THE INDEPENDENCE OF INTERNATIONAL TRIBUNALS

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> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
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> Article 10, Universal Declaration of Human Rights

The human right expressed in article 10 of the Universal Declaration of Human Rights reflects a basic principle of the rule of law, derived in part from the maxim *nemo iudex in sua causa*. The guarantee of a fair hearing reflects human rights concepts of equality and justice. It also furthers the interest of society in seeing disputes settled by peaceful means; parties are more likely to submit their differences to judicial resolution if they expect and are afforded procedural fairness and a judgment based on the facts presented and the applicable law. On the other hand, sometimes powerful litigants may be tempted to induce or pressure the forum to reach a result favorable to them.[1] Independence of the judiciary entails freedom from such

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1 Judges and lawyers world wide are subject to various forms of pressure and intimidation. Between 1 June 1990 and 31 May 1991, the Center for the Independence of Judges and Lawyers listed the cases of 532 jurists in 51 countries who were harassed due to their professional activities. Fifty-five of them were killed, 103 detained, 8 disappeared, 42 were physically attacked, 65 were threatened with physical violence and 234 were sanctioned by disbarment, removal from the bench or travel restrictions. CIJL, *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers*, June 1990 - May 1991, 5.

harassment or from any political pressure in the exercise of judicial functions. It is essential to a fair hearing.[2]

Independent and impartial tribunals are as important to international dispute resolution as they are to national legal systems. Without the governmental infrastructure that supports national judicial systems, international courts must depend to a large extent on their prestige and credibility to induce submission of disputes and compliance with decisions. The appearance of bias or lack of independence can severely undermine the effectiveness of any international tribunal or hamper the resolution of a particular case.

The need for independent tribunals and procedures that afford a fair hearing are perhaps most important where there is an extreme imbalance of power between litigants. Such disparity is usually found in international human rights proceedings, when an individual seeks redress for human rights violations committed by a state.[3] Generally, most evidence of violations is in the hands of the government and within the territory of the state concerned. The individual may be in exile and indigent or fear reprisals. In such circumstances, the international tribunal must maintain its independence and impartiality to devise procedures that ensure due process.

At first glance, ensuring an independent international tribunal may seem more difficult than guaranteeing an independent national judiciary. International courts are created by states and are limited to the competence given them by treaty and other relevant texts. They

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2 The concept of an independent judiciary as a foundation of human rights protection is well expressed in Article XXIX of the Massachusetts Bill of Rights of 1780: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws".

3 Although inter-state complaints can be heard in both the Inter-American and European Court, they are extremely rare.

are dependent on states for their budgets, their administrative support, and the enforcement of their judgments. Yet, international scrutiny and the multinational character of international courts, as well as the somewhat limited role courts play in many international disputes, may contribute to the guarantees afforded by their statutes to make them at least, if not more, independent than the judiciaries of many countries.

The elements of an independent and impartial judiciary have been identified in several international texts. The United Nations General Assembly endorsed twenty 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.[4] The Inter-American Human Rights Commission has studied the issue,[5] as have such non-governmental bodies as the International Commission of Jurists.[6] The following review tests the independence of international tribunals using the UN Principles, recognizing that the Principles were drafted for national courts and are not applicable in every respect to international tribunals. The tribunals considered are the International Court of Justice,[7] the European Court of Human

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4 Milan (1985), GA Res. 40/32 of 29 November 1985 and 40/146 of 13 December 1985. See also *Draft Declaration on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*, Report by L.M. Singhvi, E/CN.4/Sub.2/1988/20/Add.1, 20 July 1988.

5 See IACHR, "Measures necessary to enhance the autonomy, independence and integrity of members of the judicial branch," in *Annual Report of the Inter-Am.Comm.Hum.Rts* 1992-1993, OEA/Ser.L/V/II.83, Doc. 14, corr.1, March 12, 1993, 207-215.

6 See the reports of the Center for the Independence of Lawyers and Judges, *supra* note 1.

7 The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. The Court is also open to states that are not members of the United Nations. The role of the ICJ is to decide disputes submitted to it in accordance with international law. Its jurisdiction is optional and comprises cases submitted by special agreement, those arising under treaties in force between the relevant states, and those matters taken to the Court by parties that have accepted the Court's compulsory jurisdiction. Only states may be parties in cases before the Court.

Rights,[8] and the Inter-American Court of Human Rights.[9] In addition, the European Court of Justice,[10] the Iran Claims Tribunal[11] and the United Nations Administrative Tribunal[12] are referred to for

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8 The European Court of Human Rights (ECHR) was created in 1959 to ensure the observance of the European Convention on Human Rights. The Court's jurisdiction extends "to all cases concerning the interpretation and application of the ...Convention to which the High Contracting Parties or the Commission shall refer to it." After proceedings are concluded before the European Commission of Human Rights, cases may be filed by the European Commission and/or by any Contracting State concerned within three months. At the Commission, applications may be lodged by a State or by a victim individual or group of individuals.

9 The Inter-American Court of Human Rights (IACtHR) was established in 1979 pursuant to the entry into force of the American Convention on Human Rights. The Court has competence with respect to all matters relating to the interpretation or application of the Convention. Acceptance of the Court's jurisdiction is optional for states parties to the Convention. Only states parties and the Commission have the right to submit a case to the Court, but the advisory jurisdiction of the Court is open to all member states of the Organization of American States.

10 The Court of Justice of the European Union functions to "ensure that in the interpretation and application of th[e European Union] Treaty the law is observed." Article 164, Treaty Establishing the European Economic Community. The Court began in 1952 as the Court of the European Coal and Steel Community. In 1958, it became the common judicial organ for the three European Communities and remains the court of the European Union. A Court of First Instance has limited jurisdiction, subject to a right of appeal on points of law to the ECJ. The latter is competent to hear cases alleging the failure of Member States to fulfil treaty obligations as well as the legality of acts and omissions by the institutions of the Union. Cases may be brought by natural and legal persons as well as by the institutions and by Member States. National courts may, and in some circumstances must, request a preliminary ruling from the Court on questions of European law.

11 The Iran-United States Claims Tribunal was established pursuant to agreement between the two countries announced by the government of Algeria. According to the Claims Settlement Declaration, the purpose of the Tribunal is to decide outstanding claims of nationals of the United States against Iran and those of nationals of Iran against the United States, and any counterclaim arising out of the same contract, transaction or occurrence. In addition, the Tribunal has jurisdiction over "official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services" as well as over disputes concerning interpretation of the Algiers Accords. See Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, 1 Iran-U.S. C.T.R. 9 (1983). For a history of the Tribunal, see Wayne Mapp, *The Iran-United States Claims Tribunal: The First Ten Years*(1994); Jahmatullah Khan, *The Iran-United States Claims Tribunal: Controversies, Cases and Contribution* (1990).

