

**WORKING DRAFT**  
**24 January 2002**

**INDEPENDENCE IN THE INTERNATIONAL JUDICIARY:  
GENERAL OVERVIEW OF THE ISSUES**

Background Paper for the Meeting of the Study Group of the International Law Association

Burgh House, Hampstead, London  
2 February 2002

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## Introduction

The number and role of international courts and tribunals has grown significantly in recent years. The intensification of the trend of globalization and the attendant rise in the density of international relationships, and the institutions that govern them, has focused attention more closely than ever on the structure and function of those institutions. Calls for legitimacy and accountability, of which judicial independence is a large part, gain a certain urgency as international courts and tribunals are accorded an increasingly important role in a climate of eroding sovereignty and increasing international regulation. To date, however, very little attention has been given to the meaning and application of the concepts of “independence” and “impartiality” in the international judicial context, and there has been no comprehensive, systematic exploration of the promotion and maintenance of independence in the international judiciary. The first task for the ILA Study Group may therefore be to determine the parameters of its work, an endeavour which this Background Paper seeks to assist.

This Background Paper provides a brief overview of the contemporary law and practice relating to the independence of the international judiciary. The object is principally to provide information, and also to indicate some areas that might be considered to raise issues in the administration of international justice, and to suggest possible areas of focus for further efforts.

Aspects of the law and practice of the following bodies have been considered: the International Court of Justice (“ICJ”), the International Tribunal for the Law of the Sea (“ITLOS”), the Appellate Body of the World Trade Organization (“WTO”), the European Court of Human Rights (“ECHR”), the Court of Justice of the European Communities (“ECJ”), the Inter-American Court of Human Rights (“IACHR”), the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), the Permanent Court of Arbitration (“PCA”), the International Court of Arbitration (“ICA”), the International Centre for the Settlement of Investment Disputes (“ICSID”), and arbitrations under the United Nations Commission on International Trade Law Arbitration Rules (“UNCITRAL Rules”).

The independence of the international judiciary has been difficult to schematize for the same reason that international law has always resisted ambitious theoreticians: lacking a legislature and an executive, concepts developed in the domestic context cannot necessarily be imported into the international legal system. The emergence of an international judiciary has its own dynamic and rationale, and special circumstances. In that regard, perhaps the most significant difference between international and domestic systems, in the present context, is the important role of States in the functioning of international judicial processes. Through the electoral and other processes associated with appointments of international judges, control over budget and, sometimes, over staffing, States have an important influence over much of the machinery of international justice. And of course many international judges are themselves drawn from national civil services. Furthermore, judges in international courts often have to contend with the constraints placed upon the exercise of their power by the instruments that both constitute the courts and bind them closely to a political organ.<sup>1</sup>

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<sup>1</sup> Thus the *dédoulement fonctionnel* of classical international law dictates that international judges deal with States *qua* States and as Members of the political organ that constitutes the court. An appropriate analogy in the domestic context would seem to be a court which was empowered to hear cases only between high-ranking members of the executive and which at the same time was governed by a committee of those same high-ranking politicians.

In the early 1980's there was a considerable push to create global standards for the independence of the judiciary. With one notable exception, however, these projects were aimed at the promotion of independence in the domestic, rather than international, context. Nonetheless, attention paid to their content, and particularly to the reasoning behind it, may be useful in identify pertinent principles for the independence of the international judiciary. One of the guiding principles (though not always an explicit one) of each of these projects was the distinction between the independence of individual judges and that of the collective independence of the judges of a court as a whole. This distinction, first advanced by Shimon Shetreet in 1976, preserves traditional indicators of the independence of individual judges – such as security of tenure and impartiality – while focusing attention as well on institutional factors such as the degree of control a court has over its own budget.<sup>2</sup> Employing Professor Shetreet's conceptual division may be useful in avoiding the confusion inherent in analogizing international with domestic law, and allowing a clearer formulation of questions about the proper relationship between the international judiciary and the other actors in the international system.

The rest of the discussion, then, will be divided into the following sections and subsections based on those potential relationships: First, the “individual independence” of the international judge – vis-à-vis the parties to a dispute, vis-à-vis states and vis-à-vis the political organ to which the court is attached. And second, the independence of the judges on an international court as a whole – vis-à-vis the parties and vis-à-vis the political organ. Each subsection will note the resolutions, declarations, jurisprudence, statutory or procedural provisions relevant to the particular relationship. But first a brief overview of current practice.

