be the only means to achieve a fair trial, there are certain circumstances where this is required by Article 6 § 1 of the Convention [...] In the present case the judge was faced with a serious allegation that the applicant risked being condemned because of his ethnic origin. [...] Given the importance attached by all Contracting States to the need to combat racism [...], the Court considers that the judge should have reacted in a more robust manner than merely seeking vague assurances that the jurors could set aside their prejudices and try the case solely on the evidence.



about the impartiality of the jury.”³⁰² Conversely, in the *Sander case* a redirection by the judge proved to be insufficient.³⁰³

Disqualification of jurors on the basis of concerns of a conflict of interest has also been discussed by the Inter-American Commission on Human Rights.³⁰⁴ The Commission found that a reasonable suspicion of partiality is sufficient to disqualify a juror.³⁰⁵

The Human Rights Committee was confronted with a situation of “faceless” judges in the case of *Espinoza de Polay v. Peru*.³⁰⁶ The Committee considered that a tribunal composed of unidentifiable judges cannot be considered to be independent and impartial, as it goes beyond creating an obstacle for verifying the independence and impartiality of the judges— it makes it impossible.³⁰⁷ Another case regarding “faceless” judges was dealt with by the IACHR.³⁰⁸ In this case, a number of circumstances affecting independence were present, and with regard to the “faceless” judges, the Court held that if there is no way of knowing the identity of the judges to the case there is no way of assessing their competence.

5.5.2. *Soft Law*

The importance of instituting transparent procedures for disqualification of judges is recognized by the *Basic Principles*³⁰⁹ and the *Burgh House Principles*.³¹⁰ These

³⁰¹ Gregory v. United Kingdom, App. No. 22299/93, 1997-I Eur. Ct. H.R. para. 46-49.

³⁰² *Id.*

³⁰³ Sander v. United Kingdom, *supra* note 300, at paras. 30-34.

³⁰⁴ Andrews v. United States of America, Case 11.139, Inter-Am. C.H.R., Report No. 57/96, OEA/Ser.L/VII.98, doc. 6 rev. 28 (1998).

³⁰⁵ *Id.*

³⁰⁶ U.N. HRC, *Polay Campos v. Peru*, 13 U.N. Doc CCPR/C/61/D/577/1994, Communication number 577/1994 (Jan. 9, 1998).

³⁰⁷ *Id.*

³⁰⁸ Castillo Petruzzi et al. v. Peru, *supra* note 166, at 29.

³⁰⁹ Basic Principles, *supra* note 92, at arts. 17, 19, and 20:

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.



procedures should be established by the court in its statute and rules.³¹¹ The *Montreal Declaration* considers removal to be possible only by a decision of the other members of the court.³¹²

5.5.3. *The Practice of Other Courts and Tribunals*

Most courts and tribunals have procedures for disqualification or removal when a judge's independence is questioned. The provisions identified below provide for a duty to withdraw which may, in some cases, be related to conflicts of interest discussed in Section 5.4. When a judge does not carry out that duty, s/he can be disqualified. With regard to disqualification from a case, the UNAT and WBAT Statutes are silent as to procedural requirements. Article 24 of the ICJ Statute provides that “[i]f, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.”³¹³ In the absence of such notification, the President can, on his/her own initiative, consider that a member should not sit on a case and accordingly inform him/her thereof. In case of disagreement between the President of the ICJ and the judge who allegedly is to withdraw, the Court shall decide upon the case.³¹⁴ Article 18 of the ECJ Statute contains a nearly identical provision.³¹⁵ The Rules of the ECtHR³¹⁶ and the Statute of the IACHR³¹⁷ prohibit a judge from

³¹⁰ Burgh House Principles, *supra* note 54, at art. 16:

Each court shall establish rules of procedure to enable the determination whether judges are prevented from sitting in a particular case as a result of the application of these Principles or for reasons of incapacity. Such procedures shall be available to a judge, the court, or any party to the proceedings.

³¹¹ Montreal Declaration, *supra* note 90, at art. 1.18; Burgh House Principles, *supra* note 54, at art. 16.

³¹² *Id.*, at art. 1.19.

³¹³ ICJ Statute, *supra* note 183, at art. 24.

³¹⁴ *Id.*

³¹⁵ ECJ Statute, *supra* note 195, at art. 18.

³¹⁶ ECtHR Rules, *supra* note 184, at Rule 28

2. A judge may not take part in the consideration of any case if:

(a) he or she has a personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties;

(b) he or she has previously acted in the case, whether as the Agent, advocate or adviser of a party or of a person having an interest in the case, or as a member of another national or international tribunal or commission of inquiry, or in any other capacity;

(c) he or she, being an ad hoc judge or a former elected judge continuing to sit by virtue of Rule 26 § 3, engages in any political or administrative activity or any professional activity which is incompatible with his or her independence or impartiality;



presiding over a case in a various circumstances. In such a situation a judge is to withdraw and notify the President. In the event of doubt, the Chamber or Court shall decide.³¹⁸

The aforementioned disqualification procedures are crucial to the independence of these judicial institutions because they provide that questions of the impartiality and independence of individual judges are decided by the other judges or members of the tribunal and not by the political bodies of the organizations. The only statute of court that explicitly refers to disciplinary measures that may be taken by the organization is that of the Inter-American Court. Despite the fact that the Court shall emit its own disciplinary rules, the General Assembly of the OAS has the disciplinary authority, although only exercisable at request of the Court.³¹⁹

(d) he or she has expressed opinions publicly, through the communications media, in writing, through his or her public actions or otherwise, that are objectively capable of adversely affecting his or her impartiality;

(e) for any other reason, his or her independence or impartiality may legitimately be called into doubt.

3. If a judge withdraws for one of the said reasons he or she shall notify the President of the Chamber, who shall exempt the judge from sitting.

4. In the event of any doubt on the part of the judge concerned or the President as to the existence of one of the grounds referred to in paragraph 2 of this Rule, that issue shall be decided by the Chamber. After hearing the views of the judge concerned, the Chamber shall deliberate and vote, without that judge being present. For the purposes of the Chamber's deliberations and vote on this issue, he or she shall be replaced by the first substitute judge in the Chamber. The same shall apply if the judge sits in respect of any Contracting Party concerned. In that event, the Contracting Party concerned shall be deemed to have appointed the first substitute judge to sit in his or her stead, in accordance with Rule 29 § 1.

³¹⁷ IACHR Statute, *supra* note 181, at art. 19, paras. 1-3.

Judges may not take part in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity.

If a judge is disqualified from hearing a case or for some other appropriate reason considers that he should not take part in a specific matter, he shall advise the President of his disqualification. Should the latter disagree, the Court shall decide. If the President considers that a judge has cause for disqualification or for some other pertinent reason should not take part in a given matter, he shall advise him to that effect. Should the judge in question disagree, the Court shall decide.

³¹⁸ ECtHR Rules, *supra* note 184, at Rule 28; IACHR Statute, *supra* note 181, at art. 19, paras. 1-3.

³¹⁹ IACHR Statute, *supra* note 181, at art. 20, para. 2.



5.5.4. *Assessment of the International Labour Organization Administrative Tribunal*

The ILOAT Statute does not contain a provision addressing disqualification of judges. While it is unclear whether the ILOAT has mechanisms in place to address accusations of impartiality, based on the ILOAT Statute and publicly available sources the Tribunal is devoid of such a right of challenge. The absence of any statutory safeguards and the lack of transparency with regard to the practices and procedures addressing impartiality could create the appearance of a lack of independence safeguards. Further, the fact that parties before the ILOAT do not know the identity of the judges until after the judgment is rendered³²⁰ may be seen as problematic especially in light of Human Rights Committee jurisprudence addressing the issue of the faceless judge.

5.6. Improper Influence

The manner in which international administrative tribunals are organized necessitates that they be free from the influence of the international organizations that are generally the defendants and the financiers in employment disputes.³²¹ The ILOAT Statute does not contain any provisions guarding against improper influence.

5.6.1. *Human Rights Jurisprudence*

The ECtHR addresses the problem of improper influence by requiring guarantees against outside pressures. From the cases regarding improper influence, the conclusion can be drawn that Article 6 ECHR prohibits all authorities to “give instructions or even recommendations to a judge with regard to his exercise of judicial functions in a concrete case.”³²² In the *Chevrol* case, the Court found a violation of Article 6(1) ECHR stating that: “[t]he court’s independence from the parties and the executive meant that, where it

³²⁰ See *supra* note 291.