12 Several international organizations have created such tribunals, including the UN, the ILO, the World Bank, and the Organization of American States. The Statute of the

comparison. The study concludes that for the most part, the international judiciary is free from overt pressures, but is not and cannot be fully insulated from international political organs and institutions.

BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

Most of the texts creating international tribunals refer to judicial independence. Article 2 of the Statute of the ICJ provides that "The Court shall be composed of a body of independent judges...". The American Convention on Human Rights contains two specific references to the independence of the Inter-American Court. First, article 59 provides that the secretariat of the Court functions under the administrative standards of the Organization "in all matters not incompatible with the independence of the Court." Second, article 71 prohibits judges from engaging in any activity that might affect the judge's independence or impartiality. In addition, article 52 provides that the judges are elected in an individual capacity.

The European Convention on Human Rights originally contained no reference to the judges' independence. However, Protocol 8 added Article 40(7) which requires judges to sit "in their individual capacity," adding that "during their term of office they shall not hold

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UN Administrative Tribunal provides that it is competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat or of the terms of appointment of such staff members (Statute, art. 2(1)). The Applicant must first submit the dispute to an appeals body established by the staff regulations, unless the Applicant and the Secretary-General agree to submit the application directly to the Administrative Tribunal (Statute, art. 7(1)). Concerning other tribunals, see C.F. Amerasinghe, "The World Bank Administrative Tribunal," 31 *Int'l & Comp. L.Q.* 748 (1982); David Padilla, "Administrative Tribunal of the Organization of American States," 14 *Law. Am.* 249 (1982).

any position which is incompatible with their independence and impartiality as members of the Court or the demands of this office."

In the European Court of Justice, both the Judges and the Advocates-General are to be chosen from persons "whose independence is beyond doubt" (art. 167). The same language applies to the judges of the Court of First Instance (art. 168a). The Advocates-General referred to, "acting with complete impartiality and independence," are to assist the Court (art. 166).

In addition to the explicit statements on independence, courts may be somewhat protected from direct pressure by their locations. Only the European Court of Human Rights is headquartered in the same city as the political bodies of its organization, in this instance the Council of Europe. The International Court of Justice and the Iran-United States Claims Tribunal are located in The Hague. The Inter-American Court is in San Jose, Costa Rica, while most other institutions of the Organization of American States are based in Washington D.C.[13] The European Court of Justice in Luxembourg is similarly separated from the political and administrative centers of Brussels and Strasbourg. The relative isolation of the tribunals may assist in insulating the judges from political pressures, but could run the risk of marginalizing the courts within the respective organizations.

2. *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.*

In general, there is little evidence of pressure being directly placed on judges of international tribunals. The one exception seems

13 Notably, the IACtHR is "an autonomous judicial institution" not part of the OAS. The seat of the Court was chosen by the General Assembly in Resolution 372(XIII-O/78), OEA/Ser.P, AG/Doc.1020/78,Rev.2, at 97 (1978). The seat may be changed only if two thirds of the states parties to the Convention voting in the General Assembly agree to such a change (article 3(3) of the Statute). The Court itself may decide to meet in the territory of any member state of the OAS with the consent of that state.

to be the Iran-United States Claims Tribunal where, for the most part, the U.S. government and claimant community has viewed the Iranian arbitrators as lacking independence.[14] However, the United States challenged Iranian arbitrators only once, in part due to the belief that a replacement would be no more independent. "Over time, less and less was expected of the Iranian arbitrators as to impartiality and independence."[15] One US agent claimed "from the Iranian point of view, the Iranian arbitrators, the Iranian parties, and the Iranian Agent are all one large family. The Iranian arbitrators do not provide the kind of neutral, impartial service that one gets from the European arbitrator, or, in my considered judgement, from the American arbitrators."[16] The agent added that he was shocked at how Iranian arbitrators sought and received instructions from their government even during deliberations and how the Iranian agent had boasted of the power of the government to withdraw arbitrators and registry officials.[17]

The US did seek to disqualify two Iranian arbitrators who assaulted a third member of the tribunal.[18] The US argued that the assault "shows that Mr. Kashani and Mr. Shafeiei identify themselves so completely with what they consider to be the interests of the Islamic Republic of Iran that they will resort to unprecedented physical violence to protect those interests."[19] Iran withdrew the two judges before a decision on the challenge.

The differences between international arbitration and a permanent court may contribute to the less independent nature of some of the arbitrators on the Iran-United States Tribunal. Although the

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14 See Matti Pellonpaa and David Caron, *the Uncitral Arbitration Rules as Interpreted and Applied: Selected Problems in Light of the Iran-United States Claims Tribunal* (1994) 138-219 at 161.

15 *Id.*

16 *Asil Proceedings* 1983, p. 24.

17 *Id.* p. 27.

18 Pellonpaa & Caron, *supra* 14 at 141.

19 *Id.* at 169.

arbitrators are supposed to judge impartially according to the facts and law in the case, two-thirds are appointed directly by the parties and are of the nationality of the appointing power.[20] The Tribunal itself is *ad hoc* and of limited duration. The parties equally share the expenses of the Tribunal, including payment of the arbitrators salaries and expenses. Although there are guarantees against improper removal of arbitrators, these were ignored in some cases by Iran, which sought to remove arbitrators at will, at least in the beginning of the Tribunal's operation.

On permanent courts, the system of *ad hoc* judges is perhaps closest to that found in the arbitral tribunals. The role of a judge *ad hoc* can be difficult from the perspective of independence, especially when the judge is of the nationality of the appointing state. In some instances it appears from the operation of the tribunal that the *ad hoc* judge exists not to be independent, but to represent the views of the appointing government to the Court as a whole. In several cases *ad hoc* judges can be seen to make considerable efforts to fulfil the expectations of the government.[21] However, it seems it was the fear of states that permanent judges would not be impartial that led to insistence on the right to propose an *ad hoc* judge. In most cases, there should be no problem, because the qualifications and requirements of the *ad hoc* judge are identical to that of the permanent judge on the tribunal.[22]

Individuals in all institutions are sensitive to criticism. In the case of judicial bodies, the level of criticism sometimes rises to the point where judges feel under pressure regarding their decisions. In the *Barcelona Traction Case*, Judge Fitzmaurice referred to certain criticisms as misrepresenting the Court "in a manner detrimental to the dignity and good order of its functioning as an independent judicial

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20 According to the agreement between Iran and the United States, the remaining third of the Tribunal is selected by the members appointed by the two governments.

21 For examples and further discussion, see Lyndell V. Prott, *the Latent Power of Culture and the International Judge* (1979) 13-14.

22 See, e.g. Statute of the ICJ, art. 31(2) and (6).

institution."[23] Judge Koretsky also commented on the breadth of criticism addressed to the Court after the 1962 South West Africa Case.[24] Although criticism may be warranted in some cases and serve to strengthen a court, it may also amount to efforts to sway the court in a particular matter.

3. 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 defined by law.