## Current Practice

A number of non-binding instruments have been developed over the past two decades with the aim of identifying general principles, albeit for the national level. Most of these documents reflect the division between individual and collective independence, though not always explicitly. Among the most important such documents is the *United Nations Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by the General Assembly later that year.<sup>3</sup> Other major resolutions and declarations include the *International Bar Association Code of Minimum Standards of Judicial Independence* approved in New Delhi in 1982, the *Montreal Universal Declaration on the Independence of Justice* (1983), the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (1995), and the *Syracuse Principles* (1981) – each of which are reproduced in full in Appendix I.<sup>4</sup> The Montreal Declaration is especially significant in the present context; it is the only document that contains provisions aimed specifically at the international judiciary.

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<sup>2</sup> See SHIMON SHETREET, *JUDGES ON TRIAL: STUDY OF THE APPOINTMENT AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY* (1976).

<sup>3</sup> See UN Doc. A/RES/40/146 (13 December 1985).

<sup>4</sup> See generally Shimon Shetreet, *Judicial Independence in International Law*, 1701 CONFERENCE: THE 300<sup>TH</sup> ANNIVERSARY OF THE ACT OF SETTLEMENT (2001) (available at <http://www.courts.gov.bc.ca/1701/1701%20Papers/Shetreet.htm>); SHIMON SHETREET AND JULES DESCHENES, *JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE* (1985).

These documents have been prepared against the background of the practice of each international court or tribunal. The statute of each court or tribunal contains at a minimum a general provision guaranteeing the independence of its judges. Article 2 of the Statute of the International Court of Justice provides a pertinent example:

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.<sup>5</sup>

Many of the statutes, including that of the ICJ, go on in more detail about the nature of precluded activities and the procedure, if any, for settling disputes. Other important aspects of statutory and procedural law include the electoral or appointments process, disciplinary procedures, and budgetary provisions. Practice in relation to these provisions is often difficult to identify, since decisions are usually not publicized. This means that much information obtained is anecdotal, which limits the possibilities for systematic assessment. It is important to recollect that each court or tribunal has its own rules and practices, and it should not necessarily be assumed that the rule or practice in one institution is, or ought to be, followed in another. In this regard it may be a useful function of the Study Group to try to develop a more complete identification of practice in selected institutions, with a view to determining whether general principles and practices have emerged, and whether there can be identified minimum standards which are – or should be - applicable across the full range of these bodies.

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<sup>5</sup> See Appendix II, at 3.

## Independence of Individual Judges

*Vis-à-vis the parties*

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The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

- UN Basic Principles, 2

Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

- Beijing LAWASIA Principles, 7

He who has the judge for his father goes to court with an easy mind.

- Cervantes, *Don Quixote*
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### I. PRACTICE

This aspect of independence is often referred to in the context of discussions on “impartiality”, as it takes into account particular, rather than structural or systemic, impediments to the exercise of the judicial function. Thus while the other factors addressed in this Background Paper may be optimal for the promotion of judicial independence generally, still the judge may have such a relationship with the parties in a specific case as to create the appearance or actuality of bias in that case alone.

It is not possible on the basis of publicly available to obtain a complete picture concerning practice within the various international courts and tribunals, although some information is available, for example in relation to the International Court of Justice.<sup>6</sup> At the ICJ, questions concerning “impartiality” are dealt with by Articles 16, 17 and 24 of the Statute of the Court, which respectively prohibit the exercising of any political, administrative or professional function; prohibit judges from acting in cases and from hearing those in which they have previously acted in any capacity; and providing that in the case of any such incompatibility, the judge in question shall recuse herself.<sup>7</sup> There are numerous examples of decisions being taken in relation to these provisions. For example, one judge recused himself from *Certain Phosphate Lands in Nauru (Nauru v. Australia)*; having been involved in a previous inquiry into the matter.<sup>8</sup> Another ICJ judge, having sat on the panel of the arbitral award that was the subject of the dispute, excused himself from the *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*.<sup>9</sup> Similarly, another judge did not participate

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<sup>6</sup> See Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?* 90 A.J.I.L. 250 (1996).

<sup>7</sup> See Appendix II, at 3.

<sup>8</sup> See *id.*, at 255; see also 1991-92 ICJ Y.B. 198.