³²¹ See AMERASINGHE, *supra* note 5, at 68-69 (noting that Article 5(c) of the Statute of the Appeals Board of the Organization for Economic Co-operation and Development contains provisions which “contribute to the prevention of the exercise of pressure on judges, particularly by the administration or States that are members of the organization.”). See also Shetreet, *supra* note 55; John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L.R. 353, 354 (1999).

³²² KUIJER, *supra* note 157, at 247. See, e.g., Beaumartin v. France, App. No. 15287/89, 296-B Eur. Ct. H.R. (ser. A) para. 38 (2003); Chevrol v. France, App. No. 49636/99, 2003-III Eur. Ct. H.R. para. 81-82.



was dealing with a dispute that came within its jurisdiction, it could not have the solution dictated to it by one of the parties or by a representative of the executive.”³²³

For an action by the executive branch of an entity to be considered an interference with the independent functioning of a tribunal, the act does not have to be legally binding. In the *Sovtransavto* case, several persons, acting in their capacity as representatives of the Ukraine government, interfered in the proceedings before Kiev Region Arbitration Tribunal. Moreover, the President of Ukraine directly addressed the tribunal in question, urging it to “defend the interests of Ukrainian nationals” in its ruling.³²⁴ These words were interpreted as an attempt to push the tribunal to rule in favor of the Ukrainian party. The ECtHR stated that whatever the reasons for such interventions, they were “ipso facto incompatible with the notion of an independent and impartial tribunal.”³²⁵ It seems that such interference has to be directed towards the tribunal in question, as indicated in the *Falcoianu* case where the Court held that a speech by a country’s president on an issue before a court did not constitute a violation of Article 6 ECHR.³²⁶

The Inter-American Commission on Human Rights has also dealt with the issue of improper influence. In *Garcia v. Peru*, the Commission held that where the separation of powers doctrine had been abolished, the judiciary at issue could not be considered independent as it was subject to the whims of the executive.³²⁷

The Human Rights Committee contributes great value to the doctrine of separation of powers in relation to judicial independence. Accordingly, the Committees noted in its *Bahamonde v. Equatorial Guinea* decision that functions and competences of the judiciary and the executive are to be clearly distinguishable to be compatible with the notion of an independent and impartial tribunal.³²⁸ Similarly, in its Concluding

³²³ *Chevrol v. France*, App. No. 49636/99, 2003-III Eur. Ct. H.R. para. 63.

³²⁴ *Sovtransavto v. Ukraine*, App. No. 48553/99, 2002-VII Eur. Ct. H.R. para. 22.

³²⁵ *Id.* at para. 80.

³²⁶ *Falcoianu a.o. v. Romania*, App. No. 32943/96, para. 35-38 (July 9, 2002) available at <http://www.echr.coe.int/ECHR/> (last visited Feb. 5, 2007) (follow “caselaw” hyperlink; then follow “HUDOC” hyperlink; then enter “Falcoianu” in “case title”; then follow “search” hyperlink).

³²⁷ *Garcia v. Peru*, *supra* note 78, at para. IV.2.

³²⁸ U.N. HRC, *Bahamonde v. Equatorial Guinea*, U.N. Doc CCPR/C/49/D/468/1991, Communication number 468/1991, para. 6.4 (Nov. 10, 1993) (“where the functions and competences of the judiciary are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the



Observations the HRC has found the ability of an executive to control or direct the judiciary to be inconsistent with the ICCPR. In its Concluding Observations on Romania the Committee found “interference of the executive” to be a reason for concern and recommended a “clear demarcation” between the competences of both powers.³²⁹ Closely related to these concerns is the possibility of pressure being exerted on the judiciary through a supervisory authority dominated by the government.³³⁰

5.6.2. *Soft Law*

All three soft law instruments state that judges shall exercise their functions free from interferences.³³¹ According to the *Basic Principles*, these interferences can be direct or indirect, in the form of restrictions, inducements, pressures, or threats from any party and for any reason.³³² *The Burgh House Principles* specify the need for courts to be free from interferences by the international organization in question and its organs.³³³ The proceedings and the assignment of cases to particular judges must be free from influences.³³⁴ Under the *Basic Principles*, revision of decisions of the judiciary by any authority other than the judiciary itself is not acceptable.³³⁵ The *Montreal Declaration* points out that the prevention of improper influences is not only a responsibility of authorities outside of the judiciary, but the judges themselves should be held accountable for allowing any authority other than the relevant law and the interest of international justice to influence their decisions.³³⁶ Moreover, governments have a duty to respect and observe independence.³³⁷

notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.”).

³²⁹ U.N. HRC, *Concluding Observations on Romania*, U.N. Doc. CCPR/C/79/Add. 111 para. 10 (1999).

³³⁰ U.N. HRC, *Concluding Observations on Sudan*, U.N. Doc. CCPR/C/79/Add. 85. (1997).

³³¹ *Basic Principles*, *supra* note 92, at arts. 2 and 4; *Burgh House Principles*, *supra* note 54, at art. 1.1; *Montreal Declaration*, *supra* note 90, at arts. 1.02 –03.

³³² *Basic Principles*, *supra* note 92, at art. 2.

³³³ *Burgh House Principles*, *supra* note 54, at art. 1.2.

³³⁴ *Basic Principles*, *supra* note 92, at art. 14; *Burgh House Principles*, *supra* note 54, at art. 1.2.

³³⁵ *Basic Principles*, *supra* note 92, at art. 4.

³³⁶ *Montreal Declaration*, *supra* note 90, at art. 1.03.

³³⁷ *Basic Principles*, *supra* note 92, at art. 1.



5.6.3. *The Practice of Other Courts and Tribunals*

Some tribunals have included appropriate provisions in their statutes stating that judges should be independent from outside influence and that instruction to the judges is prohibited. The Treaty establishing the European Community explicitly states that judges of the ECJ shall sit in their individual capacity.³³⁸ ECtHR judges³³⁹ and similarly the judges of the IACHR are elected in their individual capacities.³⁴⁰ Furthermore judges of the ECtHR and the IACHR are to take an oath or solemn declaration that they will exercise their functions “independently and impartially.”³⁴¹ The judges of the ICJ and the ECJ make a similar declaration to exercise their powers “impartially and conscientiously.”³⁴² Article 4 of the ECJ Statute provides:

When taking up their duties, [judges] shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.³⁴³

The UNAT and WBAT Statutes do not contain provisions specifically guarding against improper influence.

5.6.4. *Assessment of the International Labour Organization Administrative Tribunal*

Not only does the ILOAT Statute not contain any provisions guarding against improper influence, no public documents contain the practices of the Tribunal with regard to this issue. It is unclear whether the defendant-international organizations engage in or attempt to engage in the unfair influence of ILOAT. It is difficult to ascertain whether the ILO’s involvement in the ILOAT’s appointment process, coupled with the fact that the ILO is the defendant in just fewer than 10% of ILOAT cases, has any improper influence over the decisions of the Tribunal. Further, no conclusive deduction

³³⁸ EC Treaty, *supra* note 180, at art. 21, para. 2.

³³⁹ ECHR, *supra* note 47, at art. 21, para. 2.

³⁴⁰ IACHR Statute, *supra* note 181, at art. 4, para. 1.

³⁴¹ ECtHR Rules, *supra* note 184, at Rule 3, para. 1; IACHR Statute, *supra* note 181, at art. 11, para. 1.

³⁴² ICJ Statute, *supra* note 183, at art. 20; ECJ Statute, *supra* note 195, at art. 2.

³⁴³ *Id.*



on improper influence can be drawn from the fact the defendant-international organization is responsible for paying for its cases that come before the ILOAT.

While we are neither alleging nor concluding that defendant-international organizations engage in improper influence of ILOAT, it is our contention that an amendment to the ILOAT Statute to include safeguards against outside pressures would likely inspire confidence that such occurrences are in fact accounted for by the Tribunal. More specifically, it would be beneficial to the appearance of independence if the ILO either (1) accounted for improper influence with safeguards in the ILOAT Statute and/or (2) allowed an impartial group to conduct the appointment process for the ILOAT.