The jurisdiction of international courts is routinely challenged when cases are submitted for decision and the courts decide each challenge as presented. Only in the ICJ case of *Nicaragua v. United States* has a state been unwilling to recognize the court's decision on its competence. In that instance, the United States withdrew its acceptance of the jurisdiction of the International Court of Justice claiming that judicial bias led to the exercise of jurisdiction when there was no basis for it. Other indirect pressure has been reported in regard to the request of the World Health Organization for an advisory opinion of the ICJ on the legality of nuclear weapons.[25] Both events demonstrate a lack of confidence in the ICJ, but more importantly reflect an effort to pressure the Court in its decision-making.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly

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23 Fitzmaurice, *Barcelona Traction Case*, Sep.Op., 113.

24 Koretsky, *South West Africa Case 1966*, Diss.Op. 242.

25 According to the Lawyers Committee on Nuclear Weapons, nuclear power states objected and in at least one case threatened to reduce or eliminate funding for WHO unless it withdrew the request.

established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

The question of review of international decisions or displacement of international tribunals is an almost uncharted area, although problems have arisen in this regard in international administrative tribunals. The question of the independence of the UN Administrative Tribunal from the General Assembly arose in the 1950s when the United States government exerted pressure on the Secretary-General to dismiss U.S. nationals suspected of communist sympathies. The Administrative Tribunal overturned their dismissals and the U.S. argued that the General Assembly, having created the Tribunal, had the authority to review and rescind the judgment.

The General Assembly requested an advisory opinion from the ICJ, which replied that "the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member." The Court found that the Tribunal was established, "not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions." The composition of the Tribunal and its statutory independence support this decision, although the Tribunal is "lay" because of the absence of a requirement that the members have legal training or judicial qualifications. In its 1954 advisory opinion, the ICJ excluded any possibility of the General Assembly acting as a review organ:

> ...[T]he General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ—considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them—all the more so as one party to the dispute is the United Nations Organization itself.[26]

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26 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, [1954] I.C.J. 47, 56.

The only means by which the decisions of the Tribunal could be reviewed would be by amendment of the Statute to provide a regular appellate procedure.

Subsequently, the General Assembly amended the Statute of the Administrative Tribunal, adding article 11, to provide a process of judicial review. A Committee of Member States who most recently served on the General Committee of the United Nations screens requests by Applicants, the Secretary-General, or a Member State for advisory opinions of the ICJ to review a decision of the Administrative Tribunal. The Committee may request such an opinion if there is "a substantial basis" for finding that the Tribunal exceeded its jurisdiction or competence, or that it failed to exercise jurisdiction vested in it, or erred on a question of law relating to the provisions of the UN Charter, or committed a fundamental error in procedure which occasioned a failure of justice. In Application for Review of Judgment No. 158, the ICJ held that the Committee is an organ of the United Nations capable of requesting advisory opinions pursuant to UN Charter article 96(2).[27]

Criticisms have been made of the Committee on Applications for Review, because it is a political organ intervening in a judicial process. Judge Gros asserted that "one cannot have a political committee, discretionary and secretive in operation, set up a hurdle, and at the same time claim to have provided 'machinery' for initiating a procedure of judicial review."[28] However, given the inability of direct access by individuals to the ICJ, creation of an organ for this purpose is necessary. Nothing, however, requires that it be a political organ and the criticisms are warranted. In at least one case, the state seeking review also sat on the Committee.

A final decision of an international tribunal not subject to review should be enforced. In the European human rights system, Conven-

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27 [1973] I.C.J. 166, 171-83. For a further discussion of ICJ review, see Joanna Gomula, "The International Court of Justice and Administrative Tribunals of International Organizations," 13 *Mich.J.Int'l L.* 83 (1991).

28 [1973] I.C.J. at 263.

tion article 54 provides that "the judgment of the Court shall be transmitted to the Committee of Ministers, a political body, which shall supervise its execution." What is not clear is if this is a political function or judicial in nature.[29] The rules do not clarify the matter. The State concerned is obligated by virtue of article 53 to abide by the Court's judgments; however, the Court does not have the power to prescribe the remedial action to be taken by the State.[30] The Committee of Ministers in "supervising" execution of the judgment may also lack the power to take or recommend specific measures be applied by the State; it remains uncertain whether the Committee has a power of review, or merely transmits the judgment of the Court.[31] The power of review by this political organ could infringe on the Court's prerogatives.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

All international tribunals have been given the power to enact rules governing proceedings before them, but the rules must conform to the treaties and statutes establishing the tribunals. This limits the ability of the court to provide full procedural equality between parties when one of them is not a state. In most international tribunals, individuals lack standing to initiate actions. Even international human rights courts currently limit access to their respective commissions and to states, although individuals are permitted to participate through the commissions. Thus, courts must devise mechanisms to ensure a fair hearing to those most directly affected by the court's decisions.

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29 On this subject see Hans-Jürgen Bartsch, "The Supervisory Functions of the Committee of Ministers under Article 54" in *Protecting Human Rights: The European Dimension* (F. Matscher & H. Petzold eds. 1988) 47- 63.

30 In contrast, article 63(1) of the American Convention on Human Rights confers on the Court authority to rule that the consequences of the measure or situation that constituted the breach be remedied.

31 The Security Council has this power under article 94(2) of the UN Charter, in cases of non-execution of a judgment of the International Court of Justice.

International tribunals generally draft written rules to govern procedure, but develop rules of evidence through jurisprudence. This approach allows flexibility in admission and weighing of submissions by the parties, but may lead to perceptions of bias when the rules are abruptly changed from one case to another.

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

To function properly, each tribunal must have adequate resources, both human and material. Budgets should not be used as a means of undermining judicial independence. On the other hand, all institutions must be financially accountable.

The finances of the ICJ are referred to in Court's Statute. Article 33 provides that the expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly. The budget of the Court is thus incorporated in the budget of the United Nations. States which are not members of the United Nations but which are parties to the Statute pay–according to an undertaking which they make when they becomes parties to the Statute–a contribution fixed by the General Assembly in consultation with them.[32]

In practice, a preliminary draft budget is prepared by the Registrar of the ICJ. If the Court is not sitting, approval is given by the President. If the Court is sitting, the draft is submitted to the Budgetary and Administrative Committee of the Court and then to the Court itself. After approval, the draft budget is forwarded to the Secretariat of the UN for incorporation in the draft budget of the United Nations, where it is first examined by the United Nations Advisory Committee on Administrative and Budgetary Questions. Following this, it is submitted to the Fifth Committee of the General Assembly and

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32 By resolution 46/221 of December 20, 1991, the General Assembly decided that the three states should pay for 1992-1994, Nauro and San Marino should each pay 0.01%, while Switzerland's contribution is 1.16%. 47 YB ICJ 1992-1993, 283.

finally voted by the General Assembly in plenary meeting. Since 1974, the budget has been presented biennially. The budget of the Court for the biennium 1992-1993 was set at $17,484,000.