<sup>9</sup> See *id.*, at 256; see also 1989-90 ICJ Y.B. 157.

in *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* because he had as a member of the Security Council been engaged in certain aspects of the dispute.<sup>10</sup>

Practice is not necessarily entirely consistent, however. For instance, two judges in *Rights of Nationals of the United States in Morocco* participated in the case although they had both been legal advisers to the parties in the early stages of the dispute.<sup>11</sup> Also, the decision to recuse Sir Muhammad Zafrulla was one aspect of the Court's controversial judgment in *South West Africa*, and was seen by some as irreconcilable with the refusal to disqualify another judge.<sup>12 13</sup>

There has been some practice in other courts which may also clarify the appropriate standards in this area. In relation to the national level, the European Court of Human Rights has developed a two-prong test for judicial bias in the particular instance: on the one hand, *actual* impartiality stemming, for instance, from an improper relationship with one of the parties; on the other, *perceived* impartiality, the latter needing a legitimate, reasonable basis.<sup>14</sup> That test has been endorsed several times by the ICTY in determining whether its own judges should recuse themselves according to Article 15(A) of its Rules of Evidence and Procedure.<sup>15</sup>

In one such case, *Decision on the Application by Momir Talic for the Disqualification and Withdrawal of a Judge (Trial Chamber II)*, the question before the President of the Trial Chamber, Judge David Hunt, was whether Judge Mumba should be disqualified because of her participation in the Tadic case, where the Appeals Chamber made findings of fact substantially similar to those at issue before the Trial Chamber in the present case. In his decision denying the motion, Judge Hunt emphasized the view of Justice Mason (later Chief Justice Mason) of the Supreme Court of Australia:

It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. [...] Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.<sup>16</sup>

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<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See Shelton, *supra* note 3, at n41.

<sup>13</sup> It should be noted in this context that the prohibition on outside occupation found in Article 16 does not preclude judges from sitting on arbitral tribunals; judges in both the PCIJ and the modern Court have done so. In at least one recent instance, it could be argued that the party that appointed the judge to its arbitration had an indirect interest in one of the cases before the Court

<sup>14</sup> See e.g., *Piersac v Belgium*, ECHR, judgment of 1 Oct 1982, Series A No 53, par 30; *Hauschildt v Denmark*, (1990) 12 EHRR 266, par 48; *Bulut v Austria*, ECHR, judgment of 22 Feb 1996, Reports of Judgments and Decisions 1996-II 347, at 356 (pars 31-33) (cited in *Prosecutor v. Talic, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge*, n36); see also *Prosecutor v Delalic, Decision of the Bureau on Motion on Judicial Independence*.

<sup>15</sup> Article 15(A) provides:

A Judge may not sit on a trial or appeal in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw, and the President shall assign another Judge to sit in his place.

<sup>16</sup> *Decision on the Application by Momir Talic for the Disqualification and Withdrawal of a Judge (Trial Chamber II)*, para. 18 (Appendix IV).

Another decision on judicial independence in the ICTY touched on the meaning of the provision in Article 16(A) of the ICJ that “no member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.” Judge Odio Benito had recently taken the oath of office as Vice President of Costa Rica, which was at the time a Member of the Security Council. While stressing that it was not alleging any *actual* bias, Counsel for the defence nonetheless argued that the Tribunal’s rules should be read in light of the Court’s statute, and that Judge Benito’s holding of prohibited political office created the *perception* of impartiality. The Bureau, composed of President McDonald, Vice President Shahbuddeen, and Judges Cassese and Korda, denied the motion, focusing on the fact that Judge Benito had confirmed several times – in writing – that she would not assume any of the duties of Vice President until the case was over. Hence she would neither be exercising a political function nor, therefore, creating a perception of bias.

Judge Mumba was the subject of another important decision on independence, in the *Furundzija* case. In one of the rare instances of an allegation of *actual* bias, defense accused Judge Mumba of deliberately advancing a political cause – the prosecution of rape as a war crime – at the expense of the accused. While a member of the UN Commission on the Status of Women, Judge Mumba had actively participated in the drafting of the Beijing Platform for Action, substantial parts of which advocated the aggressive prosecution of rape and other gender-based crimes as crimes against humanity. A follow-up meeting of an Expert Group was attended by three groups who were later *amici* in *Furundzija*, along with Patricia Viseur-Sellers – later a Prosecutor on the case – though not Judge Mumba. In deciding the case, the Appeals Chamber expressly adopted a test to be used in subsequent considerations:

- A. A Judge is not impartial if it is shown that actual bias exists.
- B. There is an unacceptable appearance of bias if:
  - i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
  - ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>17</sup>

Expanding on the definition of a reasonable observer, the Appeals Chamber decided that a “reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.”<sup>18</sup>

Distinguishing Judge Mumba’s position from that of Lord Hoffman in the *Pinochet* case in England,<sup>19</sup> the ICTY Appeals Chamber decided that her relationship with the *amici* was too

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<sup>17</sup> *Prosecutor v Furundzija, Decision of the Appeals Chamber (21 July 2000)*, paras. 164-215 (Appendix IV).

<sup>18</sup> *Id.* at para. 190 (citations omitted).