5.7. Financial Independence

Budget guarantees serve mainly to secure the autonomy of the judiciary as an institution. Adequate resources are essential to a judiciary in order to insure the proper performance of judicial tasks. Proper performance implies performance in an independent and impartial manner.³⁴⁴ Without adequate resources it could be difficult for a judiciary to function independently and impartially. In addition to issues related to the proper administrative functioning of the Tribunal, it is possible for the executive to influence the judiciary by decreasing or increasing the remuneration of judges. The fear of this possibility is especially present where there is no statutory provision prohibiting adjustment in salary during the tenure of a judge. Addressing the importance of financial independence for the independence of the judiciary, U.S. Supreme Court Justice O'Connor states:

A fundamental aspect of . . . institutional independence is ensuring that the judiciary receives adequate funding. Just as salary protection is necessary to individual judges' independence, overall financing issues can influence the work of the judiciary as a whole. . . . Ensuring adequate and unconditional financing . . . is a crucial step in insulating the judiciary from improper influence.³⁴⁵

³⁴⁴ Dung, *supra* note 51, at 15.

³⁴⁵ Sandra Day O'Connor, *The Importance of Judicial Independence* (remarks before the Arab Judicial Forum, Manama, Bahrain, September, 2003), available at <http://usinfo.state.gov/journals/itdhr/0304/ijde/oconnor.htm> (last visited March 27, 2007).



The ILOAT Statute does not provide for security of remuneration, and the Tribunal is not transparent with regard to how it is funded.

5.7.1. *Human Rights Jurisprudence*

We were unable to locate human rights jurisprudence on this aspect of judicial independence.

5.7.2. *Soft Law*

All three sets of soft law instruments discussed in this section³⁴⁶ require security of remuneration. With regard to the funding of judicial institutions, the sixth *Burgh House Principle* provides that “States parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively.”³⁴⁷ With regard to the *Basic Principles*, one scholar stated that they emphasize that any attempt to comply with these United Nations (UN) international standards must be to limit the formal interaction between the judiciary and the executive to the extent necessary to provide security and the necessary financial and administrative support to the courts.”³⁴⁸ Accordingly these principles do require the UN Member States to provide adequate resources to their judiciary.³⁴⁹ The *Montreal Declaration* recommends that the judiciary’s budget should be estimated and decided upon by a competent authority in collaboration with the judiciary.³⁵⁰

5.7.3. *The Practice of Other Courts and Tribunals*

Most statutes of international administrative tribunals lack provisions regarding judges’ salaries. However, the ICJ Statute contains language indicating that salaries may

³⁴⁶ Basic Principles, *supra* note 92, at art. 11 (“The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement shall be adequately secured by law.”); Burgh House Principles, *supra* note 54, at art. 4.2 (“No adverse changes shall be introduced with regard to judges’ remuneration and other essential conditions of service during their terms of office.”); Montreal Declaration, *supra* note 90, at art. 1.14. (“The terms of compensation and pension of judges shall be established and maintained so as to ensure their independence.”).

³⁴⁷ Burgh House Principles, *supra* note 54, at art. 6.

³⁴⁸ Kelly, *supra* note 40, at 5-6.

³⁴⁹ Basic Principles, *supra* note 92, at art. 7.

³⁵⁰ Montreal Declaration, *supra* note 90, at art. 2.42.



not be decreased during a judge's term of tenure.³⁵¹ The ECJ Statute requires the unanimous opinion of its Judges and Advocates in order to deprive a Judge of his/her right to a pension or other benefits.³⁵²

For many international courts and administrative tribunals, cases are financed by the defendant in a given case. The UNAT and WBAT receive a budget from the respective international organization, defendant to the case.³⁵³ The ICJ is financed by the United Nations,³⁵⁴ whereas the ECtHR receives its budget from the Council of Europe.³⁵⁵ The IACHR draws up its own budget to be approved by the General Assembly of the Organization of American States.³⁵⁶ The ECJ Statute and the Treaty establishing the European Community give no indication as to the financing of that Court.

5.7.4. *Assessment of the International Labour Organization Administrative Tribunal*

It is unclear whether the ILOAT provides for security of remuneration in practice; the ILOAT Statute clearly does not.

The ILOAT is not transparent with regard to how it is funded³⁵⁷ and how those funds are paid out to judges and used for ensuring the proper functioning of the Tribunal. Cases are financed by the defendant in a given case. This means that all cases are financed by the international organization at bar.³⁵⁸ These concerns are increased when one considers the success rates of complainants before the Tribunal.³⁵⁹

³⁵¹ ICJ Statute, *supra* note 183, at art. 32, para. 5 (“[Judges’] salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office.”).

³⁵² ECJ Statute, *supra* note 195, at art. 6.

³⁵³ UNAT Statute, *supra* note 182, at art. 5, para. 2; WBAT Statute, *supra* note 178, at art. 6, para. 3.

³⁵⁴ ICJ Statute, *supra* note 182, at art. 33.

³⁵⁵ ECHR, *supra* note 47, at art. 50.

³⁵⁶ IACHR Statute, *supra* note 181, at art. 27, para. 1.

³⁵⁷ See Letter from Registrar Comtet, *supra* note 33 (stating that the ILOAT does not provide financial statements).

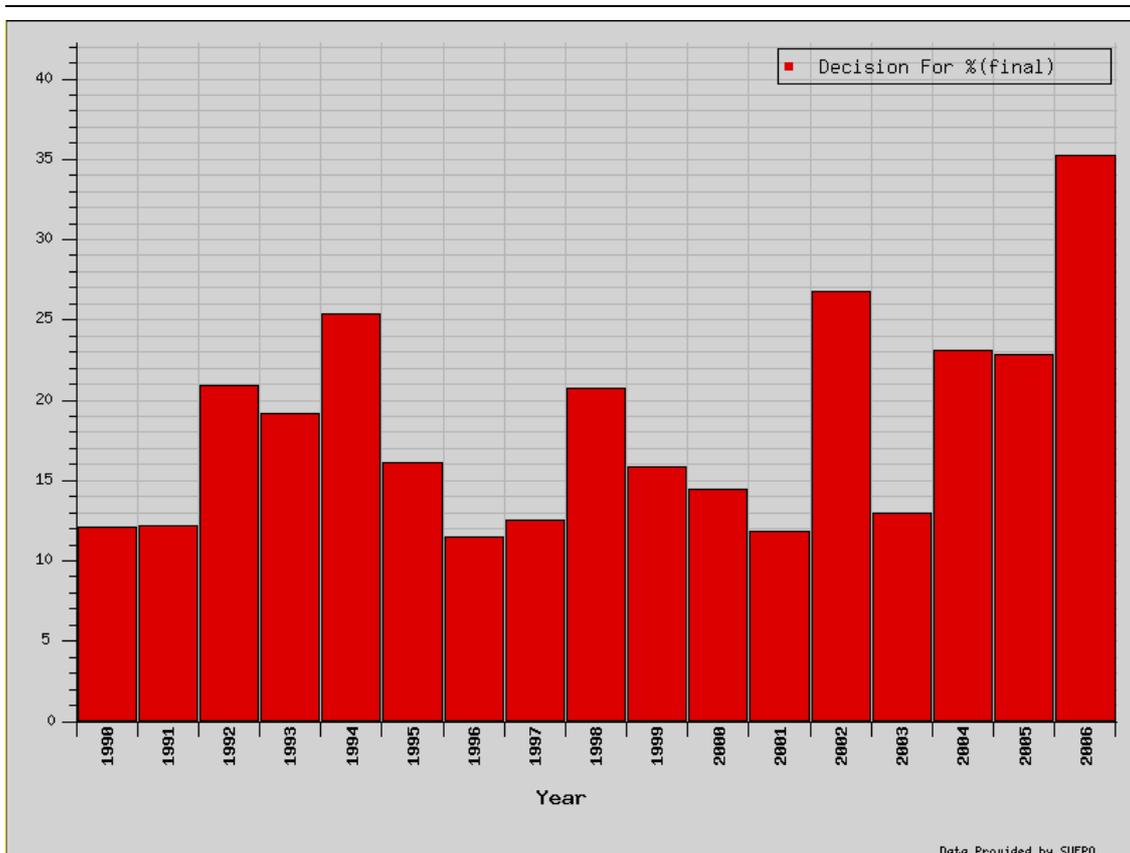
³⁵⁸ WBAT Statute, *supra* note 178, at art. 3; UNAT Statute, *supra* note 182, at art. 5, para. 2; ILOAT Statute *supra* note 4, at art. IX, para. 2; Annex to the ILOAT Statute, *supra* note 4. See also Letter from Registrar Comtet, *supra* note 33.