The Registrar executes the budget, with the assistance of an Accountant-Establishment Officer. He ensures that proper use is made of the funds and that no expenses are incurred that are not provided for in the budget. He alone may incur liabilities on behalf of the Court. The accounts are audited every year by auditors of the Secretariat of the UN and by the Board of Auditors appointed by the General Assembly.

There is less information about other tribunals. The Inter-American Court prepares and submits its budget directly to the OAS General Assembly, rather than having it go through the normal budget process applicable to OAS organs. This makes it less dependent on the organization's bureaucracy, but ultimately the amount of funding is still controlled by the governments.

The expenses of the Iran-United States Claims Tribunal are borne equally by the two governments (article VI). The Tribunal prepares its own budget and allocates the funds received.[33] Article 58 of the European Convention on Human Rights provides only that the expenses of the Court are borne by the Council of Europe.

In addition to having a degree of financial independence, it is important that tribunals have the right to appoint key staff members without interference. The IACtHR, for example, appoints its Secretary, a full-time officer who must possess not only legal knowledge and experience, but also knowledge of the working languages of the Court. He serves the Court in a position of trust and is elected by the judges for a period of five years. No less than four judges must vote

33 This has on occasion created problems with the staff of the Tribunal due to the judges allocating funds to judicial salaries and benefits at the expense of staff compensation.

in secret ballot for removal of the Secretary.[34] The Deputy Secretary is appointed by the Secretary in consultation with the Secretary General of the OAS. All other members of the Secretariat are appointed by the Secretary General in consultation with the Secretary of the Court. In practice, thus far, the Secretary General has always made the appointments recommended by the Secretary of the Court.

The Statute of the ICJ similarly provides that the Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary (art. 21). No such provision is found in the European Convention on Human Rights;[35] however, Rule 11 of the Rules of Court provides for the election of the Registrar by the plenary Court after the President has consulted the Secretary-General of the Council of Europe.[36] The Registrar is elected for a term of seven years and may be re-elected. Other staff members and necessary equipment and facilities are provided by the Secretary-General of the Council of Europe upon request of the President of the Court or the Registrar on his behalf.[37] The practice of the Iran-United States Claims Tribunal is for individual judges to engage legal assistants. Finally, the European Court of Justice employs its own staff. This currently numbers around 700 officers, about one-third of them lawyers, most of whom work in the Language Service, because the case law is published in all the official languages of the Community.[38]

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34 Compare this to the position of Executive Secretary of the Inter-American Commission, who may be removed by the Secretary General of the OAS in consultation with the Commission, Article 21(3), Statute of the Inter-American Commission on Human Rights.

35 Article 37 provides for a secretariat for the Commission, provided by the Secretary General of the Council of Europe.

36 A recent election indicated some difference of views over the extent of the Court's discretion in this regard. In particular, the issue arose over whether the Council of Europe's mandatory retirement age necessarily applied to the Registrar.

37 Rule 13.

38 See C. Kohler, "The Court of Justice of the European Communities and the European Court of Human Rights," in *Supranational and Constitutional Courts in Europe: Functions and Sources* (I. Kavass, ed. 1991) 19.

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

Although this principle is concerned with the civil and political rights of judges, in a broader sense it raises issues of the compatibility of all outside activities with judicial functions. Judges on international courts hold more concurrent offices than national judges, because only the ICJ and the ECJ are full time courts.[39] Impartiality and independence are more difficult when judges hold other positions; in some cases questions may be raised about judges' compliance with the relevant statutory requirements on incompatibility.

The Statute of the International Court of Justice prescribes in article 16(1): "No member of the court may exercise any political or administrative function or engage in any other occupation of a professional nature." Certain private functions are also excluded. In one case, the President suggested that Sir Percy Spender resign from certain company directorships.[40]

Judges on the ICJ are excluded from representing their country in an international capacity or acting as legal advisor and may not sit in a case in which they have been active in another capacity.[41] However, they are not obliged to withdraw from a case merely because their

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39 The Inter-American Court is a part-time Court. The draft statute envisaged a permanent body, but the General Assembly of the OAS refused to sanction the creation of a full-time tribunal on the grounds that it would be too expensive to maintain until it had a full case load. See S. Davidson, *The Inter-American Court of Human Rights* (1992) p. 35.

40 Shabtai Rosenne, *The World Court: What it is and How it Works* (3rd rev. ed. 1973) 55 and n. 11.

41 Sir Muhammad Zafrulla Khan was excluded from sitting in the *South West Africa Case 1966* because he had been active in the U.N. proceedings against South Africa. South Africa applied to disqualify another judge, but the order was rejected. South West Africa, Order of 18 March 1965, 1965 *ICJ Reports* 3.

own country is a party. This can lead to perceptions of bias or conflict. However, exclusion due to nationality might deprive a case of some of the most experienced and able judges.

The Rules of the European Court of Human Rights provide that "a judge may not exercise his functions while he is a member of a Government or while he holds a post or exercises a profession which is incompatible with his independence and impartiality. In case of need the plenary Court shall decide."[42] In 1977, the Parliamentary Assembly of the Council of Europe adopted a resolution requesting its members not to vote for candidates "who, by nature of their functions, are dependent on government" unless they undertake to resign such functions on election.[43] In practice, several judges have been members of their national judiciaries. This is problematic, because the knowledge of national issues and cases could influence or be seen to influence the way a judge views a case on the international level. This is particularly true because the rules provide that the chamber to hear a case must include the judge who is a national of any state party concerned. If the national judge is unable to sit or withdraws or if there is none, the state is entitled to appoint a member of the court of a different nationality or an *ad hoc* judge. There is no reason, in principle, why the exclusion of a "member of a government" should be limited to the executive branch; those serving in the national legislature or judiciary have similar conflicts of interest and present at least the appearance of bias.

Article 71 of the American Convention on Human Rights provides that the position of a judge is incompatible with any other activity which might affect independence or impartiality. Article 18 of the Court's Statute elaborates that incompatibility arises if a judge is a member or high ranking official of the executive branch of government or an official of an international organization.[44] The

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42 Rule 4. Earlier, the rule referred to "a profession likely to affect confidence in his independence."

43 Resolution 655 (1977).

44 The same objection may be raised here as in the Council of Europe to disqualifying only members of the executive branch of national government; national legislators and judges should also be excluded from serving as international judges.

former category does not include diplomatic agents who are not Chiefs of Mission to the OAS or to any of its member states. Article 18 also prohibits any other activity which might prevent judges from discharging their duties or that might affect their independence or impartiality or the dignity and prestige of the office. The Court decides on the issue and if it is unable to do so, the matter will be determined by the OAS General Assembly. The Statute provides that judges shall "remain at the disposal of the Court, and shall travel to the seat of the Court or to the place where the Court is holding its sessions as often and for as long a time as may be necessary..."