<sup>19</sup> Lord Hoffmann was an unpaid director of an Amnesty International charity at the time the latter appeared before him in the *Pinochet* appeal. It was held by a subsequent decision of the House of Lords that its first decision on the matter should be set aside because Lord Hoffmann’s interest in one of the parties disqualified him from sitting: *Pinochet (no 2)* [2000]1 AC 119.

distant to overcome the presumption of impartiality all judges enjoy, and furthermore that previous experience in the development of international law is a *qualification* for the bench, not a disqualification therefrom.

## II. STATUTORY PROVISIONS

Though case law beyond the ICTY is scarce, several statutes and suggested codes of conduct contain detailed provisions on the management of outside associations and activities past and present. Most statutes have a general provision regulating outside associations similar to that of the ICJ. Article 5 of the Statute of the International Tribunal of the Law of the Sea, for instance, is identical to that of the ICJ, with the added prohibition on engaging in any type of sea-bed mining venture or other commercial venture related to the sea (in this regard it is to be recalled that ITLOS judges are appointed on a part-time basis, with the exception of the President).

The practice of the WTO in this regard is also noteworthy. The Dispute Settlement Body passed a resolution on *Rules of conduct for the understanding on rules and procedures governing the settlement of disputes* requiring nearly everyone associated with the settlement of disputes to submit to the a detailed disclosure form; Annex 2 to that resolution contained an “illustrative list” of information to be disclosed:

Each covered person, as defined in Section IV:1 of these Rules of Conduct has a continuing duty to disclose the information described in Section VI:2 of these Rules which may include the following:

- (a) financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;
- (b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
- (c) other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);
- (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);
- (e) employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).<sup>20</sup>

Rule 4 of the European Court of Human Rights Rules of the Court enjoins the judges from any outside occupation which is “incompatible with their independence and impartiality,” and requires judges to notify the President of the Court upon accepting any external obligation. The meaning of “incompatible activities” is amplified by Rule 28:

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.

The Statute Inter-American Court of Human rights is unique among international courts in requiring judges to step down from a case not only when they have a conflict of interest, but when any member of their family may.

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<sup>20</sup> *Rules of conduct for the understanding on rules and procedures governing the settlement of disputes*, WT/DSB/RC/1 (96-5267) (11 December 1996) (Appendix II, at 48).

The ICTY, ECJ and the ICC both prohibit all outside occupation, though the difference in language is worth noting: The ECJ prohibits any occupation “whether gainful or not” while the Rome Statute excludes only those of a “professional nature.” The Statute of the ECJ, furthermore, bars judges from sitting on any case in which they were previously involved in any official capacity.<sup>21</sup>

### *Vis-à-vis non-parties*

The independence of judges from States is an endemic question in international law. Other factors to consider in defining the proper relationship between judges and non-parties is the extent of privileges and immunities to be granted to international judges, and the extent to which the secrecy of the proceedings must be protected.

## I. ELECTIONS

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Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

- UN Basic Principles, 10

The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

- Beijing LAWASIA Principles, 12

Judges shall be nominated and appointed, or elected in accordance with governing statutory provisions which shall, if possible, not confine the power of nomination to governments or make nomination subject to nationality.

- Montreal Universal Declaration of the Independence of Justice, 1.11
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Provisions of the major declarations and resolutions adopt different approaches. The UN Basic Principles and the Montreal Declaration, as quoted above, are in direct opposition.<sup>22</sup> The

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<sup>21</sup> It is perhaps worth noting that, though the language is strikingly similar, Article 16 of the Statute of the ECJ seems to be more permissive than Rule 28 of the Rules of the European Court of Human Rights; the latter forbids sitting on a case in which the judge has a “personal interest” or in which they acted in an official capacity for a non-party with an interest in the case, while he former does not.

<sup>22</sup> Indeed, the Montreal Declaration goes on:

When the statute of the court provides that judges shall be appointed on the recommendation of

LAWASIA Principles take a middle ground, recommending that judges have security of tenure, recognizing that judges are sometimes elected but providing nonetheless that “it is recommended that all judges exercising the same Jurisdiction be appointed for a period to expire upon the attainment of a particular age.”<sup>23</sup>

While the specific schemes vary, the members of each international court and tribunal are elected for a set term of office, usually renewable.

The International Court of Justice is composed of 15 judges elected to renewable 9-year terms. Every three years, one-third of the terms expire. Thus there are elections for five seats each third year. Judges are elected by the Security Council and the General Assembly, each of which must approve the candidate by a simple majority – the Permanent Members of the Security Council are not permitted a veto – from a list of nominees.<sup>24</sup> Nominations are made by the national groups in the Permanent Court of Arbitration or, if a Member State is not part of the PCA, by a national group appointed for the purpose of nomination.