³⁵⁹ The ILOAT Registrar stated that the success rates for complainants for 2006 were at approximately 40%. Letter from Registrar Comtet, *supra* note 33. The Chart below shows the success rates for complainants before the ILOAT from 1990-2006. Here it is apparent that over this 16 year period, complainants have prevailed in less than 25% of cases. Moreover, in various years, the complainant prevailed in less than 15% of cases before the ILOAT. (The Chart was calculated and created on a website created by the Staff Union of the European Patent Office that contains information on ILOAT case law, restricted access).



5.8. Interim Conclusions

From the foregoing, it is clear that the ILOAT must take substantial steps in order to meet judicial independence standards. Consistently, the ILOAT Statute and publicly available information about the Tribunal were inconclusive and lacking, respectively. The ILOAT Statute is completely silent on independence issues concerning reappointment, security of tenure, conflicts of interest, improper influence, discipline, disqualification, improper influence, and financial independence. This report acknowledges that neither human rights treaties nor soft law are binding upon the ILOAT. In addition, we acknowledge that the practices and statutory provisions of other courts and tribunals are persuasive at best in determining how judicial independence matters should be addressed in practice. Notwithstanding, as assessed above, the ILOAT's Statute is significantly deficient in providing judicial independence safeguards when compared to human rights treaties, soft law, and the statutes of other courts and tribunals. Moreover, the lack of





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transparency as to how the ILOAT deals with these matters in practice gives further cause for concern.



6. IMPLICATIONS OF ARTICLE 6(1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS FOR INTERNATIONAL ORGANIZATIONS

While Section 4 of this report establishes the applicability of customary international law to international organizations, in practice this law is difficult to enforce. This difficulty is due in part to the fact that international organizations are generally said to have functional immunity, meaning they “enjoy such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfillment of the purpose of the organization, including immunity from legal process”³⁶⁰ This immunity is seen as “an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.”³⁶¹ In practice, international organizations’ functional immunity has been applied broadly so as to constitute absolute immunity from national court systems.³⁶² However, both the European Court of Human Rights and some national courts have taken steps resulting in a limit to this apparent absolute immunity.³⁶³

Recent case law interpreting Article 6 (1) of the European Convention on Human Rights may have far-reaching repercussions for international organizations, including the ILOAT. Article 6 ECHR has been interpreted by the ECtHR as requiring that States Parties to the Convention guarantee both access to a court and adequate legal protection.³⁶⁴ Accordingly, host States are responsible for ensuring that international organizations provide adequate alternative legal protection. Thus, Article 6 ECHR may

³⁶⁰ See AMERASINGHE, *supra* note 5, at 370; KLABBERS, *supra* note 129, at 148; SANDS & KLEIN, BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS 487 (5th ed., 2001). See also Restatement (Third) of the Foreign Relations Law of the United States (1986) § 467, para. 1 (“Under international law, an international organization generally enjoys such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfilment of the purposes of the organization, including immunity from legal process, and from financial controls, taxes, and duties.”); U.N. Charter, art. 105 (“The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.”).

³⁶¹ Waite and Kennedy v. Germany, App. No. 26083/94, 1999-I Eur. Ct. H.R. para. 63.

³⁶² See August Reinisch & Ulf Andreas Weber, *In the Shadow of Waite and Kennedy*, IOLR 59, 61-2.

³⁶³ See e.g. Boimah v. United Nations General Assembly, 664 F. Supp. 69, at 71 (E.D.N.Y. 1987); FAO v. Colagrossi, Corte di Cassazione, 18 May 1992, No. 5942, 75 RivDI (1992), p. 407 (Italian Supreme Court recognizing a defendant-international organization’s absolute immunity from suit in domestic courts). Cf. Reinisch & Weber, *supra* note 362, at 61-2 (noting steps to limit absolute immunity including court decisions by US and Italian Courts and noting changes in treaty law to limit absolute immunity).

³⁶⁴ See Matthews v. United Kingdom, App. No. 24833/94, 1999-I Eur. Ct. H.R.; Waite and Kennedy v. Germany, *supra* note 361; Bosphorus v. Ireland, App. No. 45036/98 (2005), available at <http://www.echr.coe.int/ECHR/> (last visited Feb. 5, 2007) (follow “caselaw” hyperlink; then follow “HUDOC” hyperlink; then enter “Bosphorus” in “case title”; then follow “search” hyperlink).



serve as the basis for a cause of action by an employee against an employer-international organization in cases before national courts. This section explores the application of Article 6 (1) ECHR by the ECtHR and its effect on the immunity of international organizations, specifically the ILOAT. First, however, it is necessary to give some background on the applicability of Article 6 ECHR to employment disputes.

6.1. Employment Disputes and the European Convention of Human Rights

Unlike Article 8 of the American Convention on Human Rights, which explicitly provides that employment disputes fall under its protection, Article 6 of the European Convention on Human Rights simply states that it applies in the context of the “determination of . . . civil rights and obligations”³⁶⁵ Originally, the use of the term “civil” created uncertainty as to the protection afforded by this provision to civil servants in employment disputes.³⁶⁶ In the *Pellegrin v. France* decision, the European Court of Human Rights attempted to clarify this legal uncertainty by introducing a new criterion stating that “[n]o disputes between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law” concern civil rights and obligations.³⁶⁷ Dissenters in this case argued that all disputes that are decisive regarding an individual’s legal position should enjoy the protection of the European Convention of Human Rights.³⁶⁸ Nevertheless, the *Pellegrin* judgment is still considered “good law,” and therefore Member States are not bound by Article 6 ECHR to

³⁶⁵ ECHR, *supra* note 47, at art. 6, para. 1; ACHR, *supra* note 61, at art. 8 (It should be noted that neither the ICCPR nor the African Banjul Charter include a similar qualification of the rights receiving the protection of the respective provision.)

³⁶⁶ Similar to the ECHR, it is controversial whether proceedings against the dismissal of a civil servant constitute a suit at law as required by art. 14 ICCPR, *supra* note 59. See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 316 (2nd ed. 2005). However, other than the ECtHR, the HRC seems to consider all employment disputes of civil servants as a suit of law, see NOWAK, *supra*, at 317. See also U.N. HRC, *Muñoz Hermoza v. Peru*, paras. 11.3, 12, U.N. Doc CCPR/C/34/D/203/1986, Communication number 203/1986 (Nov. 17, 1988); U.N. HRC, *Casanovas v. France*, paras. 4.3, 5.2, U.N. Doc CCPR/C/51/D/441/1990, Communication number 441/1990 (July 26, 1994).

³⁶⁷ *Pellegrin v. France*, App. No. 28541/95, 1999-VIII Eur. Ct. H.R. 207, para. 67.

³⁶⁸ The case was judged by the Grand Chamber and decided with 17 to 4 votes. *Id.* Apart from a joint dissenting opinion from 4 judges, another judge had a separate opinion. These two opinions criticized the newly formed criterion and its consequences. Cf. Loukis G. Loucaides, *Questions of Fair Trial under the European Convention on Human Rights*, 3 HUM. RTS. L. REV. 27, 29 (2003) (“I find [the *Pellegrin*] criterion unsatisfactory and unjustified and I agree with the joint dissenting opinion in that case in saying



consider cases involving the hiring and firing core civil servants, although they are required to live up to the standards of Article 6 ECHR in employment disputes brought by employees whose jobs are identical to their private sector counterparts.³⁶⁹ In addition, the judgment can be interpreted as excluding “the applicability of Article 6 in *all* cases involving an employee under a special bond of trust and loyalty,” including economic bonds.³⁷⁰

The *Pellegrin* decision, however, has not been held to apply to tort claims by public servants against a State.³⁷¹ More notably, it has not been analogously applied to disputes between employees of international organization and their employers. In *Waite and Kennedy*, for instance, the ECtHR did not rely on the *Pellegrin* decision, but applied Article 6 ECHR and emphasized the need for an adequate alternative.³⁷² The Court apparently took as a given that Article 6 ECHR applied to the case. In similar situations, national courts have also applied Article 6 ECHR without questioning the civil character of the dispute.³⁷³ Thus, for the purpose of this report, it is presumed that the right to fair trial of Article 6 ECHR applies, albeit with some possible exceptions, to employment disputes between international organization and international civil servants.³⁷⁴

that the concept of civil rights and obligations should cover ‘all disputes that are decisive for a person’s legal position, even if he or she is a civil servant’” (reference omitted).