Although conflicts are a problem, a Court may benefit from having well-connected people as judges. They can call directly to those who are needed to ensure enforcement of judgments, induce states to accept the court's jurisdiction and help prepare resolutions. However, such connections also may lead to pressure. In addition, if judges fail to respect the ethical constraints of the judicial position e.g. the prohibition on *ex parte* communications between the bench and a litigant, the court can suffer as a result.

All international judges must take an oath, or make a declaration, that they will perform their duties impartially and independently. The question of impartiality is partly a question of personal integrity, but is complicated when there is no consensus on the substantive rules and sources of law to be applied by the tribunal. Subjective attitudes of the individual judge then assume increased importance, as does the experience and position of the judge.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

International courts lack the support of an organized bar association. On the national level, support by the bar can be extremely important in protecting the independence of the judiciary. The European and Inter-American Courts have held regular consultations which can assist in building professional solidarity, but this should be broadened to include all international tribunals.

10. 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.

The primary focus of attention on the independence of international tribunals has been on the methods of selecting judges and their qualifications. This is understandable given the relatively small number of judges and the important tasks they perform. There is some commonality in the requirements to be an international judge, but there is also variety among the tribunals in terms of the degree of political influence over the selection process.[45]

All treaties establishing international tribunals compromise between guaranteeing the independence of the judges and making the judges appointment dependent upon the consent of the Member States. Without any exceptions the relevant provisions set forth that the judges in the exercise of their functions are exempt from any instructions and that they have to fulfil their duties impartially. Not since 1907 and the Central American Court of Justice has each State subject to the jurisdiction of a court had the power to directly appoint

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45 None of the current procedures mimic those of the Central American Court of Justice. The first international court, it functioned during the ten years of the Treaty of Peace and Amity (1907-1917). The judges were appointed by the legislative branch of each country and were required to take their oath before the competent authority of each respective country. Justices enjoyed the "personal immunity" granted to magistrates of the Supreme Courts in the country of their appointment, and the privileges and immunities of "diplomatic agents" in other countries. However, Article 13 of the Convention provided "The Central American Court of Justice represents the national conscience of Central America, wherefore the Justices who compose the Tribunal shall not consider themselves barred from the discharge of their duties because of the interest which the Republics, to which they owe their appointment, may have in any case or question. With regard to allegations of personal interest, the rules of procedure which the Court may fix, shall make proper provision."

a judge of its choice.[46] Today, the agreement of other states is required and usually obtained through a vote in a plenary body.

Article 2 of the Statute of the ICJ provides

> 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.

Primary responsibility for getting good judges lies with those that nominate them. In the case of the ICJ, the nomination is indirectly by governments. Judges of the ICJ are elected by the General Assembly and the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration or, for those states not represented therein, from a list of persons nominated by national groups appointed for the purpose by their governments. Article 6 requires that extensive consultations be held by the national groups to obtain various opinions. The two United Nations organs vote independently of each other. There is campaigning, with candidates appearing before the election to make themselves known among those voting.

Many judges are elected after long experience in United Nations or in national affairs.[47] Often ICJ judges come from official posts within their states. In fact, some countries have been accused of seeing their judge as a "legal ambassador" to the Court. In the past

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46 In the Iran-United States Claims Tribunal, two-thirds of the arbitrators are appointed directly by the parties.

47 Earlier studies noted that two-thirds of all ICJ judges have served their own countries in an official capacity. G.M. Bechman, "Judges of the International Court of Justice," 3 *International Lawyer* 593, 594 (1969); N.J. Padelford, "The Composition of the International Court of Justice" *The Relevance of International Law* (K.W. Deutsch and S. Hoffmann eds. 1968) 231-237.

suspicions were voiced about judges from several countries.[48] In any case, selection of former diplomats is seen by some as a danger to their objectivity and independence and to the integrity of the judicial process, leading to several attempts to disqualify judges in specific cases.[49] Problems arose in particular when a judge as a former diplomat had participated in discussions in the United Nations political bodies on the issue before the Court.[50]

Most judges have considerable international experience, and membership in the International Law Commission is particularly important. Of the fifteen judges on the Court in February 1988, nine of them had served on the Commission.[51] There is some movement of judges from regional courts. Others judges have repeatedly appeared as agents for parties before the Court. Although such appearances do not present problems, there may be concerns where judges previously have been confidential lawyers for one or more states. The judges are supposed to abstain in such cases, but due to the confidentiality of their prior work, it is impossible to know if they all do.

At the ICJ, nationality plays an important informal role in the elections and may affect independence. The call for representation of

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48 "Can a Soviet judge of the International Court of Justice be an 'independent' judge? Can his solemn declaration to perform his duties as a judge impartially be taken seriously?...By 'independence' of a person we ordinarily mean that he does not act on instructions from superior authorities, and that he is not accountable to them. We do not, of course, mean ideal independence, implying absence of any environmental influence. We should insist, however, that this influence stop short of destroying the individual's ability or willingness, or both, to search for facts, to question dogma and to articulate his thoughts." Z.L. Zile, "A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy," 58 AJIL 359 (1964). Some suggest that the ICJ has resisted the practice of law clerks assisting individual judges in part because former eastern European judges were concerned that the clerks would report on them.

49 Shabtai Rosenne, "The Composition of the Court," in *The Future of the International Court of Justice* (L. Gross ed. 1976) 388-92.

50 In the South-West Africa cases several members of the Court were challenged by the government of South Africa. Judge Padilla Nervo had represented his country in the General Assembly and expressed its views on the problem of South-West Africa. The Court denied the government's challenge to his participation.

51 Rosenne, p. 59.

the most important legal systems of the world, contained in article 9 of the Statute, has been seen by some as implying that an international judge should represent the values of his national legal system.[52] This may be exacerbated by the allocation of seats on the Court: a series of understandings has led to *de facto* allocation of seats on a regional basis, paralleling in general the regional allocation of seats on the Security Council. This distribution allocates seats to Western European and Others 5 seats, Eastern Europe 2 seats, Latin America 2 seats, Asia 3 seats and Africa 3 seats.[53] Having agreement on candidates within each group helps the geographic representation and election.

In the best of circumstances the election process is affected by political issues and sometimes the merits of recent court decisions. For example, dissatisfaction with the South West Africa Case 1966 led to proposals to adopt a new method of election of the judges and to increase the number of judges to ensure a large participation of African and Asian judges. Judge Schwebel has noted that despite "the general and traditional excellence of the composition of the Court, it was universally agreed that the predominance of bloc voting was a flaw in the current election system."[54] While it is not possible to remove all politics from the election process, it is important that the Court itself should be kept depoliticized as far as possible. Nonetheless, the Institut de Droit International rejected several proposals which aimed at securing greater independence of national groups in the Permanent Court of Arbitration in the nomination process, on the

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52 Judge Moreno Quintana referred to himself in one opinion as "a representative on this court of a Spanish-American legal system." Moreno Quintana, *Arbitral Award Case*, Sep.Op., 218.