As no judge can hope to be elected to the Court without the support of her home state (for the nomination) and a significant number of others (to broker a majority in the General Assembly), ICJ elections necessarily have a political element. Judges who wish to retain their seats must do campaign for some time beforehand.

The election process for the *ad hoc* international criminal tribunals is complex. The ICTY and ICTR are composed of 16 and 14 judges, respectively. 7 judges from the ICTY and 5 from the ICTR sit in a common Appeals Chamber. Judges are elected for a term of four years. Member States may propose up to two candidates, who cannot share a nationality with each other or with any current member of the Appeals Chamber. The names are given to the Security Council, who then narrows it down and submits a revised list to the General Assembly for elections. Successful candidates have generally needed the strong support of their home country.

One judge for each party to the European Convention of Human Rights is elected to the European Court of Human Rights for a six-year, renewable term. Each State submits three nominees, one of which is then selected by the Parliamentary Assembly of the Council of Europe. Nominees must possess high moral and professional credentials. The Assembly has tried to ensure a balance of aspects of the legal profession – electing judges, lawyers and professors – and gender. In the 1998 elections, a practice was begun whereby States consulted one another on their nomination lists in order to facilitate such balance.<sup>25</sup>

Judges of the Inter-American Court of Human right are elected, by secret ballot, by the States Parties to the American Convention on Human Rights. The term is six years, and may only be renewed once. Each State may nominate up to three candidates, whether of their nationality or that of any other Member State of the Organization of American States. The General Assembly of the

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a government, such appointment shall not be made in circumstances in which that government may subsequently exert any influence in the judge (1.13).

<sup>23</sup> Beijing Principles, Article 20( Appendix I, 19).

<sup>24</sup> For an excellent overview of the process, including some illuminating case studies, see SHABTAI ROSENNE , THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996 62-77 (1997).

<sup>25</sup> See Henry G. Schermers, *Election of Judges to the European Court of Human Rights* 23 E. L. Rev. 568 (1998).

Organization of American States administers the elections, which are subject to political wrangling similar to that surrounding ICJ elections.<sup>26</sup>

The seven members of the standing Appellate Body of the WTO are appointed by the Dispute Settlement Body for 4-year terms which may be renewed once. Candidates are to be persons with recognized authority and expertise in law and international trade.

The European Court of Justice is composed of 15 judges and 8 Advocates General, appointed by the common accord of the fifteen Member States for renewable 6-year terms.

21 judges serve on the International Tribunal for the Law of the Sea. They are elected, by secret ballot, by a simple majority of States Parties to the United Nations Convention on the Law of the Sea. Judges are elected for a renewable 9-year term; like the ICJ, one-third of the terms expire every three years.

By the common accord of EFTA States, the three judges of the EFTA Court are appointed for six-year renewable terms.

The International Criminal Court will consist of 18 judges, selected either for their expertise in criminal law or international law and serving nine-year, non-renewable terms. Nominations will be made by States, either through the process by which judges are appointed to the highest judicial office in that State, or through the procedure by which ICJ judges are elected. Election will be by secret ballot; judges must be approved by two thirds of the States parties present and voting.

## II. PRIVILEGES AND IMMUNITIES

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Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

- UN Basic Principles, 16

Judges shall enjoy privileges and immunities, facilities and prerogatives, no less than those conferred on chiefs of diplomatic missions under and recognized by the Vienna Convention on Diplomatic Relations. Only the court concerned may lift these immunities.

- Montreal Declaration, 1.15

Judges shall not be liable for acts done in their official capacity.”

- Montreal Declaration, 1.16
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Though not strictly part of the subject matter at hand, the recent suits brought in Malaysia against the D.P. Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the

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<sup>26</sup> See Shelton, at 41.

independence of judges and lawyers, illustrates the possibility of “legal” reprisals for actors in the international system.<sup>27</sup> An important question which the Study Group may want to address is the precise extent of the privileges and immunities to be granted international judges.

The practice in this area is nearly uniform: judges and registrars are generally accorded the status of diplomats under international law or, when specified, under the Vienna Convention on Diplomatic Relations.

The International Tribunal for the Law of the Sea has the most fully elaborated provisions on the privileges and immunities of the judges and staff, set forth in a separate agreement. Judges and the Registrar are given the status of heads of diplomatic missions in accordance with the Vienna Convention, while separate provisions apply to staff, to testifying experts and to agents, counsel and advocates.

Judges on the International Court of Justice, under Article 19 of the Statute of the Court, are accorded diplomatic immunity when on Court business.