³⁶⁹ CLARE OVEY & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 168 (4th ed. 2006).

³⁷⁰ *Pellegrin v. France*, *supra* note 367 (Traja, J., dissenting).

³⁷¹ See *Matthews v. Ministry of Defence*, [2002] EWCA Civ. 773, paras. 18-33, England, Court of Appeal, 29 May 2002, available at http://www.hmcourts-service.gov.uk/judgmentsfiles/j1208/Matthews_v_Defence.htm (last visited Jan. 25, 2007) (the decision in *Pellegrin* does not exclude claims in tort of public servants against the State, *in casu* an ex-service man seeking damages against the Ministry of Defence in respect of injuries caused at work by exposure to asbestos).

³⁷² *Waite and Kennedy v. Germany*, *supra* note 361, at para. 68. The *Waite and Kennedy* and other related cases are discussed in section 6.2.

³⁷³ The national cases referred to are discussed in section 6.2.

³⁷⁴ Cf. European Commission for Democracy Through Law (Venice Commission), *Opinion on a Possible Solution to the Issue of Decertification of Police Officers in Bosnia and Herzegovina*, para. 33, Opinion no. 326/2004, 24 October 2005, CDL-AD(2005)024, available at [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)024-e.pdf](http://www.venice.coe.int/docs/2005/CDL-AD(2005)024-e.pdf) (last visited Jan. 25, 2007)

The Venice Commission underlines that the Human Rights Commission has found that the decertification proceedings before IPTF and the Ministry of Internal Affairs (in that particular case, but the pattern was repeated in several other cases) did not satisfy the requirements of Article 6 ECHR, on account of the lack of public, adversarial, impartial and independent examination of the applicants’ rights. In this respect, the Venice Commission stresses that the Human Rights Commission has found that no breach of Article 6 ECHR had been committed by *the national authorities*. In the Venice Commission’s opinion, instead, the Human Rights



6.2. The Responsibility of States Parties to the European Convention of Human Rights to Ensure Adequate Means of Redress for Employees of International Organizations

The European Court of Human Rights has consistently held that Article 6(1) ECHR, providing that everyone has “the right to have any claim relating to his civil rights and obligations brought before a court or tribunal,” secures the right of access to court.³⁷⁵ In interpreting Article 6(1) ECHR, the Court has determined that a Member State may not avoid its international legal responsibility to provide such a forum by transferring competences to an international organization. Accordingly, the requirement of a Member State to provide access to a court stands despite such a transfer. Moreover, merely providing access to a court or tribunal is insufficient. The ECtHR requires that this forum provide adequate protection. As explained by de Wet and Nollkaemper:

If member states choose to transfer certain powers to international organizations and the exercise of those powers may result in a violation of the human rights that they are obliged to guarantee, they have to secure that proper judicial avenues at the international level are available. If not, the final responsibility for the human rights violation in question continues to rest with the member states.³⁷⁶

This section discusses the case law of the ECtHR relating to the requirements to provide alternative and adequate legal forum, and identifies the indirect effect of this case law on international organizations that fail to provide a sufficient judicial forum.

The responsibility of a member State of an international organization to meaningfully secure access to a fair trial notwithstanding a transfer of power to the organization was addressed by the ECtHR in *Matthews v. United Kingdom*.³⁷⁷ In this case, the Applicant applied to the Electoral Registration Officer for Gibraltar to be

Commission suggested that such breach, which had taken place, had indeed been committed by the UN/IPTF. [emphasis in original].

³⁷⁵ Waite and Kennedy v. Germany, *supra* note 361, at para. 50 (citing also Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A)18, at para. 36 (1975); and Osman v. United Kingdom, 1998-VIII Eur. Ct. H.R. 3166, at para. 136). See also Beer and Regan v. Germany, App. No. 28934/95 (1999), available at <http://www.echr.coe.int/ECHR/> (last visited Feb. 5, 2007) (follow “caselaw” hyperlink; then follow “HUDOC” hyperlink; then enter “Beer” in “case title”; then follow “search” hyperlink).

³⁷⁶ Erika de Wet & André Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 GERMAN Y. INT’L 166, 188 (2002).

³⁷⁷ *Matthews v. United Kingdom*, *supra* note 364, at para. 32.



registered as a voter at the elections to the European Parliament.³⁷⁸ The Electoral Registration Officer declined to do so because the relevant provisions of the European Community Act of Direct Elections of 1976³⁷⁹ did not include Gibraltar in the franchise for the European parliamentary elections.³⁸⁰ The Applicant alleged that the denial to be registered as a voter violated Article 3 of Protocol No. 1 of the First Additional Protocol to the European Convention on Human Rights, which provides that “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”³⁸¹ Here, for the first time, the ECtHR held that a Member State had violated the Convention because it had failed to secure Convention rights notwithstanding the fact that violation was based on an act perpetrated by the European Community and not the United Kingdom itself.³⁸² In so holding, the Court acknowledged that the responsibility of Member States to protect the rights of individuals on its territory continues even where it has transferred competences to international organizations.³⁸³

Following the *Matthews* decision, the European Court of Human Rights in *Waite and Kennedy v. Germany* considered whether Germany had breached Article 6 of the European Convention on Human Rights by failing to provide access to court.³⁸⁴ In this case, the Complainants asserted that they were denied access to German courts because the named defendant was an international organization with immunity from suit in national courts. The ECtHR indicated that the right to a court is not absolute. The Court reasoned that:

To read Article 6 § 1 of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would, in the Court’s view, thwart the proper functioning

³⁷⁸ *Id.*, at para. 7.

³⁷⁹ *Id.* (The European Community Act of Direct Elections was agreed upon by all member states of the European Community and has treaty status).

³⁸⁰ *Id.*, at para. 12.

³⁸¹ *Id.*, at para. 24.

³⁸² *Id.*, at para. 64-5.

³⁸³ *Id.*

³⁸⁴ *Waite and Kennedy v. Germany*, *supra* note 361, at paras. 47, 50.



of international organisations and run counter to the current trend towards extending and strengthening international cooperation.³⁸⁵

Accordingly, the Court limited the right of access to national courts stating that where “applicants had available to them *reasonable alternative means* to protect effectively their rights under the Convention,” it was not required that a Member State agree to hear these cases in its national courts.³⁸⁶ Based on the Court’s reasoning, it is clear that where a plaintiff does not have an alternative forum that meets Article 6 ECHR standards, the Court may require Member States to provide one.

Closely following the *Matthews* and *Waite and Kennedy* decisions, the *Bosphorus* decision further reiterated the responsibilities of Member States to provide access to an alternative and adequate judicial forum.³⁸⁷ In this case, a Turkish airline charter company, Bosphorus, alleged, pursuant to Article 1 of Protocol No. 1 to the European Convention of Human Rights that its right to property was breached when Ireland impounded its aircraft.³⁸⁸ Here, the ECtHR found that the Applicant was given access to a dispute resolution forum and thus the right of access to court had been met.³⁸⁹ The question before the Court therefore was whether the court, in this case the European Court of Justice (“ECJ”), had provided the Applicant with equivalent protection. The ECtHR concluded that “[i]f . . . equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention . . . [h]owever, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.”³⁹⁰ Here, the ECtHR held that such equivalent protection was not manifestly deficient.³⁹¹

The requirement under the case law of the ECtHR that a Member State ensure the protection of the fundamental rights of individuals within its jurisdiction notwithstanding the conveyance of immunity to an international organization, has practical implications

³⁸⁵ *Id.*, at para. 72.

³⁸⁶ *Id.*, at para. 68 [emphasis added].

³⁸⁷ *Bosphorus v. Ireland*, *supra* note 364.

³⁸⁸ *Id.*, at para. 107.

³⁸⁹ *Id.*, at para. 166.

³⁹⁰ *Id.*, at para. 156.

³⁹¹ *Id.*, at para. 165.



for ILO host States as well as for those States serving as host states to those international organizations submitting to ILOAT's jurisdiction.