53 In fact, the five permanent members of the Security Council are assured seats as is Japan. Within Europe, there is a "southern European" seat, and one for northern Europe (generally Scandinavian or German). In Africa, language often accounts for the distribution of the three African seats: one to a Francophone, one to an Anglophone and one to a speaker of Arabic (North African). Latin American is perhaps the most difficult area because there are so many countries and only two seats. The reservation of seats to the Security Council is objected to by some and cited as the reason for the underutilization of the Court. Rosenne, 59.

54 *Judicial Settlement of International Disputes* (H. Mosler and R. Bernhardt eds. 1974) 181.

basis that only those candidates who command the support of their respective governments were likely to be elected.[55]

Among other tribunals, it is not surprising that the greatest degree of national control and least articulation of objective criteria for selection of members is found on the Iran-United States Claims Tribunal. The tribunal consists of nine members or larger multiples of three as Iran and the United States agree are necessary to conduct business expeditiously.[56] Each government appoints one-third of the members and the appointed members appoint the remaining one-third and the President, who must be one of the last third. The Tribunal is governed by the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), "except to the extent modified by the Parties or by the Tribunal to ensure that th[e] Agreement can be carried out."[57]

The UN Administrative Tribunal also has little in the way of qualifications or criteria. The UNAT consists of seven members from seven different states who sit in panels of three; there is no requirement that any have legal training. The UN General Assembly appoints the members for three-year terms and members may be reappointed.

On the regional level, the European Court of Justice consists of thirteen judges and six advocates-general, appointed for six years. They may be and frequently are reappointed. The President of the Court is elected for three years by the judges. Proposals to curb the influence of national governments on the procedure of determining the judges have not been adopted. Governments are not eager to lose

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55 Helmut Steinberger, "The International Court of Justice" in *Judicial Settlement of International Disputes* (Mosler & Bernhardt, eds. 1974) 280.

56 The Tribunal has consisted of nine members throughout its functioning.

57 Article 3. For the application of the Rules, see Matti Pellonpaa and David Caron, *The Uncitral Arbitration Rules as Interpreted and Applied: Selected Problems in Light of the Practice of the Iran-United States Claims Tribunal* (1994).

their nominating prerogatives and there is no indication of judges seeing themselves as national agents.

The European Court of Human Rights, according to Convention Article 38, consists of a number of judges equal to the number of members of the Council of Europe. The size of the Court and the election arrangements are designed to ensure that the composition of the Court reflects the diversity of the European States. Judges not only reflect different national cultural and legal systems, but must be "of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence" (art. 39(3)). The wording is similar to that governing the other tribunals, although competence in international law is not specifically required.

Each member state nominates three candidates. The judges are elected for a term of nine years by the Consultative Assembly of the Council of Europe. In practice, the person listed first by the nominating state is normally elected, in effect allowing each state to appoint a judge. Judges may be re-elected. No two judges may be nationals of the same State, but they need not necessarily come from a Member State of the Council of Europe.

The IACtHR is composed of seven judges who must be nationals of the member states of the OAS. They are elected from among jurists of the highest moral authority and recognized competence in the field of human rights. They must possess the qualifications which would enable them to exercise the highest judicial functions in conformity with the law of their states. No two judges may be from the same state. Upon appointment, all judges must by oath or solemn declaration state that they will exercise their functions "honorably, independently and impartially" and that all their deliberations shall be kept secret.

Judges are elected in secret ballot by an absolute majority of votes of the states parties to the Convention. The election takes place in, and is supervised by, the OAS General Assembly. Each state party may

nominate up to three persons; where three are nominated, at least one must be of a state other than the nominating state. Six months before the expiration of the terms to which the judges were elected, the Secretary General of the OAS addresses written requests to each of the states parties asking them to nominate their candidates within ninety days. The Secretary General then draws up an alphabetical list of the nominated candidates and sends the list to the states parties.

Judges are elected for a six year term and may be reelected only once. Like the ICJ, the American Convention uses a system of *ad hoc* judges when none of the judges is a national of the state concerned. Although *ad hoc* judges are appointed, rather than nominated by states parties, the judges must meet the qualifications applicable to elected judges. An unqualified judge could be objected to by other parties.

In the process of election to the Inter-American Court, States will negotiate with each other for support of particular candidates. Inter-state conflicts that are independent of the Court can have an impact on the process. As with the ICJ, an effort is made to have regional diversity, with judges from North America, the Andean states, Central America, the Caribbean and the Southern Cone. Campaigning can be political, and may be exacerbated when there is a track record; i.e. for reelection. The President and Vice-President are always at the OAS General Assembly meeting and represent the Court.

There is no selection process within each country, like that used for the International Court. Thus, it is up to each government how to select the candidate and whether to renominate when the term is up. In the election, the personal prestige of the judges is important, but the country as well may be a factor, e.g. Haiti, El Salvador are unlikely to have judges on the Court in the near future.

As international scholar Shabtai Rosenne states "[t]he natural aspiration of those having power to appoint judges in whom they have confidence, persons sympathetic to their political and social

aims and ideals, is not always reconciled with equally natural desires for an independent judiciary (though it must not be assumed that there is an unbridgeable gulf between the two)..."[58] The choice of the international judge is political, within limits designed to ensure the selection of qualified persons. The process on the whole has produced a highly qualified and respected body of judges.

11. 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.

Security of tenure and salary are among the important guarantees of an independent judiciary. In this respect, the international courts generally provide adequate guarantees, although the tenure on many tribunals is rather short.

All international tribunals have limited, renewable tenure for the judges and consequent problems due to the judges' desires to be re-elected. The fifteen judges of the ICJ serve for a term of nine years and may be re-elected. The longest-serving Judge was Manfred Lachs, who was on the court from 1967 until his death in 1993 (26 years). Each three years, one-third of the court is elected. Fitzmaurice has commented on the "sinister implications" of the frequency of elections for the International Court. He says they

> afford occasions on which various political and psychological pressures can be brought to bear on the Court and its members... These are very far from being merely theoretical or hypothetical possibilities. They have caused uneasiness for many years—an uneasiness which time and more intimate experience has only served to confirm.[59]

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58 Shabtai Rosenne, *The World Court: What it is and How it Works* (1988), 51.

59 G. Fitzmaurice, "The Future of Public International Law and of the International Legal System in the Circumstances of Today," Special Report in *Livre du Centenaire* (IDI 1973) 289.

Most judges are not nominated for a second term. This is perhaps due to a desire to allow the participation of judges from as many states as possible. However, renominations and reelections do occur. The threat to withdraw support for renomination can have an impact and some see the defeat of the Australian nominee to succeed Sir Percy Spender as deliberate retaliation for Spender's deciding vote in the *South West Africa Case 1966.* [60]

The European Court also has a nine year tenure, with possibility of re-election. In contrast, the tenure for a judge on the Inter-American Court is six years and he or she may be re-elected only once. These restrictions are no doubt due to the small size of the court (seven judges) compared to other international tribunals.