Judges, the Prosecutor and the Registrar of the ICTY and ICTR enjoy diplomatic immunity under international law, while all other staff enjoy those privileges and immunities set out in the Convention on the Privileges and Immunities of the United Nations of 13 February 1946.

Similarly, the Rome Statute gives judges, the Prosecutor and the Deputy Prosecutor, along with the Registrar, the status of heads of missions so long as they are engaged in the business of the Court. All other staff are to be granted those immunities necessary for the performance of their function.

While in office, judges on the European Court of Justice enjoy complete immunity from legal proceedings; that immunity continues after they leave office, but only for official acts. It can be waived only by Court sitting in plenary session. Judges, Advocates General, the Registrar and any Assistant Rapporteurs are accorded the privileges and immunities set forth in the Protocol on privileges and immunities of the European Communities.

The American Convention on Human Rights grants to Judges of the Court, though not the registrar or other staff, privileges and immunities akin to those of “diplomatic agents.” Judges cannot be held liable for any decision or opinion issued while in office. The Statute of the Court is more specific, granting to both judges and staff the privileges and immunities set forth in the Agreement on Privileges and Immunities of the Organization of American States.

Protocol 7, on the privileges and immunities of the EFTA Court, is unique in restricting the discretion of the Court in waiving them. Under Article 10, the Court is under an affirmative duty to waive either privileges or immunities where failing to do so would “impede the course of justice,”

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<sup>27</sup> Special Rapporteur Cumaraswamy was sued for libel in Malaysian Court for certain remarks he made in an interview. His situation was the basis for an advisory opinion requested of the ICJ by the Economic and Social Council obtained on the explicit understanding that Malaysia would abide by the opinion of the Court. *See Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights* (available at <http://www.icj-cij.org/icjwww/idecisions/ismmaries/inumasummary19990429.htm>) (expressing the opinion that the Special Rapporteur was immune). Despite the Malaysia’s agreement to abide by the opinion of the Court, only some of the suits were dismissed.

and also notes that the privileges and immunities are to protect the interests of the Court and not for the personal benefit of the judges and staff.<sup>28</sup>

III.

SECRECY

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The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

- UN Basic Principles, 15

In view of the importance of secrecy of judicial deliberations to the integrity and independence of the judicial process, judges shall respect secrecy in, and in relation to their judicial deliberations.

- Montreal Declaration, 1.17.a

States and other external authorities shall respect and protect the secrecy and confidentiality of the courts' deliberations at all stages.

- Montreal Declaration, 1.17.b

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The confidentiality of deliberations within all international courts and tribunals is required to be maintained. This is well-established since the time of the PCIJ; deliberations at the ICJ are secret, but the votes of each judge with respect to each specific ruling are published in each judgment. Judges are permitted to attach separate or dissenting opinions. The same is true of the ITLOS.

The Rules of the European Court of Human Rights preserves the secrecy of the deliberations, and furthermore, in Rule 72, provides that published judgments shall include only the number of the voting majority rather than the names of the voting judges. Any judge may append a separate or dissenting opinion, or bare statement of dissent.

The deliberations of the European Court of Justice are to remain secret, and the judgments indicate the names of the judges who participated in the decision without specifying their votes.

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<sup>28</sup> Appendix II, 64.

The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

- UN Basic Principles, 11

Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.

- Beijing LAWASIA Principles, 31

The terms and compensation and pension of judges shall be established and maintained so as to assure their independence. Those terms shall take into account the recognized limits upon their professional pursuits both during and after their tenure of office

- Montreal Declaration, 1.14
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Though the political influence of States *qua* States on the election of international judges is unique to international law, States acting collectively as the organ which constitutes the court can behave much more like the bureaucratic machinery of the executive than is familiar in the domestic context. Given that perspective, it is perhaps unsurprising that provisions for such mainstays of judicial independence as security of tenure, terms of service, and the reservation of discipline to the court itself, occur in nearly every resolution, declaration and statute.

## I. SECURITY OF TENURE, CONDITIONS OF EMPLOYMENT AND DISCIPLINARY PROCEDURES

The Beijing LAWASIA Principle, in particular, go into great detail about the tenure of judges, declaring for instance that judges “should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge,” and going on to discuss the differences in removal procedures for those societies that rely on parliamentary action for removal (recommended), and those that vest that power in the judiciary itself.<sup>29</sup> The Montreal Declaration is in direct opposition on this point; Section 1.18 states that all “measures of discipline and removal relating to judges shall be governed exclusively by the statutes and rules of their courts, and be within their jurisdiction.”<sup>30</sup>

International judges are generally paid well; their salaries compare favorably with those of the highest courts of the United States, Canada, the United Kingdom and Japan.<sup>31</sup>

No judge of the International Court of Justice may be dismissed except by the unanimous vote of the other judges on the Court. Judges’ salaries may not be decreased during their term of office.