One consequence of the requirement of equivalent protection relates to the ILOAT's jurisdictional limitation. Although this discussion falls outside of the scope of this report, it should be noted that if the ILOAT determines that it lacks competence due to its jurisdictional limitations, a litigant would have no means of securing a remedy because international organizations are generally immune from suit in national courts.³⁹² Further, if a complainant succeeds in establishing that s/he has standing before the ILOAT, *lacunae* in the staff regulations may result in the tribunal's inability to render a decision. In both of these situations the applicant is left with no forum for remedy because of the immunity of international organization. In light of the recent decisions of the ECtHR as set out above, Member States may be obliged to provide these applicants with a judicial forum under the equivalent protection doctrine.

The second and more relevant consequence for the purposes of this report, of *Matthews, Waite and Kennedy*, and *Bosphorus* decisions is that ECHR Member States are obliged to insure that international organizations to which they have transferred competences provide a judicial forum that offers equivalent protection. While in *Waite and Kennedy*, the host state, Germany, was the sole defendant, other Member States as parties to the ECHR may also be implicated.³⁹³ Pursuant to these ECtHR decisions, if the ILOAT is the selected forum for certain international organizations, then it is imperative that it meets the standards of independence as determined by Article 6 ECHR case law. Otherwise, it is arguable that although the ILOAT is an alternative forum, it may not offer equivalent protection, a key requirement according to the *Waite and Kennedy*

³⁹² See *Darricades v. United Nations Educational, Scientific and Cultural Organization (UNESCO)*, Judgments ILO Admin. Trib. No. 67, at 5 (1963), at <http://www.ilo.org/public/english/tribunal/fulltext/0067.htm> (dismissing a complaint upon a finding that the complainant was only a "casual employee" of the United Nations Educational, Scientific and Cultural Organization and that it therefore lacked jurisdiction under the ILOAT Statute to hear her complaint.):

The Tribunal recognises that as a result of holding that it lacks jurisdiction, the complainant is thereby regrettably deprived of any means of judicial redress against the injury sustained as a result of the alleged violations of her contract but the Tribunal, being a Court of limited jurisdiction, is bound to apply the mandatory provisions governing its competence.

³⁹³ See, e.g., *Cour de Cassation, Chambre sociale [Cass. soc.] [Social chamber of the highest court of original jurisdiction]*, Jan. 25, 2005, Case no. 04-41012 (Fr.) (holding France, an ECHR Member State responsible for human rights violations, not the Host State, Senegal, which is not a party to the ECHR).



decision. Accordingly, ECHR Member States, and most notably host states, would be responsible under this line of cases for providing an applicant with a judicial forum. The clear result is that an applicant that would otherwise be obliged to seek redress with ILOAT may argue that the ILOAT should not be considered a reasonable alternative forum for the protection of his/her rights. In such a case, it would be incumbent on a Member State to provide the applicant with access to a court, effectively taking jurisdiction of the case from the ILOAT.

The above analysis may, however, be problematic in practice. Some critics of the *Waite and Kennedy* and *Bosphorus* decisions argue that the ECtHR engaged in a mere cursory examination of the adequacy of the alternative forums at issue in each case. In *Bosphorus*, Judge Ress in his concurring opinion questioned the decision of the majority, arguing that the Court engaged in cursory and formalistic examination of the ECJ in determining that it met the equivalence or adequacy standard identified in the *Waite and Kennedy* decision.³⁹⁴ One scholar similarly notes that the ECtHR applied a very low level of scrutiny to the ESA in *Waite and Kennedy* stating that “the ECtHR did not review whether the standard of protection guaranteed by these procedures actually met the standards of Article 6(1) ECHR on this particular instance.”³⁹⁵

In light of the requirement that ECHR Member States provide an alternative and adequate forum, a complainant alleging that ILOAT fails to meet these standards may not succeed if the ECtHR engages in merely a cursory review of the Tribunal. Further, it should be noted that procedurally, only a complainant that has been denied recourse in a domestic court or a complainant alleging that a domestic court has engaged in an insufficient review of the alternate forum is able to seek remedy in the European Court of Human Rights.³⁹⁶ Therefore, in a case where the independence of the ILOAT is questioned, the case would first have to be reviewed by a domestic court. In the case that a complainant succeeds in reaching the ECtHR, there is arguable a strong possibility that a low level of scrutiny will be applied based on the *Waite and Kennedy* and *Bosphorus* decisions. However, as discussed in the following sub-section of this report, some

³⁹⁴ *Bosphorus v. Ireland*, *supra* note 364 (Ress, J., dissenting).

³⁹⁵ Erika de Wet, *The Emergence of International and regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LEIDEN J. INT'L 611, 624 (2006). See also Kathrin Kuhnert, *Double Standards in European Human Rights Protection?*, 2 UTRECHT L. REV. 177,187 (2006).



national courts have applied a higher level of scrutiny in determining whether Member States have met the requirements of providing equivalent protection. Accordingly, despite the apparent low level of scrutiny applied by the ECtHR, complainants may succeed in gaining redress in domestic courts.

6.3. National Court Decisions Addressing the Immunity of International Organizations

Recently, national courts have begun to recognize the need to provide equivalent protection to individuals on their territory. With specific regard to labor disputes, national courts have exercised their jurisdiction in cases between international organizations and their employees, and in so doing they have addressed the issue of the immunity granted to international organizations. The national courts held that the international organizations at issue failed to provide an alternative and/or adequate judicial forum as required by Article 6(1) ECHR. This section will examine the reasoning offered by these national courts for setting aside immunity, and the implications of these decisions for the ILOAT.

Before the promulgation of the *Waite and Kennedy* decision, national courts generally declined to waive the immunity of defendant international organizations.³⁹⁷ For example, in one case decided in 1992, the Swiss Federal Court held that international organizations enjoy absolute immunity.³⁹⁸ Here, the complainant, an employee of an international organization, dissatisfied with his arbitral decision, attempted to have it annulled.³⁹⁹ The Court declined to do so citing the immunity of the defendant-international organization. It interpreted the immunity of international organization to be absolute and stated that the organization's decision to submit to an arbitral tribunal was not a waiver of immunity.⁴⁰⁰

In the wake of the *Waite and Kennedy* decision, national courts considering labor actions initiated against international organizations decided to waive the immunity of those organizations. First, in *Siedler v. Western European Union*, a case before the

³⁹⁶ See ECHR, *supra* note 47, at art. 35, para. 1.

³⁹⁷ See generally, Reinisch & Weber, *supra* note 362.

³⁹⁸ Bundesgericht [Bger] [Federal Court] Dec. 21, 1992, 118 Entscheidungen des Schweizerischen Bundesgericht [BGE] IB 562, 564-5 (Erwagung 1) (Switz.).

³⁹⁹ *Id.*, at 563.

⁴⁰⁰ *Id.*, at 564-5.



Labour Tribunal of Brussels, the Complainant initiated proceedings against the Western European Union (“WEU”) after termination of her employment.⁴⁰¹ In her application to the Court, the Complainant argued that the compensation awarded to her by the internal appeals board of the WEU, though in accordance with WEU Staff rules, was insufficient.⁴⁰² She therefore sought supplementary compensation in the Belgian national court system.⁴⁰³ The Labour Tribunal of Brussels awarded her supplementary compensation.⁴⁰⁴ She later appealed for additional compensation, which was denied.⁴⁰⁵ The WEU also appealed the decision arguing that the Court had violated its immunity in accepting the complainant’s case. In declining to accept WEU’s immunity, the Court held that WEU’s internal appeals process did not provide equivalent protection as required by Article 6(1) ECHR.⁴⁰⁶ The Court found the internal appeals process to be deficient based on a number of considerations including the short term of office (2 years), the method of appointing judges, the fact that public debates were not guaranteed, and because there was no procedure for challenging the impartiality of judges.⁴⁰⁷

Similarly, the French Court of Cassation waived the immunity of an international organization, the Banque Africaine de Developpment.⁴⁰⁸ In this case, an employee of the Bank was unable to bring a suit before a court that could render a binding decision, because any decision rendered by the Bank’s Appeals Commission could be rejected by the organization President.⁴⁰⁹ The French Court of Cassation held that this process did not provide the complainant with the equivalent protection offered by a court of law.⁴¹⁰

This jurisprudence reiterates the importance and use of Article 6(1) in labor disputes involving international organizations. The cases make clear that States are taking

⁴⁰¹ Siedler v. Western European Union, Cour de Travail, Chambre 4 [Brussels Labour Court of Appeal] Sep. 17, 2003, JT 2004, 617.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*, at para. 62-4.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* (the Court also noted, based on Belgian law provisions, that the WEU was not vested with the right to adopt a personnel statute, and therefore Belgian labor laws were fully applicable to the Organization).