The salaries of the judges of the ICJ are fixed by the UN General Assembly, but article 32 of the Statute provides that the amount received may not be decreased during the period of office. Salaries, allowances and compensation received by judges "shall be free of all taxation" (Statute, art. 32, para.8). In 1991, the annual salaries were fixed at $145,000, to be reviewed every three years. The President and the Vice-President receive an additional special allowance. Under current General Assembly regulations, retired judges are given pensions, after age 60 and three years of service. The amount of the pension is dependent upon the number of years of service.

The part-time nature of the regional courts makes the remuneration less certain in amount. The European Court of Human Rights mitigates this by giving the judges both a daily allowance and an annual retainer. The IACtHR judges receive no salary, but an honorarium based on the limitations imposed on their other activities and the importance and independence of their office, together with daily and travel allowances. The Convention provides that judges of the Court shall receive emoluments and travel allowances in the form and under the conditions set forth in their statutes, "with due regard for the importance and independence of their office" (art. 72).

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60 Prott, p. 25.

The symbols of judicial authority are conferred on all the permanent Courts: robes, formal hearing rooms with raised chairs, and traditional speech as the session opens and closes. In the Iran Claims Tribunal, the setting differs depending on whether the litigants are private parties or the two governments. In the latter case, the Tribunal uses the smaller hearing room at the Peace Palace. For private litigants, the setting is more informal.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

Apart from natural expiration of their terms, judges have security of tenure. At the ICJ, a judge can only be dismissed if, in the unanimous opinion of his colleagues, he has ceased to fulfil the required conditions; no other body has the right to impeach a judge. The European Convention on Human Rights provides that "the members of the Court shall hold office until replaced" (art. 40(6)). Rule 4 provides that the plenary Court decides if there is a question of independence or impartiality.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

In courts using chambers, such as the European Court of Human Rights, the President of the Court generally assigns the judges to constitute the chamber (Rule 21, Rules of Court) for a particular case.

15. 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.

The rules of the international tribunals invariably provide for secrecy in the deliberations of the court.[61]

16. 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.

The traditional immunity of judges has particular and expanded meaning when applied to international courts. Almost by definition, the judges of international courts are required to exercise their functions in states other than those of their nationality. They need broad immunity to protect themselves from interference. Indeed, in some cases they may need immunity or protection from their state of nationality, as well as from other states. Perhaps for this reason, the privileges and immunities of international tribunals is one of the most detailed aspects of their independence.

Article 19 of the Statute of the ICJ provides: "The Members of the Court, when engaged on business of the Court, shall enjoy diplomatic privileges and immunities." An exchange of correspondence between the President of the Court and the Minister of Foreign Affairs of the Netherlands, dated June 26, 1946, provides that judges enjoy, in a general way, the same privileges, immunities, facilities and prerogatives as Heads of Diplomatic Missions accredited to the Netherlands.[62] General Assembly Resolution 90(1) of 11 December 1946 approved the agreement and recommended that "...if a judge, for the purpose of holding himself permanently at the disposal of the Court, resides in some country other than his own, he should be accorded diplomatic privileges and immunities during the period of his residence there" and that "judges should be accorded every facility for leaving the country where they may happen to be, for entering the country where the Court is sitting, and again for leaving

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61 See e.g. Rule 19(5) of the Rules of the European Court of Human Rights and Rule 14(2) of the Rules of the Inter-American Court of Human Rights.

62 I.C.J. *Acts and Documents* No. 5, pp. 200-207.

it. On journeys in connection with the exercise of their functions, they should, in all countries through which they may have to pass, enjoy all the privileges, immunities and facilities granted by these countries to diplomatic envoys." Members of the UN are called upon to recognize and accept the UN laissez-passer, issued to judges of the Court since 1950. In addition, the agents, counsel and advocates of the parties and the Court's officials enjoy the privileges and immunities necessary to the independent exercise of their functions.

In regard to the Inter-American Court, the Agreement between Costa Rica and the Court[63] contains several important protections for the Court, its judges and staff. The Court's juridical personality includes the right to enter into agreements of cooperation with law schools, bar associations, court academies and educational or research institutions. The premises and archives of the Court are inviolable and immune from search, requisition, confiscation, expropriation and any other form of interference (art. 6). The Court is exempt from taxes and other fiscal measures (art. 7). The Court has control over its own funds, which it may hold in foreign currency (art. 8). The Court enjoys considerable immunity from judicial or administrative process (art. 9) and is given additional protection for its communications. In particular, its correspondence and official communications cannot be censored and it has the right to use codes and send and receive correspondence by courier or sealed pouch.

Judges, whether elected or *ad hoc*, and their families have the privileges and immunities afforded by Costa Rica to diplomats who are heads of missions, and at a minimum those granted by the Vienna Convention on Diplomatic Relations and the OAS Agreement on Privileges and Immunities.[64] In addition, judges of the Court have the

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63 OAS, *Handbook of Existing Rules Pertaining to Human Rights* (1988), p. 139.

64 The only exception is that Costa Rican nationals are not granted "tax or patrimonial exemptions...except with respect to their official acts or in relation to their service with the Court." In any case, "they shall not be subject to measures of administrative or judicial restriction, execution or compulsion, unless their immunity has been waived by the Court" (art. 11).

right to hold a Costa Rican diplomatic document. If the country of nationality of a judge does not issue a diplomatic passport to the judge, the Court must ask Costa Rica to issue a diplomatic passport, if it is considered necessary. This affords judges protection in case of actions by their governments during periods when the court is not in session and they are in their home countries.[65] Indeed, the diplomatic protection of Costa Rica is extended in article 12, to permit the aid of its diplomatic missions or consuls in countries where judges are on official visits and in which Costa Rica has diplomatic envoys. Article 19 of the Statute provides that "when engaged on the business of the Court," judges enjoy diplomatic privileges and immunities.

From the moment of their election and throughout their term of office, judges enjoy the immunities and privileges accorded to diplomatic agents under international law and such diplomatic privileges as are necessary for the performance of their duties. They are exempt from all liability for any decisions or opinions issued in the exercise of their functions. By application of the Vienna Convention on Diplomatic Relations (art. 38), the judges own state must respect the inviolability of his or her person, staff, archives, correspondence, means of transportation and communication.

The part-time nature of the IACtHR's work requires differentiating court activities to which privileges and immunities apply, and private or economic professional activities of the judges. For these, the privileges and immunities are those provided in Article 31, paragraphs 1-3, of the Vienna Convention on Diplomatic Relations.