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<sup>29</sup> Appendix I, 19.

<sup>30</sup> Appendix I.

<sup>31</sup> See *Conditions of service and compensation for officials other than Secretariat officials* para. 5, U.N. Doc. A/C.5/56/14 (12 November 2001).

The terms of judges' salaries and pensions, however, are set by the General Assembly.<sup>32</sup> The current salary of a judge on the ICJ is \$160,000.<sup>33</sup>

The same is true of the International Tribunal for the Law of the Sea, whose judges also receive \$160,000 per year, except that the salaries and pensions are determined by the States Parties and not the General Assembly.

Salaries for the judges and staff of the International Criminal Court will be set by the States Parties. The Rome Statute also contains the most detailed provisions of any international court regarding the procedure for disciplining and/or removing a judge drawing a distinction, for instance, between serious misconduct (in Rule 24) and misconduct of a less serious nature (Rule 25).<sup>34</sup> It entitles the judge in question to a hearing with, should she choose, counsel of her choice, and, among other things, prescribes what the possible punishments are for the various levels of misconduct.

Judges on the European Court of Human Rights, whose salary is set by the Parliamentary Assembly at \$160,000, are granted security of tenure by Article 23 of the European Convention of Human Rights, which provides that judges "shall hold office until replaced" and by Article 24 which requires a two-thirds vote of the Court to remove a judge from office.

Articles 5 and 6 of the Statute of the ECJ by providing that a judge can only leave office through normal replacement (elections), resignation or through the unanimous vote of the remaining judges *and* Advocates General that she no longer meets the requirements.

The General Assembly of the OAS has ultimate authority over the remuneration of the judges, and the ability to remove them from office by a two-thirds vote, though the latter power may only be exercised at the behest of the Court.

A judge on the EFTA court can only be disqualified from a particular case by the vote of the two other judges.

## **Independence of the International Judiciary as a Whole**

The influence exerted by the international community on the judiciary as a whole cannot be overstated. Though there are others, perhaps the most pernicious form of influence is control over the budget of the court by the organ that constitutes it. A brief example from a tribunal other than those under consideration should serve to highlight the importance of inquiring into the proper relationship between the judiciary as a whole and the other actors in the international system.

After almost ten years of internal conflict, Sierra Leone is slowly returning to peace. The current government of Sierra Leone agreed with the UN to create a Special Court for Sierra Leone to try those responsible for the atrocities of the war. The Court as first envisioned by the Secretary General would cost \$160,000,000 for the first three years – less than the biennial budget of the

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<sup>32</sup> For a time, the conditions of the pensions were such that some observers saw them as an inducement to stay on at full salary. *See* thsjnvs

<sup>33</sup> *See Conditions of service, supra* note 32.

<sup>34</sup> *See* Appendix II, 39.

ICTY – to fund the Court and an Office of the Prosecutor with investigative capabilities.<sup>35</sup> The Secretary General recommended that the Special Court be funded through assessments rather than voluntary contributions, but the Security Council disagreed. Upon consulting with potential voluntary donor States, it quickly became apparent that the required level of support did not exist, and the proposed budget was reduced to approximately \$57,000,000 for the first three years.<sup>36</sup> The functioning of the Special Court was limited before a single individual judge was even elected. Furthermore, as it is dependent on voluntary contributions, unlike to the other *ad hoc* war crimes tribunals, its ability to function beyond those three years might depend on its ability to attract and retain donor States.

### *Vis-à-vis the parties*

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The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as described by law.

- UN Basic Principles, 3

Independence of the Judiciary requires that [...]the Judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.

- Beijing LAWASIA Principles, 3(b)
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## I. JURISDICTION

Few international courts and tribunals have compulsory jurisdiction; none of those that do are of general competence in international law. This is a bedrock feature of a consent-driven legal system and is unlikely to change soon. The Study Group may wish to consider its implications for the independence of the international judiciary.

### *Vis-à-vis the organ*

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It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

- UN Basic Principles, 7
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## I. BUDGET

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<sup>35</sup> See *Report of the U.N. Secretary-General on a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (4 October 2000).

<sup>36</sup> See *Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council regarding revised budget estimates for operation of the Court*, S/2001/693 (13 July 2001).

Just as individual judges must be paid, courts as a whole must have enough resources to enable them to administer justice. Basic Principle 7 reflects the understanding that the budget of the court not be used as a means to limit the scope of its operation.