⁴⁰⁷ *Id.*, at para. 61.

⁴⁰⁸ Case no. 04-41012 (Fr.). *supra* note 393. *See also* Cour d’Appel, Paris, Oct. 7, 2003 (noting the relevance of Article 6(1) ECHR).

⁴⁰⁹ *Id.* (Here, the internal appeals process of the international organization was conducted by the Appeals Commission. This Commissions decisions were not binding as they could be reject by the BAD President).



their responsibilities pursuant to Article 6(1) ECHR into account in decisions involving defendants that have historically been immune from suit. The obvious result with regard to the ILOAT is that if it can be established that the Tribunal provides inadequate protection, then ECHR Member States are obliged to provide the complainant with a court of law. Arguably, the concerns addressed in this report regarding the independence of the ILOAT would likely substantiate such a claim.

7. CONCLUSIONS AND RECOMMENDATIONS: POTENTIAL FOR REFORM

The ILOAT should guarantee its independence in order to ensure that complainants receive a fair trial before an independent and impartial judiciary as indicated by the various international instruments discussed in this report. The ILOAT's current system has several problematic features, most notably the failure of its Statute to address issues identified as crucial in guaranteeing a court or tribunal's independence. Moreover, one of the few guarantees of a fair trial provided for in the ILOAT Statute, oral hearings, is not utilized by the Tribunal. Its close financial connection with the executive and political organs of the ILO and other defendant-international organizations also raises additional issues of independence.

In order to comply with the standards identified in this report, the ILOAT Statute should articulate the qualifications required of judges, and stipulate procedures for disqualification, discipline, and removal of judges in the event of misconduct or the lack of independence and/or impartiality. By amending the ILOAT Statute to include such requirements, the ILOAT's judicial independence and impartiality would be clearer to the judges, the complainants, and to the ILO and other international organizations recognizing the competence of the ILOAT.

Finally, the ILOAT should also increase its transparency, including the process of selecting and appointing judges, the granting of public access to procedural practices, and it should grant public hearings more frequently. The complainants, as well as the general public must have access to information about the ILOAT dispute resolution process in

⁴¹⁰ *Id.* Also note the Madrid Social Court No. 21, Dec. 14, 2005, Babé v. International Labour Organization (waiving the immunity of the ILO) (however, this information has been obtained by writ of execution; the



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order to hold the ILOAT and its judges accountable, and also to ascertain its independence if it fact it is. Moreover, in light of the responsibilities of States Members to the European Convention on Human Rights and Fundamental Freedoms, as addressed in decisions of the European Court of Human Rights and national courts applying the Convention, a failure to make these adjustments could result in complainants seeking redress in national courts citing the lack of independence of the ILOAT. Plainly put, in order to prove that complainants are receiving a fair trial before an independent, fair, and competent judicial body, the ILOAT must increase its guarantees of judicial independence and impartiality.



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APPENDIX 1. STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION

Statute of the Administrative Tribunal of the International Labour Organization

**adopted by the International Labour Conference on 9 October 1946
and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992 and
16 June 1998**

ARTICLE I

There is established by the present Statute a Tribunal to be known as the International Labour Organization Administrative Tribunal.

ARTICLE II

1. The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case.
2. The Tribunal shall be competent to settle any dispute concerning the compensation provided for in cases of invalidity, injury or disease incurred by an official in the course of his employment and to fix finally the amount of compensation, if any, which is to be paid.
3. The Tribunal shall be competent to hear any complaint of non-observance of the Staff Pensions Regulations or of rules made in virtue thereof in regard to an official or the wife, husband or children of an official, or in regard to any class of officials to which the said Regulations or the said rules apply.
4. The Tribunal shall be competent to hear disputes arising out of contracts to which the International Labour Organization is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution.
5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure, and which is approved by the



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Governing Body.

6. The Tribunal shall be open:

(a) to the official, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death;

(b) to any other person who can show that he is entitled to some right under the terms of appointment of a deceased official or under provisions of the Staff Regulations on which the official could rely.

7. Any dispute as to the competence of the Tribunal shall be decided by it, subject to the provisions of article XII.

ARTICLE III

1. The Tribunal shall consist of seven judges who shall all be of different nationalities.

2. The judges shall be appointed for a period of three years by the Conference of the International Labour Organization.

3. A meeting of the Tribunal shall be composed of three judges or, in exceptional circumstances, five, to be designated by the President, or all seven.

ARTICLE IV

The Tribunal shall hold ordinary sessions at dates to be fixed by the Rules of Court, subject to there being cases on its list and to such cases being, in the opinion of the President, of a character to justify holding the session. An extraordinary session may be convened at the request of the Chairman of the Governing Body of the International Labour Office.

ARTICLE V

The Tribunal shall decide in each case whether the oral proceedings before it or any part of them shall be public or in camera.



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ARTICLE VI

1. The Tribunal shall take decisions by a majority vote; judgments shall be final and without appeal.
2. The reasons for a judgment shall be stated. The judgment shall be communicated in writing to the Director-General of the International Labour Office and to the complainant.
3. Judgments shall be drawn up in a single copy, which shall be filed in the archives of the International Labour Office, where it shall be available for consultation by any person concerned.

ARTICLE VII

1. A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.
2. To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published.
3. Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. The period of ninety days provided for by the last preceding paragraph shall run from the expiration of the sixty days allowed for the taking of the decision by the Administration.
4. The filing of a complaint shall not involve suspension of the execution of the decision impugned.

ARTICLE VIII

In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the



injury caused to him.

ARTICLE IX

1. The administrative arrangements necessary for the operation of the Tribunal shall be made by the International Labour Office in consultation with the Tribunal.
2. Expenses occasioned by sessions of the Tribunal shall be borne by the International Labour Office.
3. Any compensation awarded by the Tribunal shall be chargeable to the budget of the International Labour Organization.

ARTICLE X

1. Subject to the provisions of the present Statute, the Tribunal shall draw up Rules of Court covering:
 - (a) the election of the President and Vice-President;
 - (b) the convening and conduct of its sessions;
 - (c) the rules to be followed in presenting complaints and in the subsequent procedure including intervention in the proceedings before the Tribunal by persons whose rights as officials may be affected by the judgment;
 - (d) the procedure to be followed with regard to complaints and disputes submitted to the Tribunal by virtue of paragraphs 3 and 4 of article II;
 - (e) and, generally, all matters relating to the operation of the Tribunal which are not settled by the present Statute.
2. The Tribunal may amend the Rules of Court.



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ARTICLE XI

The present Statute shall remain in force during the pleasure of the General Conference of the International Labour Organization. It may be amended by the Conference or such other organ of the Organization as the Conference may determine.

ARTICLE XII

1. In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.

2. The opinion given by the Court shall be binding.

ANNEX TO THE STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION

To be entitled to recognize the jurisdiction of the Administrative Tribunal of the International Labour Organization in accordance with paragraph 5 of article II of its Statute, an international organization must either be intergovernmental in character, or fulfill the following conditions:

- a) it shall be clearly international in character, having regard to its membership, structure and scope of activity;
- b) it shall not be required to apply any national law in its relations with its officials, and shall enjoy immunity from legal process as evidenced by a headquarters agreement concluded with the host country; and
- c) it shall be endowed with functions of a permanent nature at the international level and offer, in the opinion of the Governing Body, sufficient guarantees as to its institutional capacity to carry out such functions as well as guarantees of compliance with the Tribunal's judgments.

The Statute of the Tribunal applies in its entirety to such international organizations subject to the following provisions which, in cases affecting any one of these organizations, are applicable as follows:



Article VI, paragraph 2

The reasons for a judgment shall be stated. The judgment shall be communicated in writing to the Director-General of the International Labour Office, to the Director-General of the international organization against which the complaint is filed, and to the complainant.