The Secretary and Deputy Secretary of the Court and their families receive privileges and immunities akin to those of judges; however, they are not accorded the status of chief of mission. Techni-

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65 The problems that can arise are well illustrated in a non-judicial setting by the case of the independent expert Dumitru Mazilu. Mazilu, a Romanian national, was appointed Special Rapporteur by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities. For three years, the government prohibited Mazilu from leaving the country to present his report to the United Nations. See Applicability of Article VI, Section 22 of the Convention on Privileges and Immunities of the United Nations [1989] I.C.J.177.

cal and administrative staff are covered by the OAS Agreement on Privileges and Immunities.

The work of the Court and its independence are further facilitated by article 19 which permits free entry and residence to all judges, professional staff members of the Court, and their relatives, and persons who visit Costa Rica at the request of the Court to fulfil official missions. This would presumably include experts appointed by the Court in particular cases. Persons appearing before the Court are granted privileges and immunities in article 26. It provides that Costa Rica will grant a visa, and if necessary a travel document, to all such persons and immunity from all administrative or judicial proceedings during their stay in the country. The provisions apply from the moment the Court informs Costa Rica of the summons until the end of the case. The latter term can certainly give rise to numerous questions about when a case ends. The Court may waive the immunity of persons appearing before it when it considers it necessary. No one can be held responsible with regard to words spoken or written or acts done in the course of a case or proceedings before the Court.

The privileges and immunities of the judges can only be waived by the Court. The President of the Court has the power and duty to waive the immunity of the professional staff when immunity would impede the course of justice and can be waived without prejudice to the interests of the Court (art. 23). The Court also has the duty to cooperate to prevent abuse of the privileges and immunities.

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.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

Security of office is a key test of judicial independence. None of the treaties provides for a unilateral recall of the judges by the states.

ICJ Statute article 18(1) provides "No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions."

The practice of the Iran-United States Claims Tribunal, Article III(2) of the Claims Settlement Declaration indicates the strains that can arise on this issue. The agreement makes it clear that the only method by which an arbitrator may be removed from office is through challenge by a party and decision by the Appointing Authority pursuant to Articles 11 and 12 of the UNCITRAL Rules. A challenging party can challenge on the basis of "circumstances which give rise to justifiable doubts" as to impartiality or independence. The Tribunal considered several circumstances in its cases: relationship with an affiliate of an expert witness; relationship with the parent corporation of a party; physical assault on a fellow arbitrator, and the handling of a proceeding.

The applicable UNCITRAL rules concerning composition of the Tribunal include a requirement that any arbitrator prior to his appointment and afterwards inform the parties of any circumstances that might give rise to justifiable doubts as to his impartiality or independence. The Tribunal added that arbitrators must declare to the President any circumstance that might give rise to doubts in respect of any particular case before the Tribunal. The two governments may challenge a member of the Tribunal, pursuant to Article 10, due to justifiable doubts as to the impartiality or independence of the person. However, challenges by the party who appointed the arbitrator can be made on those grounds only if they became known after the appointment was made. Articles 11 and 12 govern the procedure concerning challenges. Within six months of the appointment of the third state arbitrators, Iran challenged one of the neutral judges on the Tribunal. The reason given was that the judge had commented on summary executions in Iran. The judge refused to resign and the United States opposed the Iranian government. The Tribunal heard the challenge and issued a decision on January 13, 1982. It noted by a majority that as a general principle any right of a state party to remove an arbitrator from office by unilateral decision

would seriously impair the integrity of the arbitration process.[66] The Tribunal insisted on application of the UNCITRAL Rules, over the dissent of two Iranian arbitrators who argued that the arbitrators were appointed by the consent of the two governments and that the withdrawal of that consent for political disqualification was not subject to judicial scrutiny.[67] The UNCITRAL procedure was then followed and an authority appointed to hear the matter, rejected the Iranian challenge. Again in 1989 another challenge was lodged by Iran, this time in following the UNCITRAL procedure. The basis for the challenge was alleged to be an arbitrator's "totally improper course of conduct" in a prior case. The issue concerned memoranda used to calculate the amount of damages and the challenge amounted to an appeal from the earlier decision.

In addition to attempting to disqualify arbitrators, Iran forced the resignation of several of its nationals. In August 1983, the Iranian government notified the Tribunal that Judge Sani had resigned from the Tribunal effective August 10. The U.S. protested, stating that a resignation was not effective until accepted by the Tribunal. On September 5, the Tribunal voted to accept the resignation, to be effective when his replacement was able to assume his duties. In the meantime, the chamber made several awards, explaining the absence of Judge Sani.[68] This procedure has encouraged the Iranians to continue participating rather than abandoning the procedure to Western arbitrators.

The Tribunal has decided that a member must address his resignation to the Tribunal and the Tribunal would decide whether to accept it and if so, its effective date. The Iranian member had boycotted the meeting before voting, but not before arguing that resignation was a unilateral act of the concerned member which was

66 Re Judge Mangard, 1 *Iran-U.S.C.T.R.* 114 (1981-82).

67 *Id.* 116.

68 The opinion of arbitrator R. Most in "Craig v. Ministry of Energy", 3 *Iran-U.S.C.T.R.*, 280, 294-6 (1983) discusses the international and municipal law authorities providing that arbitral tribunals may proceed with their work after the resignation or absence of an arbitrator.

solely within the discretion of that member. There had been allegations that the resignation was imposed by the government, but the judge wrote to deny this. Parties may not in fact withdraw an arbitrator with a view to frustrating arbitration. Although the tribunal owes its existence to the will of the parties, once this will is exercised, the tribunal gains an autonomous legal existence independent of the parties. Such independence is essential for the proper functioning of its judges. The independence and judicial character of the arbitrator will be adversely affected if his is subject to the will of the parties. The issues reflect the hostility and suspicion between the two governments.

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

The Statute of the ICJ provides for circumstances in which judges must disqualify themselves or be disqualified from hearing a case by the Court. Article 19(1) provides that judges may not take part in matters in which they or their families have a direct interest or where they have been agents, counsel or advocates in a particular case. Judges who have served as members of a national or international court or an investigatory committee or in any other manner in a case are also prohibited from deciding it at the Court.

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.

At the Inter-American Court, the General Assembly has general disciplinary competence over the judges of the Court under Article 73 of the Convention. However, this provision allows the OAS General Assembly to exercise its disciplinary powers only at the request of the Court itself, which must give reasons for the request based on the Statute of the Court. Sanctions against judges must be approved by two-thirds majority vote of the OAS General Assembly and by a two-thirds majority vote of the states parties to the Convention.

CONCLUSION

International tribunals, like national ones, benefit from provisions designed to ensure their independence. However, again like national tribunals, these guarantees provide only the foundation for an independent judiciary and depend on respect for the rule of law by the governments that create the tribunals and the judges and staff that serve them. Additional thought should be given to lengthening the tenure of judges, perhaps without possibility of re-election, and to strengthening the norms on incompatibility of functions. Overall, however, the independence of the international judiciary compares favorably with that of many national legal systems.