According to Article 33 of the Statute of the International Court of Justice, the UN shall bear the expenses of the Court. The Registrar prepares the draft budget, which is then submitted to the Secretary-General and incorporated into the general programme budget of the UN. From there, it passes through the Advisory Committee on Administrative and Budgetary Questions and the Fifth Committee for successive recommendations and revisions before going to the General Assembly.

The resources available to the Court have been a serious issue. For the past several years, the President of the Court has, in his yearly address to the General Assembly, stressed the impossibility of keeping up with the increased workload of the Court without additional resources.<sup>37</sup> The situation has changed only incrementally, though an 11% increase in its biennial budget is under consideration, raising its funding to \$23,837,300 for 2002-2003.<sup>38</sup> The traditional funding difficulty has been due in part to the inclusion of the ICJ in the general budget, so that funds accorded to it from the general appropriation of the organization result in the proportional compromise of the funding of another. This has had the effect of politicizing the budgetary process of the Court, as States vie for the fullest finding of programs they support.

The budgets of the ICTY and ICTR must also pass through the office of Secretary-General but, in contrast to the ICJ, are not part of the general programme budget. The proposed biennial budget for the ICTY is \$242,791,600<sup>39</sup>; for the ICTR, \$192,312,400.<sup>40</sup>

The Inter-American Court of Human Rights prepares its own budget, and submits it directly to the General Assembly for approval, thus circumventing the normal budgetary bureaucracy. The ultimate control over funding, however, remains within the sole discretion of the organ.<sup>41</sup> For the years 1997, 1998, 1999 and 2000, the budget of the Court was frozen at \$1,114,600. In 1999, the Court requested a budget of 1,521,682.27, a 37% increase. The proposed budget, supported by a detailed report of the Secretary General of the Organization of American States, was discussed as the minimum necessary to allow the Court to keep pace with an increasing workload.<sup>42</sup> In the event, a \$3,000,000 increase was approved for the year 2000, and has not changed appreciably since.<sup>43</sup>

The budget of the Appellate Body of the WTO, approximately \$1,673,000 for 2001, must also be approved by the Members.

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<sup>37</sup> See, e.g., Addresses of the President of the International Court of Justice to the General Assembly of 1997, 1998, 1999, 2000 and 2001 (available at <http://www.icj-cij.org/icjwww/ipresscom/iprstats.htm>).

<sup>38</sup> See *Draft Report of the Fifth Committee, Proposed programme budget for the biennium 2002-200*, U.N. Doc. A/C.5/56/L.28(Part 1).

<sup>39</sup> See *Draft Report of the Fifth Committee, Financing of the [ICTY]* para. 6. U.N. Doc. A/56/730 (21 December 2001).

<sup>40</sup> See *Draft Report of the Fifth Committee, Financing of the [ICTR]* para. 6. U.N. Doc. A/56/731 (21 December 2001).

<sup>41</sup> See Shelton, *supra* note

<sup>42</sup> See *Financing the Inter-American Human Rights System, A Report Prepared by the Office of the Secretary General of the Organization of American States for the Ad Hoc Working Group on Human Rights* (28 April, 2000).

<sup>43</sup> See AG/RES. 1839 (XXXI-O/01), *Program-Budget of the Organization for 2002, Quotas and Contributions to the Voluntary Fund for 2002* (5 June 2001) (setting the budget for the Court at \$1,354,700).

The States Parties will bear the cost of the International Criminal Court, based on scale of assessment modeled after that of the UN and supplemented by voluntary contributions from the UN and States Parties.

❖ **What is the proper relationship between individual international judges and those who come before them as parties?**

Particular attention should be paid in this respect to:

- the nature of outside activities and associations to be permitted, and whether those standards might vary depending on the character of the court or tribunal.

❖ **What is the proper relationship between individual international judges and States?**

Particular attention should be paid in this respect to:

- the consideration of the impact of nomination and election procedures;
- the scope of privileges and immunities;
- the extent to which the secrecy of the deliberations is protected.

❖ **What is the proper relationship between individual international judges and the organ which constitutes their court or tribunal?**

Particular attention should be paid in this respect to:

- security of tenure;
- terms and conditions of service;
- disciplinary procedures.

❖ **What is the proper relationship between the international judiciary as a whole and the parties?**

Particular attention should be paid in this respect to:

- the extent to which potential parties should be permitted to reject the jurisdiction of the court;
- the consequences thereof for the court in question.

❖ **What is the proper relationship between the international judiciary as a whole and the organ which constitutes the court or tribunal?**

Particular attention should be paid in this respect to:

- the extent of the organ's control over the budget, and thus the functioning, of the court;