Article VI, paragraph 3

Judgments shall be drawn up in two copies, of which one shall be filed in the archives of the International Labour Office and the other in the archives of the international organization against which the complaint is filed, where they shall be available for consultation by any person concerned.

Article IX, paragraph 2

Expenses occasioned by the sessions or hearings of the Administrative Tribunal shall be borne by the international organization against which the complaint is filed.

Article IX, paragraph 3

Any compensation awarded by the Tribunal shall be chargeable to the budget of the international organization against which the complaint is filed.

Article XII, paragraph 1

In any case in which the Executive Board of an international organization which has made the declaration specified in article II. paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.



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**APPENDIX 2. RULES OF THE ADMINISTRATIVE TRIBUNAL OF THE
INTERNATIONAL LABOUR ORGANIZATION**

**Rules of the Administrative Tribunal
of the International Labour Organization**

adopted by the Tribunal on 24 November 1993

I. ORGANIZATION

ARTICLE 1

1. The Tribunal shall elect a President and a Vice-President.
2. Election shall be by vote of the majority of its members, any who cannot attend for the purpose being entitled to vote by correspondence.
3. The President shall direct its proceedings and represent it in all administrative matters.
4. If the President is unable to act, the Vice-President or, if the Vice-President is unable to act, the senior judge shall exercise the functions of President at and between sessions.

ARTICLE 2

The Tribunal shall have a Registrar and an Assistant Registrar appointed by the Director-General of the International Labour Office.

ARTICLE 3

1. The Tribunal shall hold sessions whenever the caseload so warrants.
2. The President shall set and may amend the dates of each session of the Tribunal and shall invite members to attend for such period as he determines.

II. PROCEDURE



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ARTICLE 4

1. A complaint filed against an organization which has recognized the jurisdiction of the Tribunal and any communication relating to such complaint shall be addressed to the President through the Registrar.
2. For the purpose of determining whether the time limits in paragraphs 2 and 3 of Article VII of the Statute have been complied with, the Tribunal shall take into account the date of deposit of the complaint at the Registry or the date of despatch, provided that in the event of doubt about the date of despatch it shall take into account the date of receipt at the Registry.

ARTICLE 5

1. The complainant may plead his own case or appoint for the purpose an agent who shall be a serving or former official of an organization which has recognized the Tribunal's jurisdiction or of the United Nations, or a member of a bar in a member State of one of those organizations, or, with leave from the President, someone who is qualified to deal with issues relating to the international civil service.
2. The complainant's agent shall provide, in English or French, a power of attorney.
3. The defendant organization's agent shall be one of its own serving or former officials, or a serving or former official of another organization which has recognized the Tribunal's jurisdiction or of the United Nations, or a member of a bar in a member State of one of those organizations, or, with leave from the President, someone who is qualified to deal with issues relating to the international civil service.
4. Where the defendant organization's agent is not a serving or former official, it shall provide, in English or French, a power of attorney.

ARTICLE 6

1. The complainant or the complainant's agent shall:
 - (a) fill up in English or French and sign the complaint form prescribed in the Schedule to these Rules;



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(b) append thereto a brief in the same language stating the facts of the case and the pleas and the original or a certified copy or transcript of any item of evidence adduced in support;

(c) append to any text which is not in English or French a certified translation into the language chosen in accordance with (a); and

(d) supply five copies of the complaint form, the brief and any appended item of evidence and certify them by signature to be true.

2. If not satisfied that the complaint meets the requirements of these Rules, the Registrar shall call upon the complainant or the complainant's agent to correct it within 30 days and may where appropriate return the papers for the purpose.

3. If satisfied that the complaint meets the requirements of these Rules, the Registrar shall forward one copy to the defendant organization.

4. The language chosen in accordance with l(a) shall be used in any subsequent written pleadings.

ARTICLE 7

1. If the President considers a complaint to be clearly irreceivable or devoid of merit he may instruct the Registrar to forward it to the defendant organization for information only.

2. When it takes up such complaint the Tribunal may either dismiss it summarily as clearly irreceivable or devoid of merit or else order that the procedure prescribed below shall be followed.

ARTICLE 8

1. In any case which is not dealt with in accordance with Article 7(1) the defendant organization shall despatch its reply to the Registrar within 30 days of the date of receipt of the complaint.

2. It shall:



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(a) append to its reply the original or a certified copy or transcript of any item of evidence adduced in support;

(b) append to any text which is not in English or French a certified translation into the language chosen in accordance with Article 6(1)(a); and

(c) supply five copies of its reply and of any appended item of evidence and certify them by the signature of its agent to be true.

3. If it files no reply within the time limit the written pleadings shall close.

ARTICLE 9

1. If satisfied that the defendant organization's reply meets the requirements of these Rules, the Registrar shall forward one copy to the complainant or to the complainant's agent, who may file a rejoinder within 30 days of the date of receipt.

2. If no rejoinder is filed within the time limit the written pleadings shall close.

3. If a rejoinder is filed, the Registrar shall forward one copy to the defendant organization, which may file a surrejoinder within 30 days of the date of receipt.

4. If no surrejoinder is filed within the time limit the written pleadings shall close.

5. If a surrejoinder is filed, the Registrar shall forward one copy to the complainant or to the complainant's agent.

6. The President may, on his own motion or on the application of either party, order the submission of a further written statement or document and may set the time limit for such submission.

7. The complainant or the complainant's agent shall supply with the rejoinder and with any further written statement or document, and the defendant organization shall supply with the surrejoinder and with any further written statement or document,



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(a) a certified translation into the language chosen in accordance with Article 6(1)(a) of any text which is not in English or French and

(b) five certified copies of all submissions.

ARTICLE 10

1. When the President considers the pleadings to be sufficient he shall instruct the Registrar to put the complaint on the list of a session of the Tribunal.

2. The Registrar shall inform the parties before the opening of that session of the inclusion of the complaint in the list and of the dates of the session.

3. The Tribunal or, between sessions, the President shall rule on an application by either party for a stay of proceedings or for the adjournment of a listed case to a later session.

III. OTHER MATTERS

ARTICLE 11

1. The Tribunal may, on its own motion or on the application of either party, order such measures of investigation as it deems fit, including the appearance of the parties before it, the hearing of expert and other witnesses, the consultation of any competent international authority, and expert inquiry.

2. Any measure of investigation may be by letters rogatory if the Tribunal or, between sessions, the President so orders.

ARTICLE 12

1. An application by either party for hearings shall identify any witness whom that party wants the Tribunal to hear and the issues which the party wants the witness to address.

2. The Tribunal shall determine the conduct of any hearings.



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3. Hearings shall include oral submissions by the parties and may, with leave from the Tribunal, include oral testimony by any witness.

4. A witness shall make the following declaration before giving evidence:

"I solemnly declare that I shall speak without hatred and without fear, and shall speak the truth, the whole truth and nothing but the truth."

5. An expert witness shall make the same declaration as any other witness and shall then make the following further declaration:

"I solemnly declare that I shall give evidence to the best of my knowledge and belief."

ARTICLE 13

1. Anyone to whom the Tribunal is open under Article II of the Statute may intervene in a complaint on the grounds that the ruling which the Tribunal is to make may affect him.

2. An organization which has recognized the Tribunal's jurisdiction may intervene in a complaint on the grounds that the ruling which the Tribunal is to make may affect it.

3. The Tribunal or, between sessions, the President may instruct the Registrar to give notice of a complaint to any third party if it appears that such third party may want to make submissions.

4. To be receivable, an application to intervene shall be delivered at the Registry before the opening of the session for which the complaint is listed.

ARTICLE 14

The Tribunal or, between sessions, the President may shorten or lengthen any time limit set in accordance with these Rules.

ARTICLE 15

The President may between sessions make provisional orders, without prejudice to the ultimate ruling by the Tribunal on the parties' rights, on an application by either party for



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measures to establish the existence of any fact that is material to the dispute.

ARTICLE 16

The Tribunal shall, in exercise of the powers vested in it by Article X of the Statute, deal with any matter which these Rules do not expressly provide for.

ARTICLE 17

These Rules shall come into force on 1 May 1994.

SCHEDULE

The complaint form referred to in Article 6(1)(a) of these Rules shall consist of questions under the following five heads:

1. The complainant.
2. The defendant organization.
3. The challenged decision.
4. The pleadings (relief claimed, list of documents, etc.).
5. Special applications.

The form may be obtained from the Registrar.